
# FEDERAL REGISTER

Vol. 86 Friday,

No. 5 January 8, 2021

Pages 1249–1736

OFFICE OF THE FEDERAL REGISTER

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

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

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

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

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

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

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

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

**How To Cite This Publication:** Use the volume number and the page number. Example: 85 FR 12345.

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

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

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

**Single copies/back copies:**

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

**FEDERAL AGENCIES**

**Subscriptions:**

Assistance with Federal agency subscriptions:

| | |
|---|---|
| Email | *FRSubscriptions@nara.gov* |
| Phone | **202–741–6000** |

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

# Contents

**Federal Register**

Vol. 86, No. 5

Friday, January 8, 2021

---

**Separate Parts In This Issue**



---

**Reader Aids**

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

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

## CFR PARTS AFFECTED IN THIS ISSUE

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

**2 CFR**
5900.....1253

**3 CFR**
**Executive Orders:**
13971.....1249

**8 CFR**
214.....1676

**10 CFR**
430.....1253

**12 CFR**
5.....1254
**Proposed Rules:**
204.....1303
1241.....1306
1242.....1326

**26 CFR**
1.....1256

**29 CFR**
4001.....1256
4204.....1256
4206.....1256
4207.....1256
4211.....1256
4219.....1256

**33 CFR**
220.....1278

**40 CFR**
Ch. IX.....1281
1519.....1279
**Proposed Rules:**
52.....1347
63 (2 documents) ....1362, 1390

**44 CFR**
333.....1288

**47 CFR**
51.....1636

**49 CFR**
571.....1292
**Proposed Rules:**
219.....1418

**50 CFR**
679 (3 documents) .....1300, 1301, 1302
**Proposed Rules:**
217.....1588
223 (2 documents) .....1433, 1452
226 (2 documents) .....1433, 1452

Federal Register
Vol. 86, No. 5
Friday, January 8, 2021

# Presidential Documents

**Title 3—**

## The President

**Executive Order 13971 of January 5, 2021**

## Addressing the Threat Posed by Applications and Other Software Developed or Controlled by Chinese Companies

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that additional steps must be taken to deal with the national emergency with respect to the information and communications technology and services supply chain declared in Executive Order 13873 of May 15, 2019 (Securing the Information and Communications Technology and Services Supply Chain). Specifically, the pace and pervasiveness of the spread in the United States of certain connected mobile and desktop applications and other software developed or controlled by persons in the People's Republic of China, to include Hong Kong and Macau (China), continue to threaten the national security, foreign policy, and economy of the United States. At this time, action must be taken to address the threat posed by these Chinese connected software applications.

By accessing personal electronic devices such as smartphones, tablets, and computers, Chinese connected software applications can access and capture vast swaths of information from users, including sensitive personally identifiable information and private information. This data collection threatens to provide the Government of the People's Republic of China (PRC) and the Chinese Communist Party (CCP) with access to Americans' personal and proprietary information—which would permit China to track the locations of Federal employees and contractors, and build dossiers of personal information.

The continuing activity of the PRC and the CCP to steal or otherwise obtain United States persons' data makes clear that there is an intent to use bulk data collection to advance China's economic and national security agenda. For example, the 2014 cyber intrusions of the Office of Personnel Management of security clearance records of more than 21 million people were orchestrated by Chinese agents. In 2015, a Chinese hacking group breached the United States health insurance company Anthem, affecting more than 78 million Americans. And the Department of Justice indicted members of the Chinese military for the 2017 Equifax cyber intrusion that compromised the personal information of almost half of all Americans.

In light of these risks, many executive departments and agencies (agencies) have prohibited the use of Chinese connected software applications and other dangerous software on Federal Government computers and mobile phones. These prohibitions, however, are not enough given the nature of the threat from Chinese connected software applications. In fact, the Government of India has banned the use of more than 200 Chinese connected software applications throughout the country; in a statement, India's Ministry of Electronics and Information Technology asserted that the applications were ''stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India.''

The United States has assessed that a number of Chinese connected software applications automatically capture vast swaths of information from millions

of users in the United States, including sensitive personally identifiable information and private information, which would allow the PRC and CCP access to Americans' personal and proprietary information.

The United States must take aggressive action against those who develop or control Chinese connected software applications to protect our national security.

Accordingly, I hereby order:

**Section 1**. (a) The following actions shall be prohibited beginning 45 days after the date of this order, to the extent permitted under applicable law: any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with persons that develop or control the following Chinese connected software applications, or with their subsidiaries, as those transactions and persons are identified by the Secretary of Commerce (Secretary) under subsection (e) of this section: Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, WeChat Pay, and WPS Office.

(b) The Secretary is directed to continue to evaluate Chinese connected software applications that may pose an unacceptable risk to the national security, foreign policy, or economy of the United States, and to take appropriate action in accordance with Executive Order 13873.

(c) Not later than 45 days after the date of this order, the Secretary, in consultation with the Attorney General and the Director of National Intelligence, shall provide a report to the Assistant to the President for National Security Affairs with recommendations to prevent the sale or transfer of United States user data to, or access of such data by, foreign adversaries, including through the establishment of regulations and policies to identify, control, and license the export of such data.

(d) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

(e) Not earlier than 45 days after the date of this order, the Secretary shall identify the transactions and persons that develop or control the Chinese connected software applications subject to subsection (a) of this section.

**Sec. 2**. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate the prohibition set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

**Sec. 3**. For the purposes of this order:

(a) the term ''connected software application'' means software, a software program, or group of software programs, designed to be used by an end user on an end-point computing device and designed to collect, process, or transmit data via the internet as an integral part of its functionality.

(b) the term ''entity'' means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization;

(c) the term ''person'' means an individual or entity;

(d) the term ''personally identifiable information'' (PII) is information that, when used alone or with other relevant data, can identify an individual. PII may contain direct identifiers (e.g., passport information) that can identify a person uniquely, or quasi-identifiers (e.g., race) that can be combined with other quasi-identifiers (e.g., date of birth) to successfully recognize an individual.

(e) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United

States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

**Sec. 4**. (a) The Secretary, in consultation with the Secretary of the Treasury and the Attorney General, is hereby authorized to take such actions, including adopting rules and regulations, and to employ all powers granted to me by IEEPA, as may be necessary to implement this order. All agencies shall take all appropriate measures within their authority to implement this order.

(b) The heads of agencies shall provide, in their discretion and to the extent permitted by law, such resources, information, and assistance to the Department of Commerce as required to implement this order, including the assignment of staff to the Department of Commerce to perform the duties described in this order.

**Sec. 5**. *Severability.* If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

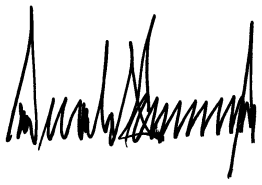
**Sec. 6**. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
*January 5, 2021.*

[FR Doc. 2021–00305
Filed 1–7–21; 8:45 am]
Billing code 3295–F1–P

# Rules and Regulations

Federal Register
Vol. 86, No. 5
Friday, January 8, 2021



## GULF COAST ECOSYSTEM RESTORATION COUNCIL

### 2 CFR Part 5900

**[Docket Number: 112102020–1111–02]**

### Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

**AGENCY:** Gulf Coast Ecosystem Restoration Council.

**ACTION:** Final rule.

**SUMMARY:** The Gulf Coast Ecosystem Restoration Council (Council) publishes this rule to amend the Council's regulation on the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, to align with the Office of Management and Budget's (OMB) recent amendments to its regulations on Grants and Agreements.

**DATES:** This rule is effective February 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Kristin Smith at 504–444–3558 or *Kristin.smith@restorethegulf.gov.*

**SUPPLEMENTARY INFORMATION:** On December 19, 2014, OMB issued an interim final rule that implemented for all Federal award-making agencies the final guidance on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). In that interim final rule, Federal awarding agencies, including the Council, joined together to implement the Uniform Guidance in their respective chapters of title 2 of the CFR, and, where approved by the Office of OMB, implemented any exceptions to the Uniform Guidance by including the relevant language in their regulations. The intent of this effort was to simultaneously reduce administrative burden and the risk of waste, fraud, and abuse while delivering better performance. Implementation of the Uniform Guidance became effective on December 26, 2014 (79 FR 75867, December 19, 2014) and must be reviewed every five years in accordance with 2 CFR 200.109.

OMB has revised sections of OMB Guidance for Grants and Agreements, effective November 12, 2020, except for the amendments to §§ 200.216 and 200.340, which were effective on August 13, 2020. (85 FR 49506, August 13, 2020). The Council publishes this final rule to adopt those revisions, without exception.

### Classification

*Paperwork Reduction Act*

This rule contains no collections of information subject to the requirements of the Paperwork Reduction Act (44 U.S.C. 3506). Notwithstanding any other provision of 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 Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

*Regulatory Flexibility Act*

Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

### List of Subjects in 2 CFR Part 5900

Accounting, Administrative practice and procedure, Grant programs, Grants administration.

For the reasons set forth above, Part 5900 of Title 2, Chapter LIX of the Code of Federal Regulations is amended to read as follows:

## PART 5900—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 1. The authority citation for 2 CFR part 5900 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 33 U.S.C. 1321(t)(2); 2 CFR part 200.

■ 2. Revise § 5900.101 to read as follows:

#### § 5900.101 Adoption of 2 CFR Part 200

Under the above authority, the Gulf Coast Ecosystem Restoration Council (Council) adopts the Office of Management and Budget (OMB) Guidance in 2 CFR part 200, as revised in part effective August 13, 2020 and in part effective November 12, 2020. This gives regulatory effect to the revised OMB guidance and supplements the guidance as needed for the Council.

**Keala Hughes,**

*Director of External Affairs & Tribal Relations, Gulf Coast Ecosystem Restoration Council.*

[FR Doc. 2020–27613 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–58–P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 430

**[EERE–2020–BT–TP–0002]**

**RIN 1904–AE85**

### Energy Conservation Program: Definition of Showerhead; Correction

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule; correction.

**SUMMARY:** On December 16, 2020, the U.S. Department of Energy (DOE) published a final rule amending the definition of showerhead. This correction republishes an amendment from the final rule that could not be incorporated into the Code of Federal Regulations (CFR) due to an inaccurate amendatory instruction. Neither the errors nor the corrections in this document affect the substance of the rulemaking or any of the conclusions reached in support of this final rule.

**DATES:** *Effective Date:* January 15, 2021.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585. Telephone: (202) 586–2588. Email: *Amelia.Whiting@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

DOE published a final rule in the **Federal Register** on December 16, 2020 (the ''December 2020 final rule''), amending the definition of showerhead. 85 FR 81341. This document corrects the regulatory text instruction for 10 CFR 430.3.

In FR Doc. 2020–27280, appearing on page 81341, in the **Federal Register** of

Wednesday, December 16, 2020, the following correction is made:

**§ 430.3 [Corrected]**

On page 81359, in the third column, amendatory instruction 3.c., ''Redesignating paragraphs (q) through (u) and paragraphs (r) through (v); and'' is corrected to read ''Redesignating paragraphs (q) through (u) as paragraphs (r) through (v); and''.

**Signing Authority**

This document of the Department of Energy was signed on December 22, 2020, by Daniel R Simmons, Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 22, 2020.

**Treena V. Garrett,**

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

[FR Doc. 2020–28761 Filed 1–7–21; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF THE TREASURY

## Office of the Comptroller of the Currency

## 12 CFR Part 5

**[Docket No. OCC–2019–0024]**

**RIN 1557–AE71**

## Licensing Amendments: Technical Correction

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Final rule; correction.

**SUMMARY:** On December 11, 2020, the Office of the Comptroller of the Currency (OCC) published in the **Federal Register** a final rule that revises its regulations relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations to update and clarify the policies and procedures, eliminate unnecessary requirements consistent with safety and soundness, and make other technical and conforming changes. This correcting amendment supplements the Effective Date discussion in the **SUPPLEMENTARY INFORMATION** section of the final rule as it appeared in the **Federal Register**. It also makes three technical changes to the regulatory text of the final rule that appeared in the **Federal Register** to correct typographical errors.

**DATES:** This correction is effective January 11, 2021.

**FOR FURTHER INFORMATION CONTACT:** Heidi M. Thomas, Special Counsel, Chief Counsel's Office, (202) 649–5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

### I. Background and Description of Correcting Amendment

On December 11, 2020, the OCC published in the **Federal Register** a final rule that revises its regulations relating to policies and procedures for corporate activities and transactions involving national banks and Federal savings associations to update and clarify the policies and procedures, eliminate unnecessary requirements consistent with safety and soundness, and make other technical and conforming changes.[1] This correcting amendment adds a paragraph to the Effective Date discussion in the **SUPPLEMENTARY INFORMATION** section of the final rule that was inadvertently omitted. This paragraph describes the OCC's good cause determination that the quarterly effective date requirement of section 302(b) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (12 U.S.C. 4802(b)) does not apply to the final rule. This correcting amendment also makes three technical changes to the regulatory text of the final rule. First, it adds a missing comma to the cross reference to 12 U.S.C. 215(b), (e), and (f) in paragraph (g)(2)(iv) of § 5.33, Business combinations involving a national bank or Federal savings association. Second, it corrects the paragraph designations in paragraph (g) of § 5.58, Pass-through investments by a Federal savings association. Third, it removes the superfluous word ''to'' in redesignated paragraph (g)(1) of § 5.58. These last three changes correct typographical errors and do not substantively change the meaning of these provisions.

[1] 85 FR 80404.

### II. Administrative Law Matters

*A. Administrative Procedure Act*

The OCC is issuing this correcting amendment without prior notice and the opportunity for public comment ordinarily prescribed by the Administrative Procedure Act (APA).[2] Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[3] The OCC finds that public notice and comment are unnecessary because this correcting amendment makes technical changes to correct typographical errors in the final rule. Therefore, the OCC believes it has good cause to dispense with the APA prior notice and public comment process.

The OCC also is issuing this correcting amendment without the delayed effective date ordinarily prescribed by the APA. The APA requires a 30-day delayed effective date, except for: (1) Substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[4] Because this correcting amendment makes technical changes to correct typographical errors in the final rule, the OCC believes it has good cause to issue this correcting amendment without a delayed effective date.

*B. Riegle Community Development and Regulatory Improvement Act*

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[5] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. Because the changes made by this technical

[2] 5 U.S.C. 553.

[3] 5 U.S.C. 553(b)(3)(A).

[4] 5 U.S.C. 553(d).

[5] 12 U.S.C. 4802(a).

correction do not impose additional reporting, disclosure, or other requirements on insured depository institutions, section 302(a) of RCDRIA does not apply.

Section 302(b) of RCDRIA requires that regulations issued by a Federal banking agency [6] imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of a calendar quarter that begins on or after the date of publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.[7] For the same reasons set forth above regarding the APA delayed effective date, the OCC finds that it has good cause to adopt this correcting amendment without the delayed effective date generally prescribed under the RCDRIA.

*C. Congressional Review Act*

For purposes of the Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major rule.'' [8] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[9]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[10]

As required by the Congressional Review Act, the OCC will submit the correcting amendment and other appropriate reports to Congress and the Government Accountability Office for review.

*E. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) [11] requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.[12] The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the OCC has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the OCC is not issuing a notice of proposed rulemaking. Accordingly, the RFA's requirements relating to initial and final regulatory flexibility analyses do not apply.

*F. Unfunded Mandates*

As a general matter, the Unfunded Mandates Act of 1995 (UMRA) [13] requires the preparation of a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. However, the UMRA does not apply to final rules for which a general notice of proposed rulemaking was not published.[14] Therefore, because the OCC has found good cause to dispense with notice and comment for this correcting amendment, the OCC has not prepared an economic analysis of the rule under the UMRA.

*G. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid OMB control number. This correcting amendment does not contain any information collection requirements therefore no submissions will be made by the agencies to OMB in connection with this rulemaking.

**Corrections**

In the final rule document OCC–2020–25595 published in the **Federal Register** on December 11, 2020, at 85 FR 80404, the following corrections are made:

1. On page 80434, in the first column, the discussion under ''E. Effective Date'' is corrected by adding the following at the end of the section to read as follows:

Section 302(b) of the RCDRIA, 12 U.S.C. 4802(b), requires that regulations issued by a Federal banking agency imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of a calendar quarter that begins on or after the date of publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time. Applying RCDRIA's quarterly effective date requirement in conjunction with the APA's 30 day delayed effective date requirement would result in an April 1, 2021, effective date. However, much of the final rule increases flexibility for filing procedures, eliminates redundant or unnecessary reporting requirements consistent with safety and soundness, and updates policies and procedures that increase clarity and reduce ambiguity for banks seeking compliance with 12 CFR part 5 requirements. In order for OCC-regulated institutions to take advantage of these burden-reducing amendments as soon as possible, the OCC finds that the benefits of an earlier effective date of the final rule outweighs the burden of a delayed April 1, 2021, effective date. Therefore, the OCC has determined that it has good cause to make the final rule effective before April 1, 2021.

**§ 5.33 [Corrected]**

■ 2. On page 80450, in the third column, in amendment 25, in § 5.33, paragraph (g)(2)(iv), ''12 U.S.C. 215(b), (e) and (f)'' is corrected to read ''12 U.S.C. 215(b), (e), and (f)''.

**§ 5.58 [Corrected]**

■ 3. On page 80469, in the first and second columns, in amendment 45, in § 5.58, paragraphs (g)(i) through (g)(v) are corrected to be designated as paragraphs (g)(1) through (g)(5).

■ 4. On page 80469, in the first column, in amendment 45, in § 5.58, in redesignated (g)(1), ''limited to those to activities'' is corrected to read ''limited to those activities''.

**Jonathan V. Gould,**

*Senior Deputy Comptroller and Chief Counsel.*

[FR Doc. 2021–00101 Filed 1–7–21; 8:45 am]

BILLING CODE 4810–33–P

[6] For purposes of RCDRIA, ''Federal banking agency'' means the OCC, FDIC, and Board. *See* 12 U.S.C. 4801.

[7] 12 U.S.C. 4802(b).

[8] 5 U.S.C. 801 *et seq.*

[9] 5 U.S.C. 801(a)(3).

[10] 5 U.S.C. 804(2).

[11] 5 U.S.C. 601 *et seq.*

[12] Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $600 million or less and trust companies with total assets of $41.5 million or less. *See* 13 CFR 121.201.

[13] 2 U.S.C. 1531 *et seq.*

[14] *See* 2 U.S.C. 1532(a).

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[TD 9941]**

**RIN 1545–BO68 and 1545–BO78**

### Taxable Year of Income Inclusion Under an Accrual Method of Accounting and Advance Payments for Goods, Services, and Other Items

*Correction*

In rule document 2020–28563 beginning on page 810 in the issue of Wednesday, January 6, 2021, make the following correction:

On page 810, in the **DATES** section, in the second line beneath the heading, ''December 31, 2021'' should read ''December 31, 2020''.

[FR Doc. C1–2020–28653 Filed 1–6–21; 1:15 pm]

**BILLING CODE 1301–00–D**

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4001, 4204, 4206, 4207, 4211, 4219

**RIN 1212–AB36**

### Methods for Computing Withdrawal Liability, Multiemployer Pension Reform Act of 2014

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Pension Benefit Guaranty Corporation is amending its regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers and Notice, Collection, and Redetermination of Withdrawal Liability. The amendments implement statutory provisions affecting the determination of a withdrawing employer's liability under a multiemployer plan and annual withdrawal liability payment amount when the plan has had benefit reductions, benefit suspensions, surcharges, or contribution increases that must be disregarded. The amendments also provide simplified withdrawal liability calculation methods.

**DATES:** *Effective date:* This rule is effective February 8, 2021.

*Applicability date:* This rule applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Hilary Duke (*duke.hilary@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, 202–229–3839. (TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–229–3839.)

**SUPPLEMENTARY INFORMATION:**

#### Executive Summary

*Purpose of Regulatory Action*

This rulemaking is needed to implement statutory changes affecting the determination of an employer's withdrawal liability and annual withdrawal liability payment amount when the employer withdraws from a multiemployer plan. The final regulation provides simplified methods for determining withdrawal liability and annual payment amounts, which a multiemployer plan sponsor can adopt to satisfy the statutory requirements and to reduce administrative burden. In this final rule, PBGC adopts its proposed changes implementing statutory changes and providing simplified methods, with some modifications in response to public comments.

PBGC's legal authority for this action is based on section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA; section 305(g) [1] of ERISA, which provides the statutory requirements for changes to withdrawal liability; section 4001 of ERISA (Definitions); section 4204 of ERISA (Sale of Assets); section 4206 of ERISA (Adjustment for Partial Withdrawal); section 4207 (Reduction or Waiver of Complete Withdrawal Liability); section 4211 of ERISA (Methods for Computing Withdrawal Liability); and section 4219 of ERISA (Notice, Collection, Etc., of Withdrawal Liability). Section 305(g)(5) of ERISA directs PBGC to provide simplified methods for multiemployer plan sponsors to use in determining withdrawal liability and annual payment amounts.

*Major Provisions of the Regulatory Action*

This final regulation amends PBGC's regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) and Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219). The changes implement statutory changes affecting the determination of an employer's withdrawal liability and annual withdrawal liability payment amount and provide simplified methods for a plan sponsor to—

- Disregard reductions and suspensions of nonforfeitable benefits in determining the plan's unfunded vested benefits for purposes of calculating withdrawal liability.
- Disregard certain contribution increases if the plan is using the presumptive, modified presumptive, or rolling-5 method for purposes of determining the allocation of unfunded vested benefits to an employer.
- Disregard certain contribution increases for purposes of determining an employer's annual withdrawal liability payment.

#### Table of Contents



#### I. Background

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement

[1] Section 305(g) of ERISA and section 432(g) of the Internal Revenue Code (Code) are parallel provisions in ERISA and the Code.

Income Security Act of 1974 (ERISA): A single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. In general, a multiemployer pension plan is a collectively bargained plan involving two or more unrelated employers. This final rule deals with multiemployer plans.

Under sections 4201 through 4225 of ERISA, when a contributing employer withdraws from an underfunded multiemployer plan, the plan sponsor assesses withdrawal liability against the employer. Withdrawal liability represents a withdrawing employer's proportionate share of the plan's unfunded benefit obligations. To assess withdrawal liability, the plan sponsor must determine the withdrawing employer's: (1) Allocable share of the plan's unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets) as provided under section 4211, and (2) annual withdrawal liability payment as provided under section 4219.

There are four statutory allocation methods for determining a withdrawing employer's allocable share of the plan's unfunded vested benefits under section 4211 of ERISA: The presumptive method, the modified presumptive method, the rolling-5 method, and the direct attribution method. Under the first three methods, the basic formula for an employer's withdrawal liability is one or more pools of unfunded vested benefits times the withdrawing employer's allocation fraction—

$$\text{Unfunded Vested Benefit Pool(s)}^{2} \times \frac{\text{Withdrawing employer's required contributions}}{\text{All employers' contributions}}$$

The withdrawing employer's allocation fraction is generally equal to the withdrawing employer's required contributions over all employers' contributions over the 5 years preceding the relevant period or periods. Under the fourth method, the direct attribution method, an employer's withdrawal liability is based on the benefits and assets attributed directly to the employer's participants' service, and a portion of the unfunded benefit obligations not attributable to any present employer.

PBGC's regulation on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) provides modifications to the allocation methods that plan sponsors may adopt. Part 4211 also provides a process that plan sponsors may use to request approval of other methods.

A withdrawn employer makes annual withdrawal liability payments at a set rate over the number of years necessary to amortize its withdrawal liability, generally limited to a period of 20 years. If any of an employer's withdrawal liability remains unpaid under the payment schedule after 20 years, the unpaid amount may be allocated to other employers in addition to their basic withdrawal liability.

Annual withdrawal liability payments are designed to approximate the employer's annual contributions before its withdrawal. The basic formula for the annual withdrawal liability payment under section 4219(c) of ERISA is a contribution rate multiplied by a contribution base. Specifically, the annual withdrawal liability payment is determined as follows—

$$\text{Employer's highest contribution rate in the 10 plan years ending with the year of withdrawal} \times \text{Average number of contribution base units (e.g., hours worked) for the highest 3 consecutive plan years in the 10-year period preceding the year of withdrawal}$$

As the basic formulas show, withdrawal liability and an employer's annual withdrawal liability payment depend, among other things, on the value of unfunded vested benefits and the amount of contributions.

In response to financial difficulties faced by some multiemployer plans, Congress made statutory changes in 2006 and 2014 that affect benefits and contributions under these plans. The four types of changes provided for are shown in the following table:

[2] Under ERISA sections 4211(b) and (c), the presumptive method provides for 20 distinct year-by-year liability pools (each pool represents the year in which the unfunded liability arose), the modified presumptive method provides for two liability pools, and the rolling-5 method provides for a single liability pool computed as of the end of the plan year preceding the plan year when the withdrawal occurs.

| | |
|---|---|
| Adjustable benefit reductions | Reductions in adjustable benefits (e.g., post-retirement death benefits, early retirement benefits) and reductions arising from a restriction on lump sums and other benefits.[3] |
| Benefit Suspensions | Temporary or permanent suspension of any current or future payment obligation of the plan to any participant or beneficiary under the plan, whether or not in pay status at the time of the benefit suspension.[4] |
| Surcharges | Surcharges, calculated as a percentage of required contributions, that certain underfunded plans are required to impose on contributing employers.[5] |
| Contribution Increases | Contribution increases that plan trustees may require under a funding improvement or rehabilitation plan.[6] |

While each of the changes has its own requirements, they generally are all required to be ''disregarded'' by the plan sponsor in determining an employer's withdrawal liability. The statutory ''disregard'' rules require in effect that all computations in determining and assessing withdrawal liability be made using values that do not reflect the lowering of benefits or raising of contributions required to be disregarded.

The Pension Protection Act of 2006, Public Law 109–280 (PPA 2006), amended ERISA's withdrawal liability rules to require a plan sponsor to disregard the adjustable benefits reductions in section 305(e)(8) of ERISA and the elimination of accelerated forms of distribution in section 305(f) of ERISA (which, for purposes of this preamble are referred to as adjustable benefit reductions) in determining a plan's unfunded vested benefits. PPA 2006 also requires a plan sponsor to disregard the contribution surcharges in section 305(e)(7) of ERISA in determining the allocation of unfunded vested benefits.

PBGC issued a final rule in December 2008 (73 FR 79628) implementing these PPA 2006 ''disregard'' rules by modifying the definition of ''nonforfeitable benefit'' for purposes of PBGC's regulations on Allocating Unfunded Vested Benefits to Withdrawing Employers (29 CFR part 4211) and on Notice, Collection, and Redetermination of Withdrawal Liability (29 CFR part 4219). PBGC provided simplified methods to determine withdrawal liability for plan sponsors required to disregard adjustable benefit reductions in Technical Update 10–3 (July 15, 2010). The 2008 final rule also excluded the employer surcharge from the numerator and denominator of the allocation fractions used under section 4211 of ERISA. The preamble included an example of the application of the exclusion of surcharge amounts from contributions in the allocation fraction.

The Multiemployer Pension Reform Act of 2014, Public Law 113–235 (MPRA), made further amendments to the withdrawal liability rules and consolidated them with the PPA 2006 changes. The additional MPRA amendments require a plan sponsor to disregard benefit suspensions in determining the plan's unfunded vested benefits for a period of 10 years after the effective date of a benefit suspension. MPRA also requires a plan sponsor to disregard certain contribution increases in determining the allocation of unfunded vested benefits. A plan sponsor must also disregard surcharges and those contribution increases in determining an employer's annual withdrawal liability payment under section 4219 of ERISA. The MPRA amendments apply to benefit suspensions and contribution increases that go into effect during plan years beginning after December 31, 2014, and to surcharges for which the obligation accrues on or after December 31, 2014.

Congress also authorized PBGC to create simplified methods for applying the ''disregard'' rules.

*Proposed Regulation*

On February 6, 2019 (at 84 FR 2075), PBGC published a proposed rule to explain the PPA 2006 and MPRA ''disregard'' requirements and PBGC's simplified methods. Each simplified method provided applies to one or more specific aspects of the process of determining and assessing withdrawal liability.

PBGC provided a 60-day comment period and received eight comment letters from: Actuarial consulting firms; associations representing multiemployer plans, pension practitioners, and contributing employers; and a practitioner. To address the comments, PBGC is making modifications and clarifications, adding examples, and providing additional simplified methods. The public comments, PBGC's responses, and the provisions of this final rule are discussed below.

## II. Discussion of Final Regulation and Public Comments

*Overview*

This final rule, like the proposed, implements the PPA 2006 and MPRA requirements to disregard adjustable benefit reductions, benefit suspensions, surcharges, and contribution increases. All of the commenters commented on the provision in the proposed rule implementing the exception to the disregard rules for a contribution increase that provides an increase in benefits. The provision, comments, and changes to the proposed rule in response to the comments are discussed in more detail in section IV.A. of the preamble. Except for those changes, the final rule is substantially the same as the proposed rule.

The final rule, like the proposed rule, provides: (1) Simplified methods for disregarding adjustable benefit reductions and benefit suspensions; and (2) simplified methods for disregarding certain contribution increases in determining the allocation of unfunded vested benefits to an employer and the annual withdrawal liability payment amount. A plan sponsor may, but is not required to, adopt any one or more of the simplified methods to use in the calculation of determining and assessing withdrawal liability but must follow the statutory withdrawal liability rules for all other aspects. In response to comments, PBGC made clarifications and improvements to the simplified methods, which are discussed below in sections III and IV of the preamble.

[3] Section 305(e)(8) and (f) of ERISA and section 432(e)(8) and (f) of the Code.

[4] Section 305(e)(9) of ERISA and section 432(e)(9) of the Code. The Department of the Treasury must approve an application for a benefit suspension, in consultation with PBGC and the Department of Labor, upon finding that the plan is eligible for the suspension and has satisfied the criteria specified by the Multiemployer Pension Reform Act of 2014, Public Law 113–235 (MPRA). The Department of the Treasury has jurisdiction over benefit suspensions and issued a final rule implementing the MPRA provisions on April 28, 2016 (81 FR 25539).

[5] Under section 305(e)(7) of ERISA and section 432(e)(7) of the Code, each employer otherwise obligated to make contributions for the initial plan year and any subsequent plan year that a plan is in critical status must pay a surcharge to the plan for such plan year, until the effective date of a collective bargaining agreement (or other agreement pursuant to which the employer contributes) that includes terms consistent with the rehabilitation plan adopted by the plan sponsor.

[6] The plan sponsor of a plan in endangered status for a plan year must adopt a funding improvement plan under section 305(c) of ERISA and section 432(c) of the Code. The plan sponsor of a plan in critical status for a plan year must adopt a rehabilitation plan under section 305(e) of ERISA and section 432(e) of the Code.

Because some of the commenters found the examples illustrating calculations using the simplified methods helpful, PBGC is adding some of the examples to the operative text and to an appendix to part 4211. The final rule also eliminates some language that merely repeats statutory provisions and makes other editorial changes.

''*Safe Harbors*''

One commenter asked PBGC to clarify that the simplified methods are ''safe harbor'' methods, but that alternate simplified methods could be appropriate. The commenter requested that PBGC consider providing plan sponsors with the opportunity to seek approval for an alternative simplified method. Under the final rule, PBGC clarifies that, similar to a safe harbor, a plan sponsor that adopts one of the simplified methods satisfies the requirements of the applicable statutory provision and regulations. Consistent with the proposed rule, a plan sponsor may choose to use an alternative approach that satisfies the requirements of the applicable statutory provisions and regulations rather than any of the simplified methods. While PBGC does not approve alternative simplified methods on a plan-by-plan basis, PBGC welcomes informal consultations with trustees and their advisors on whether an alternative approach could satisfy the requirements of the applicable statutory provisions and regulations. In addition, PBGC invited comments in the proposed rule on other simplified methods that a plan might use to satisfy certain requirements in section 305(g) of ERISA and incorporated changes in the final rule in response to comments received. PBGC encourages trustees and their advisors to inform PBGC of additional simplified methods to consider for a future rulemaking.

*Effective and Applicability Dates*

Under the proposed rule, the changes relating to simplified methods would be applicable to employer withdrawals that occur on or after the effective date of the final rule. It further proposed that the changes relating to MPRA benefit suspensions and contribution increases for determining an employer's withdrawal liability would apply to plan years beginning after December 31, 2014, and to surcharges the obligation for which occur on or after December 31, 2014. The proposed rule did not provide an effective date.

Three commenters asked for clarification of the effective date and were concerned that the rule would require retroactive application. Two commenters were concerned that plans could be required to implement changes at some time other than the beginning or end of a specified plan year. The commenters made specific recommendations for an applicability date. One commenter recommended that the date be based on withdrawals in plan years beginning on or after the effective date of the final rule. A second commenter recommended that the regulation apply for withdrawals beginning in the plan year that next follows the plan year in which the rule becomes effective with a transition period in the event the next plan year begins within 6 months following the issuance of the final regulation. A third commenter recommended a transition period of at least 1 plan year to give plans time to evaluate and consider the methodologies included in the regulation for contribution increases that provide an increase in benefits. PBGC did not adopt this suggested transition period because the final rule does not include the proposed rule's provision implementing the exception under section 305(g)(3) of ERISA for additional contributions used to provide an increase in benefits. The provision is discussed in section IV.A. of the preamble.

In response to the comments about the rule's effective date, PBGC is clarifying that the changes made by the final rule apply to plans prospectively. Accordingly, the final rule is effective February 8, 2021 and applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after the effective date. Just as before the final rule, plan sponsors may apply their own reasonable interpretations of the statutory provisions to calculate an employer's withdrawal liability. Plan sponsors may, but are not required to, adopt the simplified methods provided in the final rule. In addition, as suggested by one commenter, PBGC added effective dates in parts 4211 and 4219 for the new sections providing simplified methods.

## III. Regulatory Changes To Reflect Benefit Decreases

### *A. Requirement To Disregard Adjustable Benefit Reductions and Benefit Suspensions (§ 4211.6)*

Under the basic methodology explained in section I above, a plan sponsor must calculate the value of unfunded vested benefits (the value of nonforfeitable benefits that exceeds the value of plan assets) [7] to determine a withdrawing employer's liability. In computing nonforfeitable benefits, under section 305(g)(1) of ERISA, a plan sponsor is required to disregard certain adjustable benefit reductions and benefit suspensions.

The final regulation, like the proposed, adds a new § 4211.6 to PBGC's unfunded vested benefits allocation regulation to implement the requirements that plan sponsors must disregard adjustable benefit reductions and benefit suspensions in allocating unfunded vested benefits. Section 4211.6 replaces the approach previously taken by PBGC to implement the PPA 2006 ''disregard'' rules by modifying the definition of ''nonforfeitable benefit.'' The added MPRA ''disregard'' rules made that prior approach difficult to sustain. The final regulation, like the proposed, eliminates the special definition of ''nonforfeitable benefit'' in PBGC's unfunded vested benefits allocation regulation and notice, collection, and redetermination of withdrawal liability regulation.

MPRA limited the requirement for a plan sponsor to disregard a benefit suspension in determining an employer's withdrawal liability to 10 years. Under the final regulation, like the proposed, the requirement to disregard a benefit suspension applies only for withdrawals that occur within the 10 plan years after the end of the plan year that includes the effective date of the benefit suspension. To calculate withdrawal liability during the 10-year period, a plan sponsor disregards the benefit suspension by including the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer. For example, if a plan has a benefit suspension with an effective date within the plan's 2018 plan year, the plan sponsor would include the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer for any withdrawal occurring in plan years 2019 through 2028. The plan sponsor would not include the value of the suspended benefits in determining the amount of unfunded vested benefits allocable to an employer for a withdrawal occurring after the 2028 plan year.

In cases where a benefit suspension ends and full benefit payments resume during the 10-year period following a suspension, the value of the suspended

[7] The term ''unfunded vested benefits'' is defined in section 4213(c) of ERISA. However, for purposes of PBGC's notice, collection, and redetermination of withdrawal liability regulation (29 CFR part 4219), the calculation of unfunded vested benefits, as used in subpart B of the regulation, is modified to reflect the value of certain claims. To avoid confusion, PBGC proposes to add a specific definition of ''unfunded vested benefits'' in each part of its multiemployer regulations that uses the term.

benefits would continue to be included when calculating withdrawal liability until the end of the plan year in which the resumption of full benefit payments was required as determined under Department of the Treasury guidance, or otherwise occurs.

*B. Simplified Methods for Disregarding Adjustable Benefit Reductions and Benefit Suspensions (§ 4211.16)*

Under section 305(g)(5) of ERISA, PBGC is required to provide simplified methods for a plan sponsor to determine withdrawal liability when the plan has adjustable benefit reductions or benefit suspensions that are required to be disregarded. The final regulation, like the proposed, provides a simplified framework for disregarding adjustable benefit reductions and benefit suspensions in § 4211.16 of PBGC's unfunded vested benefits allocation regulation. A plan sponsor may adopt the simplified framework in § 4211.16 to satisfy the requirements of section 305(g)(1) of ERISA and § 4211.6 of PBGC's unfunded vested benefits allocation regulation, or may choose to use an alternative approach to satisfy the requirements of the statutory provisions and regulation.

Under the simplified framework, if a plan has adjustable benefit reductions or benefit suspensions, the plan sponsor first calculates an employer's withdrawal liability using the plan's withdrawal liability method reflecting any adjustable benefit reduction and benefit suspension (§ 4211.16(b)(1)). The plan sponsor adds the employer's proportional share of the value of any adjustable benefit reduction and any benefit suspension (§ 4211.16(b)(2)). In summary, withdrawal liability for a withdrawing employer is based on the sum of the following—

(1) The amount that would be the employer's allocable amount of unfunded vested benefits determined in accordance with section 4211 of ERISA under the method in use by the plan (based on the value of the plan's nonforfeitable benefits reflecting any adjustable benefit reduction and any benefit suspension),[8] and

(2) The employer's proportional share of the value of any adjustable benefit reduction and the employer's proportional share of the value of any suspended benefits.

Consistent with the proposed rule, under the final rule, this amount is required to be calculated before application of the adjustments required by section 4201(b)(1) of ERISA, including the de minimis reduction and the 20-year cap on payments under section 4219(c)(1)(B) of ERISA.

Two commenters asked for clarification on how the rule for the application of adjustments required by section 4201(b)(1) of ERISA interacts with guidance provided under Technical Update 10–3 (July 15, 2010) for plan sponsors required to disregard adjustable benefit reductions. The commenters stated that plans may have interpreted Technical Update 10–3 to adjust for the de minimis reduction before adding the proportional share of the adjustable benefit reduction. One commenter stated that any clarification of the method provided in Technical Update 10–3 should be provided only on a prospective basis and that the final rule should provide a safe harbor for plans that may have interpreted Technical Update 10–3 differently.

PBGC agrees that Technical Update 10–3 did not specifically address how adjustments for the de minimis reduction and the 20-year cap on payments should be applied. PBGC is aware that some plans that adopted the simplified method under Technical Update 10–3 make separate calculations of an employer's liability under section 4211 of ERISA, subject to the adjustments required under section 4201, and an employer's liability for adjustable benefit reductions.

In reviewing the issue in the context of benefit suspensions, PBGC concluded that the ''allocable amount of unfunded vested benefits'' under section 4201(b)(1) of ERISA, which is calculated before adjustments are made, should include the employer's proportional share of the value of benefit suspensions required to be disregarded. For purposes of providing a simplified framework for adjustable benefit reductions and benefit suspensions, PBGC provided in the proposed rule that the adjustments required by section 4201(b)(1) of ERISA are made after adding the amount that would be the employer's allocable amount of unfunded vested benefits determined in accordance with section 4211 of ERISA and the employer's proportional share of the value of each of the benefit reductions and benefit suspensions required to be disregarded. Section 4211.16(b) of the final rule is unchanged from the proposed rule with respect to the application of the adjustments in section 4201(b)(1) of ERISA. In consideration of the comments received, PBGC is clarifying that the simplified framework in the final rule applies prospectively only and is applicable for withdrawals that occur in plan years beginning after the effective date of the final rule.

One commenter suggested that if the employer's allocable amount determined under § 4211.16(a) results in a negative value, a plan sponsor should be able to use the negative value to offset the employer's allocable share of the value of the adjustable benefit reductions and benefit suspensions under § 4211.16(b). The preamble to the proposed rule stated that under the simplified framework, the amount of unfunded vested benefits allocable to an employer under section 4211 of ERISA may not be less than zero. PBGC acknowledges that in some cases where precise actuarial calculations are being made (*i.e.,* calculations made not using a simplified method), it might be appropriate to offset an interim negative value of allocable unfunded vested benefits calculated under section 4211 of ERISA against a positive allocable value of benefit reductions or benefit suspensions. However, because the value of the employer's allocable share of the value of adjustable benefit reductions and benefit suspensions under the simplified framework are approximations that may be less than the value that would be allocated under a non-simplified actuarial calculation, PBGC did not allow for an offset of a negative number. In the final rule, a sentence is added to the basic rule for the simplified framework in § 4211.16(b) to make it clear that the amount determined under paragraph (b)(1) may not be a negative number to be used as an offset to the employer's allocable share of the value of the adjustable benefit reductions and benefit suspensions.

The same commenter stated that construction-industry plans that have no unfunded vested benefits under section 4211 of ERISA should be permitted to elect a fresh start for that plan year, even if the plan continues to have liability for adjusted benefit reductions and benefit suspensions. PBGC agrees with the comment and that a plan sponsor's decision to implement a fresh start does not affect the value of adjustable benefit reductions and benefit suspensions in calculating withdrawal liability. In the final rule, PBGC is clarifying in new § 4211.12(d)(3) that in the case of a plan that primarily covers employees in the building and construction industry, the plan year designated by a plan amendment to implement a fresh start must be a plan year for which the plan has no unfunded vested benefits determined in accordance with section 4211 of ERISA without regard to § 4211.6.

[8] The amount of unfunded vested benefits allocable to an employer under section 4211 may not be less than zero.

The commenter also suggested that to the extent adjustable benefit reductions are restored, plan sponsors should be able to treat the liability for the adjustable benefit reductions as if it had been reduced or eliminated. PBGC agrees that, in this circumstance, a plan sponsor can offset the present value of restored adjustable benefits against the unamortized balance of the adjustable benefit reduction under § 4211.16(b)(2). The present value of the restored adjustable benefits would be included in the calculation of the allocable amount of unfunded vested benefits determined under § 4211.16(b)(1).

The simplified framework provides simplified methods for calculating the employer's proportional share of the value of any adjustable benefit reduction and the employer's proportional share of the value of any suspended benefits. If a plan has adjustable benefit reductions, the plan sponsor may adopt the simplified method discussed below to determine the value of the adjustable benefit reductions. If a plan has a benefit suspension, the plan sponsor may adopt either the static value method or adjusted value method to determine the value of the suspended benefits (also discussed below). The contributions for the allocation fractions for each of the simplified methods are determined in accordance with the rules for disregarding contribution increases under § 4211.4 of PBGC's unfunded vested benefits allocation regulation (and permissible modifications and simplifications under §§ 4211.12–4211.15 of PBGC's unfunded vested benefits allocation regulation).

Under the simplified framework, a plan sponsor must include liabilities for benefits that have been reduced or suspended in the value of vested benefits. But the simplified framework does not require a plan sponsor to calculate what plan assets would have been if benefit payments had been higher. One commenter asked for the final regulation to clarify that, regardless of whether plan sponsors adopt simplified methods for disregarding adjustable benefit reductions or benefit suspensions, plans are not required to track what plan assets would have been absent those reductions or suspensions. PBGC believes that generally accepted actuarial principles and practices accommodate the adoption of assumptions about quantities (like the amount of such an asset reduction) that may not have a material effect on the results of the computation. Thus, the issue raised by the commenter is one for resolution by the plan actuary.

1. Employer's Proportional Share of the Value of an Adjustable Benefit Reduction

Except as discussed in the preamble, the final regulation, like the proposed, incorporates the guidance provided in PBGC Technical Update 10–3 for disregarding the value of adjustable benefit reductions. Technical Update 10–3 explains the simplified method for determining an employer's proportional share of the value of adjustable benefit reductions. The method applies for any employer withdrawal that occurs in any plan year following the plan year in which an adjustable benefit reduction takes effect and before the value of the adjustable benefit reduction is fully amortized. The method is summarized in the chart in section III.B.3. below.

An employer's proportional share of the value of adjustable benefit reductions is determined as of the end of the plan year before withdrawal as follows—

| | | |
|---|---|---|
| The unamortized balance of the value of adjustable benefit reductions | x | The withdrawing employer's allocation fraction |

The value of the adjustable benefit reductions is determined using the same assumptions used to determine unfunded vested benefits for purposes of section 4211 of ERISA. The unamortized balance as of a plan year is the value as of the end of the year in which the reductions took effect (base year), reduced as if that amount were being fully amortized in level annual installments over 15 years, at the plan's valuation interest rate, beginning with the first plan year after the base year.

The withdrawing employer's allocation fraction is the amount of the employer's required contributions over a 5-year period divided by the amount of all employers' contributions over the same 5-year period.

The 5-year period for computing the allocation fraction is the most recent 5 plan years ending before the employer's withdrawal. For purposes of determining the allocation fraction, the denominator is increased by any employer contributions owed with respect to earlier periods that were collected in the 5 plan years and decreased by any amount contributed by an employer that withdrew from the plan during those plan years, or, alternatively, adjusted as permitted under § 4211.12.

For calculating the value of adjustable benefit reductions, Technical Update 10–3 provides an adjustment if the plan uses the rolling-5 method. The value is reduced by outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that withdrew as of the end of the plan year before the employer's withdrawal. PBGC is not including this adjustment in this final rule. The requirement to reduce the unfunded vested benefits by the present value of future withdrawal liability payments for previously withdrawn employers is part of the rolling-5 calculation, and PBGC believes that excluding this adjustment avoids some ambiguity that might have led to additional unnecessary calculations and recordkeeping.

One commenter asked for the final regulation to provide an additional option for allocating the value of adjustable benefit reductions for plans using the presumptive method based on the 5 consecutive plan years ending before the plan year in which the adjustable benefit reduction takes effect. The commenter stated that the option would produce an allocation that is more consistent with the amount that would be allocated to an employer if the plan did not use a simplified allocation method. PBGC considered the comment and has determined that the option could be useful for plans using any withdrawal liability method under section 4211 of ERISA. Accordingly, PBGC has added this option to the simplified framework in § 4211.16(d).

Under the added option, the 5-year period for computing the allocation fraction is the most recent 5 plan years ending before the plan year in which the adjustable benefit reduction takes effect. For purposes of determining the allocation fraction, the denominator is increased by any employer contributions owed with respect to earlier periods that were collected in the 5 plan years and decreased by any amount contributed by an employer that withdrew from the plan during those plan years, or, alternatively, adjusted as permitted under § 4211.12.

For the additional option, the regulation requires an additional

adjustment to the denominator of the allocation fraction for a plan using a method other than the presumptive method or a similar method. The denominator after the first year of the 5-year period is decreased by the contributions of any employers that withdrew and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal. This adjustment is intended to approximate how a withdrawn employer's withdrawal liability is calculated under the rolling-5 and modified presumptive methods by fully allocating the present value of the suspended benefits to solvent employers. The adjustment is not necessary under the presumptive method, as that method has a specific adjustment for previously allocated withdrawal liabilities that are deemed uncollectible.

2. Employer's Proportional Share of the Value of a Benefit Suspension

a. Static Value Method and Adjusted Value Method

PBGC's simplified framework provides two simplified methods that a plan sponsor may choose between to calculate a withdrawing employer's proportional share of the value of a benefit suspension—the static value method and the adjusted value method. Both methods apply for any employer withdrawal that occurs within the 10 plan years after the end of the plan year that includes the effective date of the benefit suspension (10-year period). A chart including a comparison of the two methods is in section III.B.3. below.

Under either method, an employer's proportional share of the value of a benefit suspension is determined as follows—

| | | |
|---|---|---|
| The present value of the suspended benefits | x | The withdrawing employer's allocation fraction |

Under the static value method, the present value of the suspended benefits as of a single calculation date is used for all withdrawals in the 10-year period. At the plan sponsor's option, the present value could be determined as of: (1) The effective date of the benefit suspension (as similar calculations are required as of that date to obtain approval of the benefit suspension); or (2) the last day of the plan year coincident with or following the date of the benefit suspension (as calculations are required as of that date for other withdrawal liability purposes). The present value is determined using the amount of the benefit suspension as authorized by the Department of the Treasury under the plan's application for benefit suspension.

Under the adjusted value method, the present value of the suspended benefits for a withdrawal in the first year of the 10-year period is the same as under the static value method. For withdrawals in years 2–10 of the 10-year period, the value of the suspended benefits is determined as of the ''revaluation date,'' the last day of the plan year before the employer's withdrawal. The value of the suspended benefits is equal to the present value of the benefits not expected to be paid in the year of withdrawal or thereafter due to the benefit suspension. For example, assume that a calendar year multiemployer plan receives final authorization by the Secretary of the Treasury for a benefit suspension, effective January 1, 2018, and a contributing employer withdraws during the 2022 plan year. The revaluation date is December 31, 2021. The value of the suspended benefits is the present value of the benefits not expected to be paid after December 31, 2021, due to the benefit suspension.

For both methods, the withdrawing employer's allocation fraction is the amount of the employer's required contributions over a 5-year period divided by the amount of all employers' contributions over the same 5-year period.

For the static value method, the 5-year period is determined based on the most recent 5 plan years ending before the plan year in which the benefit suspension takes effect. For the adjusted value method, the 5-year period is determined based on the most recent 5 plan years ending before the employer's withdrawal (which is the same 5-year period as is used for the simplified method for adjustable benefit reductions).

For both the static value method and the adjusted value method, the denominator of the allocation fraction is increased by any employer contributions owed with respect to earlier periods that were collected in the applicable 5-year period for the allocation fraction and decreased by any amount contributed by an employer that withdrew from the plan during those same 5 plan years, or, alternatively, adjusted as permitted under § 4211.12 (the same adjustments are made using the simplified method for adjustable benefit reductions).

For the static value method, the regulation requires an additional adjustment in the denominator of the allocation fraction for a plan using a method other than the presumptive method or similar method. The denominator after the first year of the 5-year period is decreased by the contributions of any employers that withdrew and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal. This adjustment is intended to approximate how a withdrawn employer's withdrawal liability is calculated under the rolling-5 and modified presumptive methods by fully allocating the present value of the suspended benefits to solvent employers. The adjustment is not necessary under the presumptive method, as that method has a specific adjustment for previously allocated withdrawal liabilities that are deemed uncollectible.

An example illustrating the simplified framework using the static value method for disregarding a benefit suspension is provided in § 4211.16(e) of PBGC's unfunded vested benefits allocation regulation.

b. Temporary Benefit Suspension

If a benefit suspension is a temporary suspension of the plan's payment obligations as authorized by the Department of the Treasury, the present value of the suspended benefits includes the value of the suspended benefits only through the ending period of the benefit suspension.

For example, assume that a calendar-year plan has an approved benefit suspension effective December 31, 2018, for a 15-year period ending December 31, 2033. Effective January 1, 2034, benefits are to be restored (prospectively only) to levels not less than those accrued as of December 30, 2018, plus benefits accrued after December 31, 2018. Employer A withdraws in a complete withdrawal during the 2022 plan year. The plan sponsor first determines Employer A's allocable amount of unfunded vested benefits under section 4211 of ERISA. That

amount is the present value of vested benefits as of December 31, 2021, including the present value of the vested benefits that are expected to be restored effective January 1, 2034. The plan sponsor then determines Employer A's proportional share of the value of the suspended benefits. The plan uses the static value method. The value of the suspended benefits equals the present value, as of December 31, 2018, of the benefits accrued as of December 30, 2018, that would otherwise have been expected to have been paid, but for the benefit suspension, during the 15-year period beginning December 31, 2018, and ending December 31, 2033. The portion of this present value allocable to Employer A is added to the unfunded vested benefits allocable to Employer A under section 4211 of ERISA.

c. Partial Withdrawals

PBGC invited public comment on whether the examples in the proposed rule are helpful and whether there are additional types of examples that would help plan sponsors with these calculations. Two commenters stated that the provided examples are helpful and suggested that PBGC provide examples involving partial withdrawals. One commenter asked for clarification with examples of the simplified method for adjustable benefit reductions as applied to partial withdrawals. Section 4206 of ERISA and 29 CFR part 4206 provide rules for determining the amount of an employer's liability for a partial withdrawal and, in the case of a subsequent withdrawal, for determining the amount of the reduction of the employer's liability for the prior partial withdrawal. PBGC appreciates the comments requesting examples involving partial withdrawals and provides the following example using the simplified method in § 4211.16.

*Example:* Assume the following:

(1) The employer's allocable amount of unfunded vested benefits determined under section 4211 of ERISA is $1,000,000.

(2) The employer's proportional share of the value of the adjustable benefit reduction is $100,000 (after 8 years of amortization of the original amount).

(3) The employer's proportional share of the value of the benefit suspension is $250,000 (the employer's partial withdrawal occurs 3 years after the effective date of the benefit suspension).

To calculate the employer's withdrawal liability amount, under § 4211.16(b), the amounts in (1) through (3) above are added together for a sum of $1,350,000. Based on the sum, a de minimis reduction would not apply. The sum is then adjusted in accordance with the rules for adjustment of partial withdrawal under section 4206 of ERISA. Thus, in this example, the employer's proportional share of the value of the adjustable benefit reduction and proportional share of the value of the benefit suspension are disregarded in determining the withdrawn employer's partial withdrawal liability assessment amount.

4. Chart of Simplified Methods To Determine Employer's Proportional Share of the Value of a Benefit Suspension and an Adjustable Benefit Reduction

The following chart provides a summary of the simplified methods discussed above:

EMPLOYER'S PROPORTIONAL SHARE OF THE VALUE OF A BENEFIT SUSPENSION OR AN ADJUSTABLE BENEFIT REDUCTION

[Value of benefit × allocation fraction]

| Method | Benefit suspension | | Adjustable benefit reduction |
|---|---|---|---|
| | Static value method | Adjusted value method | |
| Value of Benefit Suspension or Adjustable Benefit Reduction. | Withdrawals in years 1–10 after the benefit suspension: Present value of the suspended benefits as authorized by the Department of the Treasury in accordance with section 305(e)(9) of ERISA calculated as of the date of the benefit suspension or the last day of the plan year coincident with or following the date of the benefit suspension. | Withdrawals in year 1 after the suspension: Same as Static Value Method.<br>Withdrawals in years 2–10 after the suspension: The present value, determined as of the end of the plan year before a withdrawal, of the benefits not expected to be paid in the year of withdrawal or thereafter due to the benefit suspension. | Unamortized balance of the value of the adjustable benefit reduction using the same assumptions as for UVBs for purposes of section 4211 of ERISA and amortization in level annual installments over 15 years. |
| Allocation Fraction .. | For all three methods, the Allocation Fraction is the amount of the employer's required contributions over a 5-year period divided by the amount of all employers' contributions over the same 5-year period. The Allocation Fraction is determined in accordance with rules to disregard contribution increases under § 4211.4 and permissible modifications and simplifications under §§ 4211.12–15. | | |
| Five-Year Period for the Allocation Fraction. | Five consecutive plan years ending before the plan year in which the benefit suspension takes effect. | Five consecutive plan years ending before the employer's withdrawal. | Choice of 5 consecutive plan years ending before the employer's withdrawal or the plan year in which the adjustable benefit reduction takes effect. |
| Adjustments to Denominator of the Allocation Fraction. | Same as Adjusted Value Method, but using the 5-year period for the Static Value Method. In addition, if a plan uses a method other than the presumptive method, the denominator after the first year of the 5-year period is decreased by the contributions of any employers that withdrew from the plan and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal. | The denominator is increased by any employer contributions owed with respect to earlier periods which were collected in the 5-year period and decreased by any amount contributed by an employer that withdrew from the plan during the 5-year period, or, alternatively, adjusted as permitted under § 4211.12. | Same as Adjusted Value Method if using 5 consecutive plan years before the employer's withdrawal.<br>If using alternative 5-year period, same as Static Value Method, but using the 5 consecutive plan years before the plan year in which the adjustable benefit reduction takes effect. |

## IV. Regulatory Changes To Reflect Surcharges and Contribution Increases

### *A. Requirement To Disregard Surcharges and Certain Contribution Increases in Determining the Allocation of Unfunded Vested Benefits to an Employer (§ 4211.4) and the Annual Withdrawal Liability Payment Amount (§ 4219.3)*

Changes in contributions can affect the calculation of an employer's withdrawal liability and annual withdrawal liability payment amount. For example, such changes can increase or decrease the allocation fraction (discussed above in section I) that is used to calculate an employer's withdrawal liability. They can also increase or decrease an employer's highest contribution rate used to calculate the employer's annual withdrawal liability payment amount (also discussed above in section I).

Required surcharges and certain contribution increases would typically result in an increase in an employer's withdrawal liability even though unfunded vested benefits are being reduced by the increased contributions. Sections 305(g)(2) and (3) of ERISA mitigate the effect on withdrawal liability by providing that these surcharges and contribution increases that are required or made to enable the plan to meet the requirements of the funding improvement plan or rehabilitation plan are disregarded in determining contribution amounts used for the allocation of unfunded vested benefits and the annual payment amount. These sections do not apply for purposes of determining the unfunded vested benefits attributable to an employer by a plan using the direct attribution method under section 4211(c)(4) of ERISA or a comparable method.

Except as described below the final regulation, like the proposed, amends § 4211.4 of PBGC's unfunded vested benefits allocation regulation and § 4219.3 of PBGC's notice, collection, and redetermination of withdrawal liability regulation to incorporate the requirements to disregard these surcharges and contribution increases. The final regulation also provides simplified methods for disregarding certain contribution increases in the allocation fraction in § 4211.14 of PBGC's unfunded vested benefits allocation regulation (discussed below in section IV.B.). The final rule incorporates the disregard rules and simplified methods for contribution increases in the allocation methods for merged multiemployer plans provided in subpart D of part 4211. PBGC is not providing a simplified method for disregarding surcharges in the final rule because we believe that plans have been able to apply the statutory requirements without the need for a simplified method.

The provision regarding contribution increases applies to increases in the contribution rate or other required contribution increases that go into effect during plan years beginning after December 31, 2014.[9] A special rule under section 305(g)(3)(B) of ERISA provides that a contribution increase is deemed to be required or made to enable the plan to meet the requirement of the funding improvement plan or rehabilitation plan, such that the contribution increase is disregarded. However, the statute provides that this deeming rule does not apply to increases in contribution requirements due to increases in levels of work, employment, or periods for which compensation is provided, or additional contributions used to provide an increase in benefits, including an increase in future benefit accruals, permitted by section 305(d)(1)(B) or 305(f)(1)(B). Accordingly, the final regulation, with changes from the proposed rule as discussed below, provides that these increases are included as contribution increases for purposes of determining the allocation fraction and the highest contribution rate. In addition, under section 305(g)(4) of ERISA, contribution increases are not treated as necessary to satisfy the requirement of the funding improvement plan or rehabilitation plan after the plan has emerged from critical or endangered status. This exception applies only to the determination of the allocation fraction. The table below summarizes the statutory exceptions to the rule to disregard a contribution increase under section 305(g)(3) and (4) of ERISA.

EXCEPTIONS TO DISREGARDING A CONTRIBUTION INCREASE

| | |
|---|---|
| Allocation fraction and highest contribution rate exceptions (simplified methods for these exceptions are explained in III.B. of the preamble). | (1) Increases in contribution requirements associated with increased levels of work, employment, or periods for which compensation is provided.<br>(2) Additional contributions used to provide an increase in benefits, including an increase in future benefit accruals, permitted by section 305(d)(1)(B) or (f)(1)(B) of ERISA. |
| Allocation fraction exception (simplified methods for this exception are explained in III.C. of the preamble). | (3) The withdrawal occurs on or after the expiration date of the employer's collective bargaining agreement in effect in the plan year the plan is no longer in endangered or critical status, or, if earlier, the date as of which the employer renegotiates a contribution rate effective after the plan year the plan is no longer in endangered or critical status. |

Sections 4211.4(b)(2)(ii) and 4219.3(a)(2)(ii) of the proposed rule reflected an interpretation of the exception under section 305(g)(3) of ERISA for additional contributions used to provide an increase in benefits. Those sections provided, ''The contribution increase provides an increase in benefits, including an increase in future benefit accruals, permitted by sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA or sections 432(d)(1)(B) or section 432(f)(1)(B) of the Code, and an increase in benefit accruals as an integral part of the benefit formula.'' The proposed rule required the portion of such contribution increase that is attributable to an increase in benefit accruals to be determined actuarially and for those contribution increases to be included in the calculation of a withdrawn employer's withdrawal liability and annual withdrawal liability payment amount.

Three commenters disagreed with the interpretation provided in the proposed rule. They said that the only narrow exception to include contribution increases that are used to provide an increase in benefits in the calculation of

[9] The requirement to disregard surcharges for purposes of determining an employer's annual withdrawal liability payment is effective for surcharges the obligation for which accrues on or after December 31, 2014.

withdrawal liability is for increases specifically referred to in sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA. These commenters noted that plans have excluded all contribution increases under a funding improvement plan or rehabilitation plan that became effective in plan years beginning after December 31, 2014 from the calculation of withdrawal liability. In contrast, two commenters noted that some plans have included all contribution increases. One commenter explained that some plans use a benefit formula that makes it nearly impossible to allocate between what is and is not benefit bearing. Commenters objected to the requirement for the portion of the contribution increase that is benefit bearing to be determined actuarially. They stated that this would cause an increase in administrative costs and that plans have used other methods to differentiate between benefit bearing and non-benefit bearing portions of contribution increases. For example, some plan sponsors classify contribution increases as either benefit-bearing (*i.e.,* included in a benefit formula that bases accruals on contributions) or supplemental (*i.e.,* excluded from the benefit accrual formula). Finally, one commenter asked whether certifications under sections 305(d)(1)(B) or 305(f)(1)(B) of ERISA are required in the case of a plan with a percentage of contribution formula and a contribution increase required by a funding improvement plan or rehabilitation plan.

The final rule modifies proposed § 4211.4(b)(2)(ii) and § 4219.3(a)(2)(ii) to provide the exception to the disregard rules for a contribution increase that provides an increase in benefits by simply referring to section 305(g)(3) of ERISA. Specifically, § 4211.4(b)(2)(ii) and § 4219.3(a)(2)(ii) in the final rule describe the exception as applying to contribution increases ''used to provide an increase in benefits, including an increase in future benefit accruals, permitted by section (d)(1)(B) or (f)(1)(B) of ERISA.'' A plan sponsor is required to include such contribution increases in the calculation of a withdrawn employer's withdrawal liability and annual withdrawal liability payment amount. The final rule does not provide further interpretation. Commenters raised interpretive issues about sections 305(g)(3), 305(d)(1)(B), and 305(f)(1)(B) of ERISA that are under the jurisdiction of the Department of the Treasury as well as plan benefit design issues that require further study. PBGC is continuing to examine these issues with the Department of the Treasury and, if appropriate, will issue additional guidance.

*B. Simplified Methods for Disregarding Certain Contribution Increases in the Allocation Fraction (§ 4211.14)*

The allocation fraction that is used in the presumptive, modified presumptive, and rolling-5 methods to determine an employer's proportional share of unfunded vested benefits is discussed above in section I. The final regulation adds a new § 4211.14 to the unfunded vested benefits allocation regulation to provide a choice of one simplified method for the numerator and two simplified methods for the denominator of the allocation fraction. A plan sponsor may adopt the simplified methods in § 4211.14 to satisfy the requirements of section 305(g)(3) of ERISA and § 4211.4(b)(2) to disregard contribution increases in determining the allocation of unfunded vested benefits, or may choose an alternative approach that satisfies the requirements of the statutory provisions and regulations. A plan amended to use one or more of the simplified methods in this section must also apply the rules to disregard surcharges under new § 4211.4.

One commenter asked that the final regulation allow plans using the direct attribution method to use the simplified methods for contribution increases if use of such methods is otherwise reasonable. The disregard rules for contribution increases under section 305(g)(3)(A) of ERISA do not apply for purposes of determining the unfunded vested benefits attributable to an employer by a plan using the direct attribution method under section 4211(c)(4) of ERISA or a comparable method. PBGC's authority to provide simplified methods under section 305(g)(5) of ERISA is limited to methods for applying the disregard rules in determining withdrawal liability and payment amounts. PBGC therefore did not incorporate the commenter's requested change in the final rule.

1. Determining the Numerator Using the Employer's Plan Year 2014 Contribution Rate

Under the simplified method for determining the numerator of the allocation fraction, a plan sponsor bases the calculation on an employer's contribution rate as of the last day of each plan year (rather than applying a separate calculation for contribution increases that occur in the middle of a plan year). The plan sponsor starts with the employer's contribution rate as of the ''employer freeze date.'' The employer freeze date is the date that is the later of the last day of the first plan year that ends on or after December 31, 2014 (December 31, 2014 for a calendar year plan) and the last day of the plan year the employer first contributes to the plan. If, after the employer freeze date, the plan has a contribution rate increase that provides an increase in benefits so that the contribution increase is included, that rate increase is added to the contribution rate for each target year for which the rate increase is effective. Under the method, the product of the employer freeze date contribution rate (increased in accordance with the prior sentence, if applicable) and the withdrawn employer's contribution base units in each plan year (''target year'') are used for the numerator and the comparable amount determined for each employer is included in the denominator (described in B.2 below), unless the plan sponsor uses the proxy group method for determining the denominator (described in B.3 below). If there is more than one contribution rate or basis for calculating contribution base units, the calculations can be performed separately for each contribution rate or contribution base sub-group and then summed. An example illustrating the simplified method for disregarding certain contributions in determining the numerator using the employer's plan year 2014 contribution rate is provided in the appendix to part 4211.

2. Determining the Denominator Using Each Employer's Plan Year 2014 Contribution Rate

Under the first simplified method for determining the denominator of the allocation fraction, a plan sponsor applies the same principles as for the simplified method above for determining the numerator of the allocation fraction. The plan sponsor holds steady each employer's contribution rate as of the employer freeze date, except for contribution increases that provide benefit increases as described above. For each employer, the plan sponsor multiplies this rate by each employer's contribution base units in each target year.

3. Determining the Denominator Using the Proxy Group Method

Plans frequently offer multiple contribution schedules under a funding improvement plan or rehabilitation plan, which may have varying contribution rate increases. Under these and other circumstances, it could be administratively burdensome for plans to determine the exact amount of an employer's contributions—excluding contributions required to be disregarded

in determining withdrawal liability—to include in the denominator of the allocation fraction. Accordingly, the regulation provides a second simplified method for determining contributions in the denominator. This method, called the proxy group method, is available for plans that are amended to provide for use of the method. The method permits the contributions included in the denominator of the allocation fraction for a plan year to be based on an amount calculated for ''proxy'' representatives of the plan's contributing employers.

A commenter noted that different schedules and rate increases may apply to different categories of employees of a single employer—for example, because different collective bargaining agreements apply to different categories of the employer's employees. In response, the final regulation permits a single employer whose employees have highly dissimilar contribution histories to be treated as two or more employers with more uniform contribution histories in applying the proxy group method.

Under the proxy group method, employers are grouped in rate history groups, based on similarity of contribution histories (or same percentage increases in contributions from year to year). (Notwithstanding the diversity of contribution histories, rate history groups may be limited to 10.) Representative employers, representing at least 10 percent of active plan participants, are drawn from rate history groups to form the proxy group. ''Adjusted contributions''—excluding contribution rate increases that must be disregarded for withdrawal liability purposes—are determined for employers in the proxy group; then for rate history groups, based on the adjusted contributions of employers in each rate history group; and finally for the plan, based on the adjusted contributions of rate history groups represented in the proxy group. The plan's adjusted contributions form the denominator of the withdrawal liability allocation fraction.

As with other simplified methods, only contribution rates in effect at year end need be considered.

The process of forming rate history groups may be illustrated by the following examples.

Example 1. Employers in Plan A had twelve different contribution rates at the start of the rehabilitation period, as shown in the following table:

| | Column 1 | Column 2 | Column 3 | Column 4 |
|---|---|---|---|---|
| Row 1 | $2.00 | $2.25 | $2.50 | $2.75 |
| Row 2 | 3.00 | 3.25 | 3.50 | 3.75 |
| Row 3 | 4.00 | 4.25 | 4.50 | 4.75 |

The rehabilitation plan requires increases of $0.50 per hour per year for employers in Row 1, $0.75 per hour per year for those in Row 2, and $1.00 per hour per year for those in Row 3. All collective bargaining agreements are amended by the beginning of 2015, and the increases are effective as of the beginning of 2015. The following table shows the percentage rates of increase in contribution rates at year-end 2015 compared with year-end 2014:

| | Column 1 (percent) | Column 2 (percent) | Column 3 (percent) | Column 4 (percent) |
|---|---|---|---|---|
| Row 1 | 25.00 | 22.22 | 20.00 | 18.18 |
| Row 2 | 25.00 | 23.08 | 21.43 | 20.00 |
| Row 3 | 25.00 | 23.53 | 22.22 | 21.05 |

Since the increase rates for employers in Column 1 are the same, the plan can put those employers in one rate group. Similarly, employers in Column 2 have relatively uniform rates and can be grouped together, and likewise for those in Columns 3 and those in Column 4. Alternatively, employers in Columns 3 and 4 of Row 1 could be grouped together with those in Column 4 of Row 2; and employers in Columns 3 and 4 of Row 3 could be grouped together with those in Column 3 of Row 2.

Example 2. Plan B has many employers and many contribution rate schedules. Contributions change between 2010 and 2021 as follows:

Under the default schedule, there are one-time increases of 50 percent in 2010 for employers in Category A (defaults occurring in 2010); 55 percent in 2011 for employers in Category B (defaults occurring in 2011); and 60 percent in 2012 for employers in Category C (defaults occurring in 2012). For employers in Category D through Y, which have negotiated new collective bargaining agreements, increases are as shown in the following table:

| Category | First increase (year and quarter) | Annual percentage increase thereafter through 2021 |
|---|---|---|
| D | 2010 Q1 | 3.8 |
| E | 2010 Q2 | 3.9 |
| F | 2010 Q3 | 4.0 |
| G | 2010 Q4 | 4.1 |
| H | 2011 Q1 | 4.3 |
| I | 2011 Q2 | 4.5 |
| J | 2011 Q3 | 4.7 |
| K | 2011 Q4 | 4.9 |
| L | 2012 Q1 | 5.2 |
| M | 2012 Q2 | 5.5 |
| N | 2012 Q3 | 5.8 |
| O | 2012 Q4 | 6.1 |
| P | 2013 Q1 | 6.4 |

| Category | First increase (year and quarter) | Annual percentage increase thereafter through 2021 |
|---|---|---|
| Q | 2013 Q2 | 6.7 |
| R | 2013 Q3 | 7.1 |
| S | 2013 Q4 | 7.5 |
| T | 2014 Q1 | 8.0 |
| U | 2014 Q2 | 8.5 |
| V | 2014 Q3 | 9.0 |
| W | 2014 Q4 | 9.5 |
| X | 2015 Q1 | 10.3 |
| Y | 2015 Q2 and later | 11.0 |

The annual percentage increases for employers in Category D through Y are cumulative. Thus, if an employer's contribution rate for the second quarter of 2010 in Category F was $100.00, its contributions for 2010, 2011, and 2012 would be $104.00, $108.16, and $112.49 (based on rates in effect at year-end).

Appropriate rate history groups for 2015 through 2021 could be as follows:

| Rate history group | Employer categories in group |
|---|---|
| 1 | A, B, C. |
| 2 | D, E, F, G. |
| 3 | H, I, J, K. |
| 4 | L, M, N, O. |
| 5 | P, Q. |
| 6 | R, S. |
| 7 | T, U. |
| 8 | V, W. |
| 9 | X. |
| 10 | Y. |

These groupings take advantage of the provision that no more than ten rate history groups need be provided for.

In response to a comment requesting more flexibility in the determination of proxy groups, the final regulation omits the requirement that the proxy group employers be named in the plan. However, the regulation requires that there be consistency from year to year in the composition of both the proxy group and rate history groups, with certain exceptions. The intent is to keep these groups generally unchanged but to permit changes in their make-up to accommodate changes in circumstances such as contribution histories and employer withdrawals.

Employers contributing under the same rate schedule would typically be in the same rate history group, and a change in the rate schedule would typically not change the composition of the rate history group, because the rate histories of all employers in the group would be similarly affected. For example, suppose all the employers under a rate schedule are in the same rate history group, and the rate schedule changes. This would typically not change the composition of the rate history group, because the rate histories of all employers in the group would be similarly affected.

In the same vein, employers with disparate rate histories would typically be in different rate history groups, and the fact that they became covered by the same rate schedule would not typically place them in the same rate history group because their rate histories would remain different. For example, suppose two employers with disparate rate histories are in different rate history groups and become covered by the same rate schedule. This would not typically place them in the same rate history group because their rate histories would remain different.

On the other hand, if two employers in a rate history group moved to a different rate schedule, their rate histories would no longer match those of the other employers in the group. Depending on circumstances, this change might result in the formation of a new rate history group that (if it represented more than 5 percent of active participants) would require representation in the proxy group.

For proxy group employers, adjusted contributions for the plan year are determined by multiplying each employer's contribution base units for the plan year by what would have been the employer's contribution rate excluding contribution rate increases that are required to be disregarded in determining withdrawal liability.

Determining adjusted contributions for rate history groups is a two-step process. First, an adjustment factor is determined for the plan year for each rate history group represented in the proxy group of employers. This adjustment factor equals the sum of the adjusted contributions for the plan year for all employers in the rate history group that are in the proxy group, divided by the sum of those employers' actual total contributions for the plan year. Second, the adjustment factor for the year for each rate history group is multiplied by the contributions for the year of all employers in the rate history group (both proxy group members and non-members) to determine the adjusted contributions for the rate history group for the year.

Finally, the same steps are performed to determine adjusted contributions at the plan level. The sum of the adjusted contributions for all the rate history groups represented in the proxy group is divided by the sum of the actual contributions for the employers in those rate history groups, and the resulting adjustment factor for the plan is multiplied by the plan's total contributions for the plan year, including contributions by employers in small rate history groups not represented in the proxy group. The result—the adjusted contributions for the whole plan—is the amount of contributions for the plan year that may be used to determine the denominator for the allocation fraction under the proxy group method.

This process weights contributors by the size of their contributions. Heavy contributors' rates have a greater impact on the adjusted contributions than light contributors' rates.

A commenter asked that relief be provided for cases where information needed to determine adjusted contributions is unavailable. In response, PBGC has added a provision addressing situations where total contributions for a rate history group or a plan are unavailable to calculate adjusted contributions. In such situations, total contributions may be estimated by multiplying each contribution rate times the relevant projected contribution base units and adding all the results.

An example illustrating the simplified method for disregarding certain contributions in determining the denominator of the allocation fraction using the proxy group method is provided in the appendix to part 4211.

*C. Simplified Methods After Plan Is No Longer in Endangered or Critical Status*

As noted above in section IV.A., changes in contributions can affect the calculation of an employer's withdrawal

liability and annual withdrawal liability payment amount. Once a plan is no longer in endangered or critical status, the ''disregard'' rules for contribution increases change. Under section 305(g)(4) of ERISA, plan sponsors are required to: (1) Include contribution increases in determining the allocation fraction used to calculate withdrawal liability under section 4211 of ERISA; and (2) continue to disregard contribution increases in determining the highest contribution rate used to calculate the annual withdrawal liability payment amount under section 4219(c) of ERISA, as follows:

PLANS NO LONGER IN ENDANGERED OR CRITICAL STATUS

| | |
|---|---|
| Allocation Fraction (section 4211 of ERISA). | A plan sponsor is required to include contribution increases (previously disregarded) as of the expiration date of the collective bargaining agreement in effect when a plan is no longer in endangered or critical status. |
| Highest Contribution Rate (section 4219(c) of ERISA). | A plan sponsor is required to continue disregarding contribution increases that applied for plan years during which the plan was in endangered or critical status. |

The final regulation, like the proposed, amends § 4211.4 of PBGC's unfunded vested benefits allocation regulation and § 4219.3 of PBGC's notice, collection, and redetermination of withdrawal liability regulation to incorporate the requirements for contribution increases when a plan is no longer in endangered or critical status. The final regulation also provides simplified methods required by section 305(g)(5) of ERISA that a plan sponsor could adopt to satisfy the requirements of section 305(g)(4).

1. Including Contribution Increases in Determining the Allocation of Unfunded Vested Benefits (§ 4211.15)

The rule to begin including contribution increases for purposes of determining withdrawal liability is based, in part, on when a plan's collective bargaining agreements expire. Because plans may operate under numerous collective bargaining agreements with varying expiration dates, it could be burdensome for a plan sponsor to calculate the amount contributed by employers over the 5-year periods used for the denominators of the plan's allocation method. The plan sponsor would have to make a year-by-year determination of whether contribution increases should be included or disregarded in the denominators relative to collective bargaining agreements expiring in each applicable year. The final regulation adds a new § 4211.15 to PBGC's unfunded vested benefits allocation regulation to provide two alternative simplified methods that a plan sponsor could adopt for determining the denominators in the allocation fractions when the plan is no longer in endangered or critical status.

Under the first simplified method, a plan sponsor could adopt a rule that contribution increases previously disregarded are included in the allocation fraction as of the expiration date of the first collective bargaining agreement requiring contributions that expires after the plan's emergence from endangered or critical status. If the plan sponsor adopts this rule, then for any withdrawals after the applicable expiration date, the plan sponsor would include the total amount contributed by employers for plan years included in the denominator of the allocation fraction determined in accordance with section 4211 of ERISA under the method in use by the plan. This would relieve plan sponsors of the burden of a year-by-year determination of whether contribution increases should be included or disregarded in the denominator under the plan's allocation method relative to collective bargaining agreements expiring in that year. An example illustrating this simplified method is provided in § 4211.15(c) of PBGC's unfunded vested benefits allocation regulation.

Under the second simplified method, a plan sponsor could adopt a rule that contribution increases previously disregarded are included in calculating withdrawal liability for any employer withdrawal that occurs after the first full plan year after a plan is no longer in endangered or critical status, or if later, the plan year including the expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan's emergence from endangered or critical status.

The final regulation also provides that, for purposes of these simplified methods, an ''evergreen contract'' that continues until the collective bargaining parties elect to terminate the agreement has a termination date that is the earlier of—

(1) The termination of the agreement by decision of the parties.

(2) The beginning of the third plan year following the plan year in which the plan is no longer in endangered or critical status.

PBGC invited public comment on other simplified methods that a plan operating under numerous collective bargaining agreements with varying expiration dates might use to satisfy the requirement in section 305(g)(4) of ERISA that, as of the expiration date of the first collective bargaining agreement requiring plan contributions that expires after a plan is no longer in endangered or critical status, the allocation fraction must include contribution increases that were previously disregarded. Two commenters supported PBGC's proposed simplified method as a reasonable way to satisfy the requirements of section 305(g)(4) of ERISA.

2. Continuing To Disregard Contribution Increases in Determining the Highest Contribution Rate (§ 4219.3)

The rule for determining the highest contribution rate requires a plan sponsor of a plan that is no longer in endangered or critical status to continue to disregard increases in the contribution rate that applied for plan years during which the plan was in endangered or critical status. Because an employer's highest contribution rate is determined over the 10 plan years ending with the year of withdrawal, applying the rule would require a year-by-year determination of whether contribution increases should be included or disregarded. The final regulation adds a new § 4219.3 to PBGC's notice, collection, and redetermination of withdrawal liability regulation to provide a simplified method that a plan sponsor could adopt for determining the highest contribution rate.

The simplified method provides that, for a plan that is no longer in endangered or critical status, the highest contribution rate for purposes of section 4219(c) of ERISA is the greater of—

(1) The employer's contribution rate in effect, for a calendar year plan, as of December 31, 2014, and for other plans, the last day of the plan year that ends on or after December 31, 2014, plus any contribution increases occurring after that date and before the employer's withdrawal that must be included in

determining the highest contribution rate under section 305(g)(3) of ERISA, or

(2) The highest contribution rate for any plan year after the plan year that includes the expiration date of the first collective bargaining agreement of the withdrawing employer requiring plan contributions that expires after the plan is no longer in endangered or critical status, or, if earlier, the date as of which the withdrawing employer renegotiated a contribution rate effective after a plan is no longer in endangered or critical status.

An example illustrating this simplified method is provided in § 4219.3 of PBGC's notice, collection, and redetermination of withdrawal liability regulation. PBGC received two comments about the simplified method provided in § 4219.3. One commenter asked for clarification about the contribution rate that should be included in determining the highest contribution rate if an employer withdraws after its collective bargaining agreement expires, but before a new collective bargaining agreement is adopted. Another commenter stated that under the simplified method, if the plan year ends soon after the expiration date of the collective bargaining agreement, a higher contribution rate could be imposed on an employer than the plan's later negotiated contribution rate. PBGC agrees that this could occur under the simplified method if the bargaining parties do not reach agreement by the plan year after the plan year that includes the expiration date of the first collective bargaining agreement of the withdrawing employer requiring plan contributions that expires after the plan is no longer in endangered or critical status.

A commenter suggested that a grace period could be provided after the expiration date of the collective bargaining agreement, such as 180 days, during which the higher rate would not apply if it had not been agreed to in collective bargaining. While in many cases collective bargaining agreements are not renegotiated until after the expiration date of the collective bargaining agreement, PBGC believes that the collective bargaining parties will generally have time to resolve the scenario described by the commenter before a plan emerges from endangered or critical status. In addition, PBGC's simplified method already extends the disregard period beyond the highest contribution rate ''for plan years during which the plan was in endangered or critical status'' to include the period through the end of the plan year after the plan year that includes the expiration date of the first collective bargaining agreement that expires after the plan is no longer in endangered or critical status. Therefore, PBGC did not adopt the commenter's suggestion to change the simplified method in the final rule.

## V. Compliance With Rulemaking Guidelines

*Executive Orders 12866, 13563, and 13771*

The Office of Management and Budget (OMB) has determined that this rulemaking is not a ''significant regulatory action'' under Executive Order 12866 and Executive Order 13771. The rule provides simplified methods, as required by section 305(g)(5) of ERISA, to determine withdrawal liability and payment amounts, which multiemployer plan sponsors may choose, but are not required, to adopt. Accordingly, this final rule is exempt from Executive Order 13771 and OMB has not reviewed the rule under Executive Order 12866.

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, and public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes retrospective review of regulations, harmonizing rules, and promoting flexibility.

Although this is not a significant regulatory action under Executive Order 12866, PBGC has examined the economic implications of this final rule and has concluded that the amendments providing simplified methods for plan sponsors to comply with the statutory requirements will reduce costs for multiemployer plans by approximately $1,476,000. Based on 2016 data, there are about 450 plans that are in endangered or critical status.[10] PBGC estimates that a portion of these plans using the simplified methods under the final rule will have administrative savings, as follows:

| Annual amounts | Estimated number of plans affected | Savings per plan | Total savings |
|---|---|---|---|
| Savings on actuarial calculations using simplified methods and assuming an average hourly rate of $400 | | | |
| Disregarding benefit suspensions (Section III.B.2.) | 5 | $2,000 | $10,000 |
| Exceptions to disregarding contribution increases (Section IV.A.) | 40 | 4,000 | 160,000 |
| Allocation fraction numerator (Section IV.B.1.) | 200 | 1,200 | 240,000 |
| Allocation fraction denominator using 2014 contribution rate (Section IV.B.2.) | 160 | 4,000 | 640,000 |
| Allocation fraction denominator using proxy group of employers (Section IV.B.3.) | 40 | 8,000 | 320,000 |
| Other estimated savings | | | |
| Reduced plan valuation cost for plans that have a benefit suspension and use the static value method | 3 | 2,000 | 6,000 |
| Savings on potential withdrawal liability arbitration costs assuming an average hourly rate of $400 | 5 | 20,000 | 100,000 |
| Total savings | | | 1,476,000 |

PBGC invited public comment on the expected savings on actuarial calculations and other costs using the simplified methods. A commenter noted that expected savings on actuarial calculations and plan administration

[10] *https://www.pbgc.gov/sites/default/files/2017_pension_data_tables.pdf,* Table M–18.

will vary greatly from plan to plan based on the plan's industry, benefit formula, and other factors. Three commenters stated that the requirement in the proposed rule that the portion of contribution increases that is funding an increase in future benefit accruals be determined actuarially would cause an increase in administrative costs. As discussed above in section IV.A. of the preamble, the final rule does not adopt this provision.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act imposes certain requirements with respect to rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the Regulatory Flexibility Act requires that the agency present a final regulatory flexibility analysis at the time of the publication of the final regulation describing the impact of the rule on small entities and steps taken to minimize the impact. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of the Regulatory Flexibility Act requirements with respect to this final rule, PBGC considers a small entity to be a plan with fewer than 100 participants. This is substantially the same criterion PBGC uses in other regulations [11] and is consistent with certain requirements in title I of ERISA [12] and the Code,[13] as well as the definition of a small entity that the Department of Labor has used for purposes of the Regulatory Flexibility Act.[14]

Thus, PBGC believes that assessing the impact of the proposed regulation on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business based on size standards promulgated by the Small Business Administration (13 CFR 121.201) pursuant to the Small Business Act. PBGC therefore requested comments on the appropriateness of the size standard used in evaluating the impact on small entities of the proposed amendments. PBGC did not receive any such comments.

On the basis of its definition of small entity, PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. Based on data for recent premium filings, PBGC estimates that only 38 plans of the approximately 1,400 plans covered by PBGC's multiemployer program are small plans, and that only about 14 of those plans will be impacted by this final rule. Furthermore, plan sponsors may, but are not required to, use the simplified methods under the final rule. As shown above, plans that use the simplified methods will have administrative savings. The final rule will not impose costs on plans. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

**List of Subjects**

*20 CFR Part 4001*

Business and industry, Employee benefit plans, Pension insurance.

*20 CFR Part 4204*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

*20 CFR Part 4206*

Employee benefit plans, Pension insurance.

*20 CFR Part 4207*

Employee benefit plans, Pension insurance.

*29 CFR Part 4211*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4219*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

For the reasons given above, PBGC amends 29 CFR parts 4001, 4204, 4206, 4207, 4211 and 4219 as follows:

## PART 4001—TERMINOLOGY

■ 1. The authority citation for part 4001 continues to read as follows:

**Authority:** 29 U.S.C. 1301, 1302(b)(3).

**§ 4001.2 [Amended]**

■ 2. In § 4001.2, amend the definition of ''Nonforfeitable benefit'' by removing ''will be considered forfeitable.'' and adding in its place ''are considered forfeitable.''

## PART 4204—VARIANCES FOR SALE OF ASSETS

■ 3. The authority citation for part 4204 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1384(c).

■ 4. In § 4204.2, add in alphabetical order a definition for ''Unfunded vested benefits'' to read as follows:

**§ 4204.2 Definitions.**

* * * * *

*Unfunded vested benefits* means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

**§ 4204.12 [Amended]**

■ 5. In § 4204.12:

■ a. Amend the first sentence by removing ''for the purposes of section'' and adding in its place ''for the purposes of section 304(b)(3)(A) of ERISA and section''; and

■ b. Remove the second sentence.

## PART 4206—ADJUSTMENT OF LIABILITY FOR A WITHDRAWAL SUBSEQUENT TO A PARTIAL WITHDRAWAL

■ 6. The authority citation for part 4206 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3) and 1386(b).

■ 7. In § 4206.2, add in alphabetical order a definition for ''Unfunded vested benefits'' to read as follows:

**§ 4206.2 Definitions.**

* * * * *

*Unfunded vested benefits* means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

## PART 4207—REDUCTION OR WAIVER OF COMPLETE WITHDRAWAL LIABILITY

■ 8. The authority citation for part 4207 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1387.

■ 9. In § 4207.2, add in alphabetical order a definition for ''Unfunded vested benefits'' to read as follows:

[11] *See, e.g.,* special rules for small plans under part 4007 (Payment of Premiums).

[12] *See, e.g.,* section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants.

[13] *See, e.g.,* section 430(g)(2)(B) of the Code, which permits plans with 100 or fewer participants to use valuation dates other than the first day of the plan year.

[14] *See, e.g.,* DOL's final rule on Prohibited Transaction Exemption Procedures, 76 FR 66637, 66644 (Oct. 27, 2011).

**§ 4207.2 Definitions.**

* * * * *

*Unfunded vested benefits* means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

## PART 4211—ALLOCATING UNFUNDED VESTED BENEFITS TO WITHDRAWING EMPLOYERS

■ 10. The authority citation for part 4211 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3); 1391(c)(1), (c)(2)(D), (c)(5)(A), (c)(5)(B), (c)(5)(D), and (f).

■ 11. In § 4211.1, amend paragraph (a) by removing the sixth, seventh, and eighth sentences and adding two sentences in their place to read as follows:

**§ 4211.1 Purpose and scope.**

(a) * * * Section 4211(c)(5) of ERISA also permits certain modifications to the statutory allocation methods that PBGC may prescribe in a regulation. Subpart B of this part contains the permissible modifications to the statutory methods that plan sponsors may adopt without PBGC approval. * * *

* * * * *

■ 12. In § 4211.2:

■ a. Amend the introductory text by removing ''multiemployer plan,'' and adding in its place ''multiemployer plan, nonforfeitable benefit,'';

■ b. Amend the definition of ''Initial plan year'' by removing ''establishment'' and adding in its place ''effective date'';

■ c. Remove the definition of ''Nonforfeitable benefit'';

■ d. Revise the definition of ''Unfunded vested benefits'';

■ e. Amend the definition of ''Withdrawing employer'' by removing ''for whom'' and adding in its place ''for which'';

■ f. Amend the definition of ''Withdrawn employer'' by removing ''who, prior to the withdrawing employer,'' and adding in its place ''that, in a plan year before the withdrawing employer withdraws,'';

The revision reads as follows:

**§ 4211.2 Definitions.**

* * * * *

*Unfunded vested benefits* means, as described in section 4213(c) of ERISA, the amount by which the value of nonforfeitable benefits under the plan exceeds the value of the assets of the plan.

* * * * *

■ 13. Revise § 4211.3 to read as follows:

**§ 4211.3 Special rules for construction industry and Code section 404(c) plans.**

(a) *Construction plans.* A plan that primarily covers employees in the building and construction industry must use the presumptive method for allocating unfunded vested benefits, except as provided in §§ 4211.11(b) and 4211.21(b).

(b) *Code section 404(c) plans.* A plan described in section 404(c) of the Code or a continuation of such a plan must use the rolling-5 method for allocating unfunded vested benefits unless the plan sponsor, by amendment, adopts an alternative method or modification.

■ 14. Revise § 4211.4 to read as follows:

**§ 4211.4 Contributions for purposes of the numerator and denominator of the allocation fractions.**

(a) *In general.* Subject to paragraph (b) of this section, each of the allocation fractions used in the presumptive, modified presumptive and rolling-5 methods is based on contributions that certain employers have made to the plan for a 5-year period.

(1) The numerator of the allocation fraction, with respect to a withdrawing employer, is based on the ''sum of the contributions required to be made'' or the ''total amount required to be contributed'' by the employer for the specified period.

(2) The denominator of the allocation fraction is based on contributions that certain employers have made to the plan for a specified period.

(b) *Disregarding surcharges and contribution increases.* For each of the allocation fractions used in the presumptive, modified presumptive and rolling-5 methods in determining the allocation of unfunded vested benefits to an employer, a plan in endangered or critical status must disregard:

(1) *Surcharge.* Any surcharge under section 305(e)(7) of ERISA and section 432(e)(7) of the Code.

(2) *Contribution increase.* Any increase in the contribution rate or other increase in contribution requirements that goes into effect during plan years beginning after December 31, 2014, so that a plan may meet the requirements of a funding improvement plan under section 305(c) of ERISA and section 432(c) of the Code or a rehabilitation plan under section 305(e) of ERISA and 432(e) of the Code, except to the extent that one of the following exceptions applies pursuant to section 305(g)(3) or (4) of ERISA and section 432(g)(3) or (4) of the Code:

(i) The increases in contribution requirements are due to increased levels of work, employment, or periods for which compensation is provided.

(ii) The additional contributions are used to provide an increase in benefits, including an increase in future benefit accruals, permitted by section 305(d)(1)(B) or (f)(1)(B) of ERISA and section 432(d)(1)(B) or (f)(1)(B) of the Code.

(iii) The withdrawal occurs on or after the expiration date of the employer's collective bargaining agreement in effect in the plan year the plan is no longer in endangered or critical status, or, if earlier, the date as of which the employer renegotiates a contribution rate effective after the plan year the plan is no longer in endangered or critical status.

(c) *Simplified methods.* See §§ 4211.14 and 4211.15 for simplified methods of meeting the requirements of this section.

■ 15. Add § 4211.6 to read as follows:

**§ 4211.6 Disregarding benefit reductions and benefit suspensions.**

(a) *In general.* A plan must disregard the following nonforfeitable benefit reductions and benefit suspensions in determining a plan's nonforfeitable benefits for purposes of determining an employer's withdrawal liability under section 4201 of ERISA:

(1) *Adjustable benefit.* A reduction to adjustable benefits under section 305(e)(8) of ERISA and section 432(e)(8) of the Code.

(2) *Lump sum.* A benefit reduction arising from a restriction on lump sums or other benefits under section 305(f) of ERISA and section 432(f) of the Code.

(3) *Benefit suspension.* A benefit suspension under section 305(e)(9) of ERISA and section 432(e)(9) of the Code, but only for withdrawals not more than 10 years after the end of the plan year in which the benefit suspension takes effect.

(b) *Simplified methods.* See § 4211.16 for simplified methods for meeting the requirements of this section.

■ 16. Revise § 4211.11 to read as follows:

**§ 4211.11 Plan sponsor adoption of modifications and simplified methods.**

(a) *General rule.* A plan sponsor, other than the sponsor of a plan that primarily covers employees in the building and construction industry, may adopt by amendment, without the approval of PBGC, any of the statutory allocation methods and any of the modifications and simplified methods set forth in §§ 4211.12 through 4211.16.

(b) *Building and construction industry plans.* The plan sponsor of a plan that primarily covers employees in the building and construction industry may adopt by amendment, without the

approval of PBGC, any of the modifications to the presumptive rule and simplified methods set forth in § 4211.12 and §§ 4211.14 through 4211.16.

■ 17. Revise § 4211.12 to read as follows:

**§ 4211.12 Modifications to the presumptive, modified presumptive, and rolling-5 methods.**

(a) *Disregarding certain contribution increases.* A plan amended to use the modifications in this section must apply the rules to disregard surcharges and contribution increases under § 4211.4. A plan sponsor may amend a plan to incorporate the simplified methods in §§ 4211.14 and 4211.15 to fulfill the requirements of § 4211.4 with the modifications in this section if done consistently from year to year.

(b) *Changing the period for counting contributions.* A plan sponsor may amend a plan to modify the denominators in the presumptive, modified presumptive and rolling-5 methods in accordance with one of the alternatives described in this paragraph (b). Any amendment adopted under this paragraph (b) must be applied consistently to all plan years. Contributions counted for 1 plan year may not be counted for any other plan year. If a contribution is counted as part of the ''total amount contributed'' for any plan year used to determine a denominator, that contribution may not also be counted as a contribution owed with respect to an earlier year used to determine the same denominator, regardless of when the plan collected that contribution.

(1) A plan sponsor may amend a plan to provide that ''the sum of all contributions made'' or ''total amount contributed'' for a plan year means the amount of contributions that the plan actually received during the plan year, without regard to whether the contributions are treated as made for that plan year under section 304(b)(3)(A) of ERISA and section 431(b)(3)(A) of the Code.

(2) A plan sponsor may amend a plan to provide that ''the sum of all contributions made'' or ''total amount contributed'' for a plan year means the amount of contributions actually received during the plan year, increased by the amount of contributions received during a specified period of time after the close of the plan year not to exceed the period described in section 304(c)(8) of ERISA and section 431(c)(8) of the Code and regulations thereunder.

(3) A plan sponsor may amend a plan to provide that ''the sum of all contributions made'' or ''total amount contributed'' for a plan year means the amount of contributions actually received during the plan year, increased by the amount of contributions accrued during the plan year and received during a specified period of time after the close of the plan year not to exceed the period described in section 304(c)(8) of ERISA and section 431(c)(8) of the Code and regulations thereunder.

(c) *Excluding contributions of significant withdrawn employers.* Contributions of certain withdrawn employers are excluded from the denominator in each of the fractions used to determine a withdrawing employer's share of unfunded vested benefits under the presumptive, modified presumptive and rolling-5 methods. Except as provided in paragraph (c)(1) of this section, contributions of all employers that permanently cease to have an obligation to contribute to the plan or permanently cease covered operations before the end of the period of plan years used to determine the fractions for allocating unfunded vested benefits under each of those methods (and contributions of all employers that withdrew before September 26, 1980) are excluded from the denominators of the fractions.

(1) The plan sponsor of a plan using the presumptive, modified presumptive or rolling-5 method may amend the plan to provide that only the contributions of significant withdrawn employers are excluded from the denominators of the fractions used in those methods.

(2) For purposes of this paragraph (c), ''significant withdrawn employer'' means—

(i) An employer to which the plan has sent a notice of withdrawal liability under section 4219 of ERISA; or

(ii) A withdrawn employer that in any plan year used to determine the denominator of a fraction contributed at least $250,000 or, if less, 1 percent of all contributions made by employers for that year.

(3) If a group of employers withdraw in a concerted withdrawal, the plan sponsor must treat the group as a single employer in determining whether the members are significant withdrawn employers under paragraph (c)(2) of this section. A ''concerted withdrawal'' means a cessation of contributions to the plan during a single plan year—

(i) By an employer association;

(ii) By all or substantially all of the employers covered by a single collective bargaining agreement; or

(iii) By all or substantially all of the employers covered by agreements with a single labor organization.

(d) ''*Fresh start*'' *rules under presumptive method.* (1) The plan sponsor of a plan using the presumptive method (including a plan that primarily covers employees in the building and construction industry) may amend the plan to provide that—

(i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September 26, 1980, in applying section 4211(b)(1)(B), section 4211(b)(2)(B)(ii)(I), section 4211(b)(2)(D), section 4211(b)(3), and section 4211(b)(3)(B) of ERISA; and

(ii) Plan years ending after the end of the designated plan year in paragraph (d)(1)(i) of this section will substitute for plan years ending after September 25, 1980, in applying section 4211(b)(1)(A), section 4211(b)(2)(A), and section 4211(b)(2)(B)(ii)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (d)(1) of this section must provide that the plan's unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

(3) In the case of a plan that primarily covers employees in the building and construction industry, the plan year designated by a plan amendment pursuant to paragraph (d)(1) of this section must be a plan year for which the plan has no unfunded vested benefits determined in accordance with section 4211 of ERISA without regard to § 4211.6.

(e) ''*Fresh start*'' *rules under modified presumptive method.* (1) The plan sponsor of a plan using the modified presumptive method may amend the plan to provide—

(i) A designated plan year ending after September 26, 1980, will substitute for the plan year ending before September 26, 1980, in applying section 4211(c)(2)(B)(i) and section 4211(c)(2)(B)(ii)(I) and (II) of ERISA; and

(ii) Plan years ending after the end of the designated plan year will substitute for plan years ending after September 25, 1980, in applying section 4211(c)(2)(B)(ii)(II) and section 4211(c)(2)(C)(i)(II) of ERISA.

(2) A plan amendment made pursuant to paragraph (e)(1) of this section must provide that the plan's unfunded vested benefits for plan years ending after the designated plan year are reduced by the value of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers that had withdrawn from the plan as of the end of the designated plan year.

**§ 4211.13 [Amended]**

■ 18. In § 4211.13:
■ a. Amend paragraph (a) by removing ''shall'' and adding in its place ''must'';
■ b. Amend paragraph (b) by removing ''shall be'' and adding in its place ''is''.
■ 19. Add § 4211.14 to read as follows:

**§ 4211.14 Simplified methods for disregarding certain contributions.**

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt any of the simplified methods in paragraphs (b) through (d) of this section to fulfill the requirements of section 305(g)(3) of ERISA and section 432(g)(3) of the Code and § 4211.4(b)(2) in determining an allocation fraction. Examples illustrating calculations using the simplified methods in this section are provided in the appendix to this part.

(b) *Simplified method for the numerator—after 2014 plan year.* A plan sponsor may amend a plan to provide that the withdrawing employer's required contributions for each plan year (a ''target year'') after the date that is the later of the last day of the first plan year that ends on or after December 31, 2014 and the last day of the plan year the employer first contributes to the plan (the ''employer freeze date'') is the product of—

(1) The employer's contribution rate in effect on the employer freeze date, plus any contribution increase in § 4211.4(b)(2)(ii) that is effective after the employer freeze date but not later than the last day of the target year; times

(2) The employer's contribution base units for the target year.

(c) *Simplified method for the denominator—after 2014 plan year.* A plan sponsor may amend a plan to provide that the denominator for the allocation fraction for each plan year after the employer freeze date is calculated using the same principles as paragraph (b) of this section.

(d) *Simplified method for the denominator—proxy group averaging.* (1) A plan sponsor may amend a plan to provide that, for purposes of determining the denominator of the unfunded vested benefits allocation fraction, employer contributions for a plan year beginning after the plan freeze date described in paragraph (d)(2)(i) of this section are calculated, in accordance with this paragraph (d), based on an average of representative contribution rates that exclude contribution increases that are required to be disregarded in determining withdrawal liability. The method described in this paragraph (d) is effective only for plan years to which the amendment applies.

(2) For purposes of this paragraph (d) —

(i) *Plan freeze date* means the last day of the first plan year that ends on or after December 31, 2014.

(ii) *Base year* means the first plan year beginning after the plan freeze date.

(iii) *Contribution history* for a plan year means the history of total contribution rates, and contribution rates that are not required to be disregarded in determining withdrawal liability, from the plan freeze date up to the end of the plan year.

(iv) *Included employer* with respect to a plan for a plan year means an employer that is a contributing employer of the plan on at least 1 day of the plan year and whose contributions for the plan year are to be taken into account under the plan in determining the denominator of the unfunded vested benefits allocation fraction under section 4211 of ERISA. If the contribution histories of different categories of employees of an employer are not substantially the same, the employer may be treated as two or more employers that have more uniform contribution histories.

(v) *Rate history group* is defined in paragraph (d)(3) of this section.

(vi) *Proxy group* is defined in paragraph (d)(4) of this section.

(vii) *Adjusted* as applied to contributions for an employer, a rate history group, or a plan is defined in paragraphs (d)(5), (6), and (7) of this section.

(3) A rate history group of a plan for a plan year is a group of included employers satisfying all of the following requirements:

(i) Each included employer of the plan is in one and only one rate history group.

(ii) The employers in the rate history group have substantially the same contribution history (or the same percentage increases in contributions from year to year), but there need not be more than ten rate history groups.

(iii) There is consistency in the composition of rate history groups from year to year.

(4) The proxy group of a plan for a plan year is a group of included employers satisfying all of the following requirements:

(i) On at least 1 day of the plan year, the employers in the proxy group represent at least 10 percent of active plan participants.

(ii) There is at least one employer in the proxy group from each rate history group of the plan for the plan year that represents, on at least 1 day of the plan year, at least 5 percent of active plan participants.

(iii) There is consistency in the composition of the proxy group from year to year.

(5) The adjusted contributions of an employer under a plan for a plan year are —

(i) The employer's contribution base units for the plan year; multiplied by

(ii) The employer's contribution rate per contribution base unit at the end of the plan year, reduced by the sum of the employer's contribution rate increases since the plan freeze date that are required to be disregarded in determining withdrawal liability.

(6) The adjusted contributions of a rate history group that is represented in the proxy group of a plan for a plan year are the total contributions for the plan year attributable to employers in the rate history group, multiplied by the adjustment factor for the rate history group. The adjustment factor for the rate history group is the quotient, for all employers in the rate history group that are also in the proxy group, of —

(i) Total adjusted contributions for the plan year; divided by

(ii) Total contributions for the plan year.

(7) The adjusted contributions of a plan for a plan year are the plan's total contributions for the plan year by all employers, multiplied by the adjustment factor for the plan. For this purpose, ''the plan's total contributions for the plan year'' means the total unadjusted plan contributions for the plan year that would otherwise be included in the denominator of the allocation fraction in the absence of section 305(g)(1) of ERISA, including any employer contributions owed with respect to earlier periods that were collected in that plan year, and excluding any amounts contributed in that plan year by an employer that withdrew from the plan during that plan year. The adjustment factor for the plan is the quotient, for all rate history groups that are represented in the proxy group, of —

(i) Total adjusted contributions for the plan year; divided by

(ii) Total contributions for the plan year.

(8) Under this method, in determining the denominator of a plan's unfunded vested benefits allocation fraction, the contributions taken into account with respect to any plan year (beginning with the base year) are the plan's adjusted contributions for the plan year.

(9) Notwithstanding the foregoing provisions of this paragraph (d), if total contributions for a year for a rate history group or for a plan are not timely and reasonably available for calculating adjusted contributions for that year,

each relevant contribution rate for the year may be multiplied by the projected contribution base units for the year corresponding to that rate and the sum, for all rates, may be used in place of total contributions for that year.

(e) *Effective and applicability dates.* (1) *Effective date.* This section is effective on February 8, 2021.

(2) *Applicability date.* This section applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

■ 20. Add § 4211.15 to read as follows:

**§ 4211.15 Simplified methods for determining expiration date of a collective bargaining agreement.**

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt any of the simplified methods in this section to fulfill the requirements of section 305(g)(4) of ERISA and 432(g)(4) of the Code and § 4211.4(b)(2)(iii) for a withdrawal that occurs on or after the plan's reversion date.

(b) *Reversion date.* The reversion date is either—

(1) The expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in endangered or critical status, or

(2) The date that is the later of—

(i) The end of the first plan year following the plan year in which the plan is no longer in endangered or critical status; or

(ii) The end of the plan year that includes the expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in endangered or critical status.

(3) For purposes of paragraph (b)(2) of this section, the expiration date of a collective bargaining agreement that by its terms remains in force until terminated by the parties thereto is considered to be the earlier of—

(i) The termination date agreed to by the parties thereto; or

(ii) The first day of the third plan year following the plan year in which the plan is no longer in endangered or critical status.

(c) *Example.* The simplified method in paragraph (b)(1) of this section is illustrated by the following example.

(1) *Facts.* A plan certifies that it is not in endangered or critical status for the plan year beginning January 1, 2021. The plan operates under several collective bargaining agreements. The plan sponsor adopts a rule providing that all contribution increases will be included in the numerator and denominator of the allocation fractions for withdrawals occurring after October 31, 2022, the expiration date of the first collective bargaining agreement requiring plan contributions that expires after January 1, 2021.

(2) *Allocation fraction.* A contributing employer withdraws from the plan in November 2022, after the date designated by the plan sponsor for the inclusion of all contribution rate increases in the allocation fraction. The allocation fraction used by the plan sponsor to determine the employer's share of the plan's unfunded vested benefits includes all of the employer's required contributions in the numerator and total contributions made by all employers in the denominator, including any amounts related to contribution increases previously disregarded.

(d) *Effective and applicability dates.* (1) *Effective date.* This section is effective on February 8, 2021.

(2) *Applicability date.* This section applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

■ 21. Add § 4211.16 to read as follows:

**§ 4211.16 Simplified methods for disregarding benefit reductions and benefit suspensions.**

(a) *In general.* A plan sponsor may amend a plan without PBGC approval to adopt the simplified methods in this section to fulfill the requirements of section 305(g)(1) of ERISA and section 432(g)(1) of the Code and § 4211.6 to disregard benefit reductions and benefit suspensions.

(b) *Basic rule.* The withdrawal liability of a withdrawing employer is the sum of paragraphs (b)(1) and (2) of this section, and then adjusted by paragraphs (A)-(D) of section 4201(b)(1) of ERISA. The amount determined under paragraph (b)(1) may not be less than zero.

(1) The amount that would be the employer's allocable amount of unfunded vested benefits determined in accordance with section 4211 of ERISA under the method in use by the plan without regard to § 4211.6 (but taking into account § 4211.4); and

(2) The employer's proportional share of the value of each of the benefit reductions and benefit suspensions required to be disregarded under § 4211.6 determined in accordance with this section.

(c) *Benefit suspension.* This paragraph (c) applies to a benefit suspension under § 4211.6(a)(3).

(1) *General.* The employer's proportional share of the present value of a benefit suspension as of the end of the plan year before the employer's withdrawal is determined by applying paragraph (c)(2) or (3) of this section to the present value of the suspended benefits, as authorized by the Department of the Treasury in accordance with section 305(e)(9) of ERISA, calculated either as of the date of the benefit suspension or as of the end of the plan year coincident with or following the date of the benefit suspension (the ''authorized value'').

(2) *Static value method.* A plan may provide that the present value of the suspended benefits as of the end of the plan year in which the benefit suspension takes effect and for each of the succeeding 9 plan years is the authorized value in paragraph (c)(1) of this section. An employer's proportional share of the present value of a benefit suspension to which this paragraph (c) applies using the static value method is determined by multiplying the present value of the suspended benefits by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the 5 consecutive plan years ending before the plan year in which the benefit suspension takes effect; and

(ii) The denominator is the total of all employers' contributions for the 5 consecutive plan years ending before the plan year in which the suspension takes effect, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years. If a plan uses an allocation method other than the presumptive method in section 4211(b) of ERISA or similar method, the denominator after the first year is decreased by the contributions of any employers that withdrew from the plan and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal.

(iii) In determining the numerator and the denominator in paragraph (c)(2) of this section, the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

(3) *Adjusted value method.* A plan may provide that the present value of the suspended benefits as of the end of the plan year in which the benefit suspension takes effect is the authorized value in paragraph (c)(1) of this section and that the present value as of the end of each of the succeeding nine plan years (the ''revaluation date'') is the present value, as of a revaluation date, of the benefits not expected to be paid

after the revaluation date due to the benefit suspension. An employer's proportional share of the present value of a benefit suspension to which this paragraph (c) applies using the adjusted value method is determined by multiplying the present value of the suspended benefits by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the 5 consecutive plan years ending before the employer's withdrawal; and

(ii) The denominator is the total of all employers' contributions for the 5 consecutive plan years ending before the employer's withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years.

(iii) In determining the numerator and the denominator in this paragraph (c)(3), the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

(iv) If a benefit suspension in § 4211.6(a)(3) is a temporary suspension of the plan's payment obligations as authorized by the Department of the Treasury, the present value of the suspended benefits in this paragraph (c)(3) includes only the value of the suspended benefits through the ending period of the benefit suspension.

(d) *Benefit reductions.* This paragraph (d) applies to benefits reduced under § 4211.6(a)(1) or (2).

(1) *Value of a benefit reduction.* The value of a benefit reduction is—

(i) The unamortized balance, as of the end of the plan year before the withdrawal, of;

(ii) The value of the benefit reduction as of the end of the plan year in which the reduction took effect; and

(iii) Determined using the same assumptions as for unfunded vested benefits and amortization in level annual installments over a period of 15 years.

(2) *Employer's proportional share of a benefit reduction.* An employer's proportional share of the value of a benefit reduction to which this paragraph (d) applies is determined by multiplying the value of the benefit reduction by a fraction—

(i) The numerator is the sum of all contributions required to be made by the withdrawing employer for the 5 consecutive plan years ending before the employer's withdrawal; and

(ii) The denominator is the total of all employers' contributions for the 5 consecutive plan years ending before the employer's withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer that withdrew from the plan during those plan years.

(iii) The 5 consecutive plan years ending before the plan year in which the adjustable benefit reduction takes effect may be used in determining the numerator and the denominator in this paragraph (d). If such 5-year period is used, in determining the denominator, if a plan uses an allocation method other than the presumptive method in section 4211(b) of ERISA or similar method, the denominator after the first year is decreased by the contributions of any employers that withdrew from the plan and were unable to satisfy their withdrawal liability claims in any year before the employer's withdrawal.

(iv) In determining the numerator and the denominator in this paragraph (d), the rules under § 4211.4 (and permissible modifications under § 4211.12 and simplified methods under §§ 4211.14 and 4211.15) apply.

(e) *Example.* The simplified framework using the static value method under § 4211.16(c)(2) for disregarding a benefit suspension is illustrated by the following example.

(1) *Facts.* Assume that a calendar year multiemployer plan receives final authorization by the Secretary of the Treasury for a benefit suspension, effective January 1, 2018. The present value, as of that date, of the benefit suspension is $30 million. Employer A, a contributing employer, withdraws during the 2022 plan year. Employer A's proportional share of contributions for the 5 plan years ending in 2017 (the year before the benefit suspension takes effect) is 10 percent. Employer A's proportional share of contributions for the 5 plan years ending before Employer A's withdrawal in 2022 is 11 percent. The plan uses the rolling-5 method for allocating unfunded vested benefits to withdrawn employers under section 4211 of ERISA. The plan sponsor has adopted by amendment the static value simplified method for disregarding benefit suspensions in determining unfunded vested benefits. Accordingly, there is a one-time valuation of the initial value of the suspended benefits with respect to employer withdrawals occurring during the 2019 through 2028 plan years, the first 10 years of the benefit suspension.

(2) *Unfunded vested benefits allocable to Employer A.* To determine the amount of unfunded vested benefits allocable to Employer A, the plan's actuary first determines the amount of Employer A's withdrawal liability as of the end of 2021 assuming the benefit suspensions remain in effect. Under the rolling-5 method, if the plan's unfunded vested benefits as determined in the plan's 2021 plan year valuation were $170 million (not including the present value of the suspended benefits), the share of these unfunded vested benefits allocable to Employer A is equal to $170 million multiplied by Employer A's allocation fraction of 11 percent, or $18.7 million. The plan's actuary then adds to this amount Employer A's proportional 10 percent share of the $30 million initial value of the suspended benefits, or $3 million. Employer A's share of the plan's unfunded vested benefits for withdrawal liability purposes is $21.7 million ($18.7 million + $3 million).

(3) *Adjustment of allocation fraction.* If another significant contributing employer—Employer B—had withdrawn in 2019 and was unable to satisfy its withdrawal liability claim, the allocation fraction applicable to the value of the suspended benefits is adjusted. The contributions in the denominator for the last 5 plan years ending in 2017 is reduced by the contributions that were made by Employer B, thereby increasing Employer A's allocable share of the $30 million value of the suspended benefits.

(f) *Effective and applicability dates.* (1) *Effective date.* This section is effective on February 8, 2021.

(2) *Applicability date.* This section applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

**§ 4211.21 [Amended]**

■ 22. In § 4211.21, amend paragraph (b) by removing ''§ 4211.12'' and adding in its place ''section 4211 of ERISA''.

**§ 4211.31 [Amended]**

■ 23. In § 4211.31, amend paragraph (b) by removing ''set forth in § 4211.12'' and adding in its place ''subpart B of this part''.

■ 24. Amend § 4211.32 by adding paragraph (c)(2)(iii) to read as follows:

**§ 4211.32 Presumptive method for withdrawals after the initial plan year.**

* * * * *

(c) * * *

(2) * * *

(iii) In determining the numerator and the denominator in this paragraph (c), the rules under § 4211.4 (and permissible simplified methods under §§ 4211.14 and 4211.15) apply.

* * * * *

■ 25. Amend § 4211.33 by adding paragraph (c)(2)(iii) to read as follows:

**§ 4211.33 Modified presumptive method for withdrawals after the initial plan year.**

* * * * *

(c) * * *

(2) * * *

(iii) In determining the numerator and the denominator in this paragraph (c), the rules under § 4211.4 (and permissible simplified methods under §§ 4211.14 and 4211.15) apply.

■ 26. In § 4211.36, amend paragraph (a) by adding a sentence at the end of the paragraph to read as follows:

**§ 4211.36 Modifications to the determination of initial liabilities, the amortization of initial liabilities, and the allocation fraction.**

(a) * * * In determining the numerators and the denominators in paragraph (d) of this section, the rules under § 4211.4 (and permissible simplified methods under §§ 4211.14 and 4211.15) apply.

* * * * *

■ 27. Add appendix to part 4211 to read as follows:

## APPENDIX TO PART 4211—EXAMPLES

The examples in this appendix illustrate simplified methods for disregarding certain contribution increases in the allocation fraction provided in § 4211.14 of this part.

Example 1. Determining the Numerator of the Allocation Fraction Using the Employer's Plan Year 2014 Contribution Rate (§ 4211.14(b)).

Assume Plan X is a calendar year multiemployer plan in critical status which did not have a benefit increase after plan year 2014. In accordance with section 305(g)(3)(B) of ERISA, the annual 5 percent contribution rate increases applicable to Employer A and other employers in Plan X after the 2014 plan year were deemed to be required to enable the plan to meet the requirement of its rehabilitation plan and must be disregarded. Employer A, a contributing employer, withdraws from Plan X in 2021. Using the rolling-5 method, Plan X has unfunded vested benefits of $200 million as of the end of the 2020 plan year. To determine Employer A's allocable share of these unfunded vested benefits, Employer A's hourly required contribution rate and contribution base units for the 2014 plan year and each of the 5 plan years between 2016 and 2020 are identified as shown in the following table:

| | 2014 PY | 2016 PY | 2017 PY | 2018 PY | 2019 PY | 2020 PY | 5-year total |
|---|---|---|---|---|---|---|---|
| Employer A's Contribution Rate | $5.51 | n/a | n/a | n/a | n/a | n/a | ..... |
| Contribution Base Units | 800,000 | 800,000 | 800,000 | 900,000 | 900,000 | 900,000 | 4,300,000 |
| Contributions | $4.41M | $4.86M | $5.10M | $6.03M | $6.33M | $6.64M | $28.96M |

The plan sponsor makes a determination pursuant to section 305(g)(3) of ERISA that the annual 5 percent contribution rate increases applicable to Employer A and other employers in Plan X after the 2014 plan year were required to enable the plan to meet the requirement of its rehabilitation plan and should be disregarded; benefits were not increased after plan year 2014.

Applying the simplified method, contribution rate increases that went into effect during plan years beginning after December 31, 2014 would be disregarded: The $5.51 contribution rate in effect at the end of plan year 2014 would be held steady in computing Employer A's required contributions for the plan years included in the numerator of the allocation fraction. Based on 4.3 million contribution base units, this results in total required contributions of $23.7 million over 5 years. Absent section 305(g)(3) of ERISA, the sum of the contributions required to be made by Employer A would have been determined by multiplying Employer A's contribution rate in effect for each plan year by the contribution base units in that plan year, producing total required contributions of $28.96 million over 5 years.

Example 2. Determining the Denominator of the Allocation Fraction Using the Proxy Group Method (§ 4211.14(d)).

Assume a plan covers ten employers. For 2017, three small employers were in rate history group X, representing less than 5 percent of active plan participants; employers A and B and two other employers were in rate history group Y; and employer C and two other employers were in rate history group Z. For 2018, there were changes in contribution rates for some of B's employees, and as a result, employer B is being treated as two employers, B1 and B2. B1 remained in rate history group Y because, while B1 has a significantly lower contribution rate than A, the contributions of both are subject to the same percentage increase each year. B2 was added to rate history group X. X continues to represent less than 5 percent of active plan participants, and the plan continues to ignore it in forming the proxy group. The plan forms a 2018 proxy group of three employers—A and B1 from rate history group Y and C from rate history group Z—that together represent more than 10 percent of active plan participants.

Contributions for 2018 are $1,000,000: $20,000 for rate history group X, $740,000 for rate history group Y, and $240,000 for rate history group Z, with A and B1 accounting for $150,000 and C accounting for $45,000 of the total contribution amounts.

Contribution rates for 2018 for A, B1, and C (excluding rate increases required to be disregarded for withdrawal liability purposes) and contribution base units for the three employers are: For A, 87 cents and 100,000 CBUs; for B1, 43 cents and 50,000 CBUs; and for C, 70 cents and 60,000 CBUs, as shown in rows (1) and (2) of the table below. Thus, the three employers' adjusted contributions are $87,000, $21,500, and $42,000 respectively, as shown in row (3).

Moving from the employer level to the rate history group level, the adjusted contributions for employers in the proxy group that are in the same rate history group are added together (row (4)). Those totals are then divided by total actual contributions for the proxy group employers in each rate history group (row (6)) to derive an adjustment factor for each rate history group (row (7)) that is applied to the actual contributions of all employers in the rate history group (row (8)) to get the adjusted contributions for each rate history group represented in the proxy group (row (9)).

Moving from the rate history group level to the plan level, the same process is repeated. Adjusted employer contributions for the rate history group are summed (row (10)) and divided by the total contributions for all rate history groups represented in the proxy group (row (11)) to get an adjustment factor for the plan (row (12)). Contributions for rate history group X are excluded from row (11) because no employer in rate history group X is in the proxy group. The adjustment factor for the plan is then applied to total plan contributions (row (13)) to get adjusted plan contributions (row (14)). Contributions for rate history group X are included in row (13) because—although X was ignored in determining the adjustment factor for the plan — the adjustment factor applies to all plan contributions (other than those by employers excluded from the plan's allocation fraction denominator). The plan will use the adjusted plan contributions in row (14) as the total contributions for 2018 in determining the denominator of any allocation fraction that includes contributions for 2018.

| Row number | Regulatory reference in § 4211.14(d) | Description of action | Rate history group | | |
|---|---|---|---|---|---|
| | | | Y | | Z |
| | | | Employer A | Employer B1 | Employer C |
| (1) | (6)(ii) | 2018 contribution rate excluding disregarded increases. | $0.87 per CBU | $0.43 per CBU | $0.70 per CBU |
| (2) | (6)(i) | 2018 CBUs | 100,000 | 50,000 | 60,000 |
| (3) | (6) | Adjusted employer contributions (1)x(2). | $87,000 | $21,500 | $42,000 |
| (4) | (7)(i) | Sum of adjusted contributions for proxy employers by rate history group. | $108,500 | | $42,000 |
| (5) | (7)(ii) | Unadjusted contributions for proxy employers. | $100,000 | $25,000 | $45,000 |
| (6) | (7)(ii) | Sum of unadjusted contributions for proxy employers by rate history group. | $125,000 | | $45,000 |
| (7) | (7) | Adjustment factor by rate history group (4)/(6). | 0.868 | | 0.933 |
| (8) | (7) | Total actual contributions by rate history group. | $740,000 | | $240,000 |
| (9) | (7) | Adjusted contributions by rate history group (7)x(8). | $642,320 | | $223,920 |
| (10) | (8)(i) | Sum of adjusted contributions for rate history groups represented in proxy group. | $866,240 | | |
| (11) | (8)(ii) | Total actual contributions for rate history groups represented in proxy group. | $980,000 | | |
| (12) | (8) | Adjustment factor for plan (10)/(11) | 0.884 | | |
| (13) | (8) | Total plan contributions | $1,000,000 | | |
| (14) | (8) | Adjusted plan contributions (for allocation fraction denominators) (12)x(13). | $884,000 | | |

## PART 4219—NOTICE, COLLECTION, AND REDETERMINATION OF WITHDRAWAL LIABILITY

■ 28. The authority citation for part 4219 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3) and 1399(c)(6).

■ 29. In § 4219.1:

■ a. Amend paragraph (a) by adding two sentences at the end of the paragraph;

■ b. Amend paragraph (b)(1) by removing in the third sentence ''shall'' and adding in its place ''does'';

■ c. Amend paragraph (b)(2) by removing in the second sentence ''shall cease'' and adding in its place ''cease'';

■ d. Amend paragraph (c) by removing in the second sentence ''whom'' and adding in its place ''which''.

The additions read as follows:

**§ 4219.1 Purpose and scope.**

(a) * * * Section 4219(c) of ERISA requires a withdrawn employer to make annual withdrawal liability payments at a set rate over the number of years necessary to amortize its withdrawal liability, generally limited to a period of 20 years. This subpart provides rules for disregarding certain contribution increases in determining the highest contribution rate under section 4219(c) of ERISA.

* * * * *

**§ 4219.2 [Amended]**

■ 30. In § 4219.2:

■ a. Amend paragraph (a) by removing ''multiemployer plan,'' and adding in its place ''multiemployer plan, nonforfeitable benefit,'';

■ b. Amend the definition of ''Mass withdrawal valuation date'' by removing the last sentence of the definition;

■ c. Amend the definition of ''Reallocation record date'' by removing ''shall be'' and adding in its place ''is'';

■ d. Amend the definition of ''Unfunded vested benefits'' by removing ''a plan's vested nonforfeitable benefits (as defined for purposes of this section)'' and adding in its place ''a plan's nonforfeitable benefits''.

■ 31. Add § 4219.3 to read as follows:

**§ 4219.3 Disregarding certain contributions.**

(a) *General rule.* For purposes of determining the highest contribution rate under section 4219(c) of ERISA, a plan must disregard:

(1) *Surcharge.* Any surcharge under section 305(e)(7) of ERISA and section 432(e)(7) of the Code the obligation for which accrues on or after December 31, 2014.

(2) *Contribution increase.* Any increase in the contribution rate or other increase in contribution requirements

that goes into effect during a plan year beginning after December 31, 2014, so that a plan may meet the requirements of a funding improvement plan under section 305(c) of ERISA and section 432(c) of the Code or a rehabilitation plan under section 305(e) of ERISA and section 432(e) of the Code, except to the extent that one of the following exceptions applies pursuant to section 305(g)(3) of ERISA and section 432(g)(3) of the Code:

(i) The increases in contribution requirements are due to increased levels of work, employment, or periods for which compensation is provided.

(ii) The additional contributions are used to provide an increase in benefits, including an increase in future benefit accruals, permitted by section 305(d)(1)(B) or (f)(1)(B) of ERISA and section 432(d)(1)(B) or (f)(1)(B) of the Code.

(b) *Simplified method for a plan that is no longer in endangered or critical status.* A plan sponsor may amend a plan without PBGC approval to use the simplified method in this paragraph (b) for purposes of determining the highest contribution rate for a plan that is no longer in endangered or critical status. The highest contribution rate is the greater of—

(1) The employer's contribution rate as of the date that is the later of the last day of the first plan year that ends on or after December 31, 2014 and the last day of the plan year the employer first contributes to the plan (the ''employer freeze date'') plus any contribution increases after the employer freeze date, and before the employer's withdrawal date that are determined in accordance with the rules under § 4219.3(a)(2)(ii); or

(2) The highest contribution rate for any plan year after the plan year that includes the expiration date of the first collective bargaining agreement of the withdrawing employer requiring plan contributions that expires after the plan is no longer in endangered or critical status, or, if earlier, the date as of which the withdrawing employer renegotiated a contribution rate effective after the plan year the plan is no longer in endangered or critical status.

(c) *Example:* The simplified method in paragraph (b) of this section is illustrated by the following example.

(1) *Facts.* A contributing employer withdraws in plan year 2028, after the 2027 expiration date of the first collective bargaining agreement requiring plan contributions that expires after the plan is no longer in critical status in plan year 2026. The plan sponsor determines that under the expiring collective bargaining agreement the employer's $4.50 hourly contribution rate in plan year 2014 was required to increase each year to $7.00 per hour in plan year 2025, to enable the plan to meet its rehabilitation plan. The plan sponsor determines that, over this period, a cumulative increase of $0.85 per hour was used to fund benefit increases, as provided by plan amendment. Under a new collective bargaining agreement effective in 2027, the employer's hourly contribution rate is reduced to $5.00.

(2) *Highest contribution rate.* The plan sponsor determines that the employer's highest contribution rate for purposes of section 4219(c) of ERISA is $5.35, because it is the greater of the highest rate in effect after the plan is no longer in critical status ($5.00) and the employer's contribution rate in plan year 2014 ($4.50) plus any increases between 2015 and 2025 ($0.85) that were required to be taken into account under section 305(g)(3) of ERISA.

(d) *Effective and applicability dates.* (1) *Effective date.* This section is effective on February 8, 2021.

(2) *Applicability date.* This section applies to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

Issued in Washington, DC.

**Gordon Hartogensis,**

*Director, Pension Benefit Guaranty Corporation.*

[FR Doc. 2020–28866 Filed 1–7–21; 8:45 am]

**BILLING CODE 7709–02–P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

### 33 CFR Part 220

**[COE–2020–0009]**

**RIN 0710–AA85**

### Design Criteria for Dam and Lake Projects

**AGENCY:** U.S. Army Corps of Engineers, Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This final rule removes the U.S. Army Corps of Engineers' part titled Design Criteria for Dam and Lake Projects. This part is out-of-date and otherwise covers internal agency operations that have no public compliance component or adverse public impact. Therefore, this part can be removed from the Code of Federal Regulations (CFR).

**DATES:** This rule is effective on January 8, 2021.

**ADDRESSES:** Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–EC (Mr. Robert Bank), 441 G Street NW, Washington, DC 20314–1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Bank at (202) 761–5532 or by email at *Robert.Bank@usace.army.mil.*

**SUPPLEMENTARY INFORMATION:**

This final rule removes from the 33 CFR part 220, Design Criteria for Dam and Lake Projects providing policy, design, and report requirements for low level discharge facilities for drawdown of lakes to be impounded by Corps Civil Works projects. The rule was initially published in the **Federal Register** on May 8, 1975 (40 FR 20081), and amended on August 22, 1975 (40 FR 36774). While the rule applies only to Corps design criteria on Corps dam and lake projects, it was published, at that time, in the **Federal Register** to aid public accessibility.

The solicitation of public comment for this removal is unnecessary because the rule is out-of-date, duplicative of existing internal agency guidance, and otherwise covers internal agency operations that have no public compliance component or adverse public impact. For current public accessibility purposes, updated internal agency policy on this topic may be found in Engineer Manual 1110–2–1602, ''Hydraulic Design of Reservoir Outlet Works'' (available at *https://www.publications.usace.army.mil/Portals/76/Publications/EngineerManuals/EM_1110-2-1602.pdf*). The agency policy is only applicable to field operating activities having responsibility for the design of Corps Civil Works projects and provides guidance specific to the Corps' hydraulic design analysis of reservoir outlet works facilities.

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding the current policy which governs the Corps' design criteria for Corps dam and lake projects. Because the regulation does not place a burden on the public, its removal does not provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.'' Therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' do not apply. This removal supports a recommendation of the DoD Regulatory Reform Task Force.

**List of Subjects in 33 CFR Part 220**

Dams, Flood control.

## PART 220—[REMOVED]

■ Accordingly, for the reasons stated in the preamble and under the authority of 5 U.S.C. 301, the Corps removes 33 CFR part 220.

**R.D. James,**

*Assistant Secretary of the Army (Civil Works).*

[FR Doc. 2020–27908 Filed 1–7–21; 8:45 am]

**BILLING CODE 3720–58–P**

## COUNCIL ON ENVIRONMENTAL QUALITY

### 40 CFR Part 1519

**RIN 0331–AA04**

### Guidance Document Procedures

**AGENCY:** Council on Environmental Quality.

**ACTION:** Final rule.

**SUMMARY:** Pursuant to Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' this final rule establishes the process that the Council on Environmental Quality (CEQ) will follow for issuing guidance documents. E.O. 13891 requires Federal agencies to finalize regulations or amend existing regulations to establish processes and procedures for issuing guidance documents.

**DATES:** This rule is effective January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Amy B. Coyle, Deputy General Counsel, Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503, (202) 395–5750, *amy.b.coyle@ceq.eop.gov.*

**SUPPLEMENTARY INFORMATION:**

On October 9, 2019, President Trump issued E.O. 13891,[1] which addresses the development, use, and public availability of agency guidance documents. It requires agencies to promulgate or update existing regulations setting forth their procedures for issuing guidance documents. In accordance with section 6 of E.O. 13891, on October 31, 2019, the Office of Management and Budget (OMB) issued memorandum M–20–02, ''Guidance Implementing Executive Order 13891, Titled 'Promoting the Rule of Law Through Improved Agency Guidance Documents' '' (OMB M–20–02)[2] to provide guidance and implement the Executive order. OMB M–20–02 provides agencies with additional instruction on how to implement E.O. 13891, including the required rulemaking.

### I. Summary of Final Rule

In this final rule, CEQ adds a new part 1519 to the Code of Federal Regulations to set out its procedures for the development and issuance of guidance documents consistent with the direction and reflecting the policies described in E.O. 13891 and OMB M–20–02.

*A. Section 1519.1, ''Purpose''*

Section 1519.1, ''Purpose,'' states that the purpose of part 1519 is to implement E.O. 13891, and explains CEQ's process for developing and issuing guidance.

*B. Section 1519.2, ''Guidance Document Procedures''*

Section 1519.2, ''Guidance document procedures,'' defines ''guidance documents'' in paragraph (a) and describes documents that do not meet that definition in paragraph (b), consistent with section 2(b)[3] of the E.O. and Q2 of OMB M–20–02.

Paragraph (c) of § 1519.2 lists the minimum requirements for any document meeting the definition of a guidance document consistent with Q22 of OMB M–20–02, including a title, unique identification number, date, indication of whether it revises or replaces prior guidance, summaries, and legal citations. Additionally, consistent with section 4(i) of E.O. 13891, paragraph (c)(6) includes a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract.

Paragraph (c)(11) of § 1519.2 specifies that any guidance document must be posted on CEQ's website. E.O. 13891 also directed Federal agencies to make guidance documents publicly available in an indexed, searchable database online. As described in the **Federal Register** notice published today, CEQ has complied with this requirement through its website *whitehouse.gov/ceq/resources.*[4] As noted on this website, CEQ may not cite, use, or rely on any guidance that is not posted on its web pages except to establish historical facts. CEQ also makes clear that CEQ's guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract.

Finally, paragraph (d) of § 1519.2 requires the CEQ Office of the General Counsel to review and clear all guidance documents before CEQ issues them.

*C. Section 1519.3, ''Procedures for the Public To Request Withdrawal or Modification of a Guidance Document''*

Consistent with section 4(ii) of E.O. 13891, § 1519.3, ''Procedures for the public to request withdrawal or modification of a guidance document,'' addresses the process for members of the public to petition CEQ to withdraw or modify a particular guidance document, including designation of the Office of the General Counsel as the office within CEQ to which the public should direct such petitions. CEQ intends to provide additional instructions on its guidance website, including appropriate contact information and format of the petitions.

*D. Section 1519.4, ''Significant Guidance Documents''*

Finally, § 1519.4, ''Significant guidance documents,'' addresses specific requirements for a subset of ''guidance documents'' that are ''significant guidance documents'' as defined by section 2(c) of E.O. 13891. Paragraph (a) sets forth that definition. OMB's Office of Information and Regulatory Affairs (OIRA) makes the final determination of whether a guidance document is significant. If OIRA makes such a determination for a particular guidance document, this section will also apply. Consistent with section 4(iii) of E.O. 13891, paragraph (b) sets forth procedural requirements, including public notice and comment for at least 30 days, unless an exception applies; public response to major concerns raised in comments; approval on a non-delegable basis by the Chairman, or an official acting as Chairman; review by OIRA under Executive Order 12866; and compliance with the applicable requirements for regulations or rules.

### II. Rulemaking Analyses and Notices

*A. Regulatory Procedures*

Under the Administrative Procedure Act, an agency may waive notice and comment procedures if an action is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). This rule describes the internal process that CEQ will follow to comply with the requirements specified in E.O. 13891 when issuing guidance documents as defined by the

[1] 84 FR 55235 (Oct. 15, 2019).

[2] OMB M–20–02 is available at *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf.*

[3] E.O. 13891 section 2(b) lists the following as exclusions to the definition of guidance document. 84 FR at 55235–36.

[4] CEQ's website, *whitehouse.gov/ceq/resources,* includes links to CEQ guidance documents and resources, some of which are provided on *nepa.gov* and *sustainability.gov.*

E.O. Because this rule is one of agency organization, procedure, or practice, it is exempt from the requirement to provide prior notice and opportunity for public comment.

*B. Regulatory Planning and Review (E.O. 12866 and E.O. 13563)*

E.O. 12866 provides that OIRA will review all significant rules. E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal government's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory objectives. OMB determined that this final rule does not meet the requirements for a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563, and therefore it was not subject to review.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act, as amended (RFA), 5 U.S.C. 601 *et seq.,* and E.O. 13272 do not apply to this rulemaking because it is not subject to the notice and comment requirements of 5 U.S.C. 553(b).

*D. Unfunded Mandates Reform Act*

A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.,* is not required. This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year, and it will not have a significant or unique effect on State, local, or Tribal governments, or the private sector.

*E. Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)*

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

*F. Federalism (E.O. 13132)*

Under the criteria in section 1 of E.O. 13132, this rule will not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement because it will not substantially and directly affect the relationship between the Federal and State governments.

*G. National Environmental Policy Act*

The purpose of this rulemaking is to formalize the CEQ's administrative procedures for issuing guidance documents, as required by E.O. 13891. CEQ has determined that the final rule is a non-major Federal action under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.,* and would not have any effect on the environment because it merely outlines internal CEQ administrative procedures and does not authorize any activity or commit resources to a project that may affect the environment.

*H. Paperwork Reduction Act*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments, individuals, businesses, or organizations.

**List of Subjects in 40 CFR Part 1519**

Administrative practice and procedure, Guidance.

**Mary B. Neumayr,**
*Chairman.*

■ For the reasons stated in the preamble, the Council on Environmental Quality adds 40 CFR part 1519 as follows:

## PART 1519—GUIDANCE DOCUMENTS

Sec.


**Authority:** 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; and E.O. 13891, 84 FR 55235.

### § 1519.1 Purpose.

(a) This part implements Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' and reflects the policies described in that order. The provisions in this part address the Council on Environmental Quality's procedures for the development and issuance of agency guidance documents. This part explains what constitutes guidance documents, and sets forth the minimum requirements for guidance documents, the procedures to request withdrawal or modification of guidance documents, and the additional requirements and procedures for significant guidance documents.

(b) This part is intended to improve the internal management of the Council on Environmental Quality. It is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

(c) If Executive Order 13891 or any provision thereof is rescinded or superseded, this part remains in effect.

### § 1519.2 Guidance document procedures.

(a) *Definition of guidance documents.* For purposes of this part, guidance documents are agency statements of general applicability, intended to have future effect on the behavior of regulated parties, that set forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.

(b) *Documents excluded from the definition of guidance documents.* Guidance documents do not include:

(1) Agency statements of specific, rather than general, applicability.

(2) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation.

(3) Legislative rules promulgated under 5 U.S.C. 553 (or similar statutory provisions), or exempt from rulemaking requirements under 5 U.S.C. 553(a).

(4) Rules of agency organization, procedure, or practice that are not anticipated to have substantial future effect on the behavior of regulated parties or the public.

(5) Decisions of agency adjudication.

(6) Documents or agency statements that are directed solely to the Council on Environmental Quality or other agencies (or personnel of such agencies) that are not anticipated to have substantial future effect on the behavior of regulated parties or the public.

(7) Legal briefs and other court filings.

(8) Legal advice or opinions from the Council on Environmental Quality's Office of the General Counsel.

(9) Categories of guidance documents made exempt from Executive Order 13891 by the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs through memoranda issued pursuant to section 4(b) of Executive Order 13891.

(c) *Elements of guidance documents.* In general, each guidance document must:

(1) Provide the title of the guidance document;

(2) Provide a unique document identification number;

(3) Identify the Council on Environmental Quality and any office, as appropriate, issuing the guidance document;

(4) Include the date of issuance;

(5) Include the term ''guidance'';

(6) Include a disclaimer clarifying that it does not have the force and effect of law; is not meant to bind the public in any way; and is intended only to provide clarity to the public regarding

existing requirements under the law or agency policies. When a guidance document is binding because the law authorizes binding guidance or because a contract incorporates the guidance, the Council on Environmental Quality must modify the disclaimer to reflect accordingly;

(7) If it is a revision to or a replacement of a previously issued guidance document, identify the guidance document that it revises or replaces;

(8) Include a short summary of the subject matter covered in the guidance document at the top of the document;

(9) Identify the activities to which and the persons to whom the guidance document applies;

(10) Include the citation to the statutory provision or regulation to which the guidance document applies or which it interprets; and

(11) Be posted on the Council on Environmental Quality's website.

(d) *Review and clearance.* The Office of the General Counsel must review and clear all proposed guidance documents before issuance.

**§ 1519.3 Procedures for the public to request withdrawal or modification of a guidance document.**

(a) Any member of the public may petition the Council on Environmental Quality to withdraw or modify a guidance document.

(b) The petitioner must submit the request for the withdrawal or modification of a guidance document in writing to the Office of the General Counsel. The petition must contain a statement of the reasons for the petition and any supporting documents to support the petitioner's request.

(c) Upon receipt of a petition for withdrawal or modification of a guidance document, the Office of the General Counsel will consult with the relevant offices and coordinate the response to the petition.

(d) The Council on Environmental Quality should respond to a petition in writing, including electronically, within 90 days of receipt of a petition. The response should state whether the petition is granted, granted in part and denied in part, denied, or provisionally denied for lack of adequate information. If the petition is provisionally denied for lack of adequate information, the response should indicate what additional information is necessary to adjudicate the petition. The Office of the General Counsel should respond to the petition in writing no later than 90 days after receipt of the necessary additional information. The response should state whether the petition is granted, granted in part and denied in part, or denied.

(e) The Council on Environmental Quality may consider in a coordinated manner or provide a coordinated response to similar petitions for withdrawal or modification.

(f) The Council on Environmental Quality need not respond to petitions under this part for withdrawal or modification of documents that do not meet the definition of a guidance document.

**§ 1519.4 Significant guidance documents.**

(a) *Significant guidance documents definition.* For the purposes of this section, significant guidance documents are guidance documents that may be reasonably anticipated to:

(1) Lead to an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(b) *Actions the Council on Environmental Quality will take before issuing significant guidance documents.* When the Office of Management and Budget's Office of Information and Regulatory Affairs determines that a guidance document is a significant guidance document, the Council on Environmental Quality must:

(1) Submit the guidance document for review by the Office of Information and Regulatory Affairs under Executive Order 12866;

(2) Publish the draft significant guidance document in the **Federal Register** for a public notice and comment period of at least 30 days;

(i) This provision will not apply if the Council on Environmental Quality for good cause finds that notice and public comment is impracticable, unnecessary, or contrary to the public interest.

(ii) If such a finding is made, the Council on Environmental Quality must incorporate such a finding and a brief statement of its reasoning into the significant guidance document.

(3) Obtain approval on a non-delegable basis from the Chairman or an official who is serving in an acting capacity as the Chairman.

(4) Provide a public response to major concerns raised in comments on the draft significant guidance document.

(5) Announce the availability of the final significant guidance document.

(6) Comply with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, ''Regulatory Planning and Review,'' 13563, ''Improving Regulation and Regulatory Review,'' 13609, ''Promoting International Regulatory Cooperation,'' 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' and 13777, ''Enforcing the Regulatory Reform Agenda.''

(c) *Exemption.* This section will not apply if the Chairman or an official who is serving in an acting capacity as the Chairman of the Council on Environmental Quality and the Administrator of the Office of Information and Regulatory Affairs agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements.

[FR Doc. 2020–28881 Filed 1–7–21; 8:45 am]

BILLING CODE 3225–F1–P

## FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

### 40 CFR Chapter IX

**[Agency Docket Number 2020–001]**

**RIN 3121–AA01**

## Adding Mining as a Sector of Projects Eligible for Coverage Under Title 41 of the Fixing America's Surface Transportation Act

**AGENCY:** Federal Permitting Improvement Steering Council.

**ACTION:** Final rule.

**SUMMARY:** The Federal Permitting Improvement Steering Council (Permitting Council) has voted to add mining as a sector with infrastructure projects eligible for coverage under Title 41 of the Fixing America's Surface Transportation Act (FAST–41). A new part will be included in the Code of Federal Regulations that adds mining to the list of statutory FAST–41 sectors. The addition of mining as a FAST–41 sector will allow qualified mining infrastructure projects to become FAST–41 covered projects. FAST–41 coverage will help Federal agencies coordinate their environmental and project review efforts to improve the timeliness, efficiency, predictability, and transparency of the decision-making processes associated with covered

mining projects. The designation of mining as a FAST–41 sector does not predetermine or affect any Federal agency decision with respect to any mining authorization or permit application, nor does it sidestep any required environmental review or public consultation process.

**DATES:** This rule becomes effective on January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** John G. Cossa, General Counsel, Federal Permitting Improvement Steering Council, 1800 G St. NW, Suite 2400, Washington, DC 20006, *john.cossa@fpisc.gov,* or by telephone at 202–255–6936.

Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact this individual during normal business hours or to leave a message at other times. FIRS is available 24 hours a day, 7 days a week. You will receive a reply to a message during normal business hours.

**SUPPLEMENTARY INFORMATION:** On November 27, 2020, the Permitting Council, which comprises the Permitting Council Executive Director; 13 Federal agency council members (including the designees of the Secretaries of Agriculture, Army, Commerce, Interior, Energy, Transportation, Defense, Homeland Security, and Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Chairmen of the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and the Advisory Council on Historic Preservation); and additional Permitting Council members, the Chairman of the Council on Environmental Quality (CEQ) and the Director of the Office of Management and Budget (OMB); [1] published in the **Federal Register** a proposed rule to designate mining as a sector of infrastructure projects eligible for coverage under FAST–41, 42 U.S.C. 4370m *et seq.* 85 FR 75998. The comment period for the proposed rule closed on December 28, 2020. The Permitting Council received 6,487 comments, the majority of which were form letters opposed to the proposal. Responses to selected comments are contained in the Responses to Selected Comments section below. The Permitting Council did not alter the regulatory proposal in response to comments.

[1] *See* 42 U.S.C. 4370m–1(b) (Prescribing Permitting Council composition).

The Permitting Council reviewed the comments received, and on January 4, 2021, voted whether to designate mining, as defined in the proposed rule, as a FAST–41 sector. A majority of the Permitting Council, including the Executive Director, Permitting Council members representing the Nuclear Regulatory Commission, Advisory Council on Historic Preservation, Department of Commerce, Department of Energy, Environmental Protection Agency, Army Corps of Engineers, Department of the Interior, Department of Agriculture, Department of Transportation, Department of Defense, and Department of Homeland Security, and the Chairman of CEQ voted in favor of the proposal. The Permitting Council member representing the Department of Housing and Urban Development and the Director of OMB abstained from the vote. The Permitting Council member representing the Federal Energy Regulatory Commission did not vote. No Permitting Council member voted against the proposal.

The Permitting Council continues to believe that, like the other FAST–41 sectors, mining is an important infrastructure sector. Mining projects can involve the construction of significant infrastructure, require substantial investment, and necessitate extensive and complex Federal and state environmental reviews and authorizations. Accordingly, like qualified projects from the statutory FAST–41 sectors, mining projects that satisfy the other covered project criteria of 42 U.S.C. 4370m(6) could benefit from the enhanced interagency coordination, transparency, and predictability provided by FAST–41 coverage. Extending FAST–41 coverage to qualified mining projects is consistent with Executive Order (E.O.) 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, 82 FR 40463 (Aug. 14, 2017) and E.O. 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals, 82 FR 60835 (Dec. 20, 2017).

Because a majority of the Permitting Council voted in favor of designating mining as a FAST–41 sector pursuant to 42 U.S.C. 4370m(6)(A), the Permitting Council will add part 1900 to title 40 of the Code of Federal Regulations to designate mining as a FAST–41 sector.

## Responses to Selected Comments

The Permitting Council received 6,487 comments, the majority of which were variants of two form letters opposed to adding mining as a FAST–41 sector. Although none of the comments resulted in changes to the proposed rule, the Permitting Council provides the following comment responses to clarify apparent misperceptions in the comment record about the scope and effect of FAST–41 and FAST–41 coverage.

### *Denial of Request for Extension of Time To Comment*

On December 9, 2020, the Permitting Council received a letter undersigned by several non-governmental entities requesting that the Permitting Council extend by an additional 45 days the 30-day comment period for the proposed rule. The letter asserted that the extension was needed because the ongoing COVID–19 crisis and the holiday season limited the ability of potentially affected stakeholders to provide timely comment, particularly given the various and disparate environmental and economic effects of mining. The Permitting Council denied the extension request, explaining that 30 days was sufficient time to provide comment on the proposal, which is administrative in nature and does not make any mining project more or less likely to be approved or implemented, or any environmental or economic effect that may be associated with a mining project to occur.

### *Authority To Designate Mining as a FAST–41 Sector*

Numerous commenters incorrectly argue that the scope of the FAST Act is limited to transportation, and that therefore, the Permitting Council is prohibited from designating mining—which is not transportation—as a FAST–41 sector. While much of the FAST Act does deal with transportation issues, 6 of the 10 statutory FAST–41 sectors—renewable energy production, conventional energy production, electricity transmission, water resource projects, broadband, and manufacturing—are not transportation. 42 U.S.C. 4370m(6)(A). Nothing in FAST–41 suggests that the Permitting Council is prohibited from designating new sectors that are not transportation.

Some commenters make the unsubstantiated assertion that Congress intentionally did not include mining as a FAST–41 sector because the environmental effects of mining allegedly are more severe than the effects of the other FAST–41 sectors. The FAST–41 statute contains no evidence of such Congressional intent. The statute places no limitation on the Permitting Council's authority to add a FAST–41 sector based on that sector's perceived environmental impacts. On the contrary, the only limitation

Congress placed on the Permitting Council's authority to designate a FAST–41 sector is that the designation occur ''by majority vote.'' 42 U.S.C. 4370m(6)(A). Moreover, because compliance with the National Environmental Policy Act (NEPA) is a precondition of FAST–41 project coverage, the fact that a sector has projects with potentially significant environmental impacts militates in favor of adding it as a FAST–41 sector. 42 U.S.C. 4370m(6)(A)(i) & (ii).

*Suitability of Mining Projects for FAST–41 Coverage*

Several commenters argue that designating mining as a FAST–41 sector is inappropriate because mining projects are too complex and diverse for the FAST–41 process and the Permitting Council to manage. One commenter suggested that the Permitting Council lacks adequate resources, funding, and technical expertise to conduct environmental reviews and oversee the permitting process for any covered mining projects, despite the fact that the Permitting Council consists of all the Federal agencies currently responsible for the environmental review and authorization of mining projects and collectively possesses all the technical and environmental expertise that the U.S. government has to bear.

Mining is an appropriate FAST–41 sector precisely because mining projects can be complex and diverse, and can necessitate extensive and coordinated Federal and state environmental review and decision making. The more complex the permitting path, the more likely it is that a project will be able to benefit from the enhanced interagency coordination, transparency, and predictability FAST–41 coverage provides. The Permitting Council's current project portfolio includes some of the largest, most complex, and novel infrastructure projects in the U.S., including multibillion-dollar renewable energy projects (wind and solar) as well as pipeline projects that are hundreds of miles long, cross Federal, state, private, and Tribal lands, and require dozens of permits and authorizations from numerous Federal and state entities. Covered projects also include several unprecedented, multibillion-dollar offshore wind projects, which require close interagency coordination as they are shepherded through the project review and approval process. Two of the FAST–41 covered projects that completed the Federal review process in 2020 are the largest of their kind (a solar renewable energy project and a liquefied natural gas and pipeline project).

Most large-scale infrastructure projects that would be eligible for FAST–41 coverage present environmental, jurisdictional, procedural, and interagency permitting challenges that the Permitting Council works daily to resolve. Through its vote to add mining as a FAST–41 sector, the Permitting Council has signaled its willingness to assist covered mining project sponsors in resolving their complex project review process challenges.

The same commenters who argue that mining projects are too complex and diverse for FAST–41 coverage inconsistently argue that FAST–41 coverage for mining projects is unnecessary because mining permitting in the U.S. is relatively swift, purportedly averaging two years. But the fact that some mining projects may be approved within a relatively short timeframe has no bearing on whether any given mining project may benefit from the enhanced interagency coordination, predictability, efficiency, and transparency that FAST–41 coverage can provide. Additionally, the two-year average permitting timeframe cited by commenters originates in a U.S. Government Accountability Office (GAO) report that only considered the time needed to obtain mining authorizations from Federal land management agencies, and not the estimated time needed to obtain myriad other Federal authorizations and permits that likely would be included in any FAST–41 covered project permitting timetable.[2] The GAO report acknowledges that it sometimes can take ''over 11 years'' to obtain authorizations from Federal land management agencies, not counting these other required authorizations.[3] Several commenters referenced the example of the Kensington Mine in Alaska, which reportedly took 19 years to authorize and required over 90 Federal and State authorizations.

*FAST–41 Does Not Supplant NEPA or Existing Procedural Requirements*

Many of the comments evidence a widespread belief that FAST–41 provides an alternate ''expedited'' project review and permitting regime that supplants NEPA and potentially other permitting and procedural requirements. This is not the case. The FAST–41 statute expressly does not supersede NEPA or affect any other agency statutory or regulatory requirement. *See* 42 U.S.C. 4370m–6(d)(1) (FAST–41 does not supersede, amend, or modify any Federal statute or affect the responsibility of any Federal agency officer to comply with or enforce any statute); 42 U.S.C. 4370m–6(d)(2) (''Nothing in [FAST–41] . . . creates a presumption that a covered project will be approved or favorably reviewed by any agency''); 42 U.S.C. 4370m–6(e)(1) (''Nothing in this section preempts, limits, or interferes with . . . any practice of seeking, considering, or responding to public comment''); 42 U.S.C. 4370m–6(e)(2) (''Nothing in [FAST–41] preempts, limits, or interferes with . . . any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.''); 42 U.S.C. 4370m–11 (providing that FAST–41 does not amend NEPA).

Although FAST–41 may provide more timely Federal decision making with respect to a covered project, it does not alter the ''rigor'' of any Federal agency's decision making, as some commenters suggest. Longer permitting timeframes should not be confused with rigorous Federal agency decision making. Much of the time savings associated with FAST–41 coverage has been achieved through coordinating interagency efforts, eliminating needless duplication, and engaging agencies and project sponsors to foster improved communication, and not through subverting applicable project review or decision-making procedures.

*FAST–41 Flexibility Mechanisms*

Commenters appear to incorrectly presume that FAST–41 coverage would subject mining projects to an arbitrarily inflexible, ''expedited'' environmental review and authorization process that would prevent Federal decision makers from obtaining and reviewing necessary technical and environmental information, providing opportunities for essential public input, coordinating with relevant state, local, and Tribal governments, and adjusting the FAST–41 project permitting timetable (42 U.S.C. 4370m–2(c)(1)(A), (c)(1)(b)(ii) & (c)(2)) to accommodate adequate NEPA review. But FAST–41 contains precisely the flexibility mechanisms that

[2] GAO, *Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More,* GAO–16–165 (Jan. 2016).

[3] *Id.* at 13, 17 (''we identified six categories of federal permits and authorizations that mine operators may need to obtain from entities other than BLM and the Forest Service and seven categories of state and local permits and authorizations across 12 western states that may be required depending on the nature of the mining operations'').

commenters claim it lacks. For example, one comment letter asserts that the recommended performance schedule (RPS) established for a new sector pursuant to 42 U.S.C. 4370m–1(c)(1)(C) limits the flexibility of agencies to craft a permitting timetable that reflects the complexity of the specific project or the impacts of the project on unique environmental or cultural resources. But FAST–41 specifically provides that agencies may modify the RPS based on ''relevant factors,'' including factors such as those identified by the commenter (*i.e.,* to accommodate ''the size and complexity of the covered project'' and ''the sensitivity of the natural or historic resources affected by the project''). 42 U.S.C. 4370m–2(c)(2)(B)(i) & (iv). Indeed, despite the commenter's concern about the RPS provision, the Permitting Council has successfully created a unique permitting timetable for each FAST–41 covered project.

Similarly, commenters' concern that agencies are unable to adjust FAST–41 project permitting timetables as needed to accommodate changed circumstances or new information is unfounded. Pursuant to 42 U.S.C. 4370m–2(c)(2)(D)(i)(I) and (II), agencies may adjust permitting timetable milestones where interagency agreement can be reached about the need for the extension and a written explanation is provided for the record. And if an extension of a milestone would extend a final permitting completion date by more than 30 days, the Permitting Council Executive Director may extend the final permitting timetable date after consulting with relevant agencies and determining on the record that that an extension is warranted based on the same ''relevant factors'' that can be used for deviating from the RPS. 42 U.S.C. 4370m–2(c)(2)(D)(i)(III). In short, nothing in FAST–41 prevents agencies from modifying permitting timetables for the reasons commenters are concerned about.

Commenters' concerns regarding the FAST–41 provision that requires OMB approval and a report to Congress if a permitting timetable exceeds by 50 percent the originally established permitting timetable (150 percent date) are equally misplaced. 42 U.S.C. 4370m–2(c)(2)(D)(iii). Like the milestone extension requirements, the 150 percent date requirement is a transparency and accountability mechanism which, like many of FAST–41's substantive provisions, encourages thoughtful, coordinated, and deliberate agency planning and action. Nothing prevents OMB from granting permitting timetable extensions beyond 50 percent of the original timetable to accommodate any information gap, needed stakeholder consultation, or environmental concern. The Permitting Council agrees with commenters that project sponsor delay can be a significant source of permitting timeline delay. That is why the 150 percent date requirement does not count against an agency when the permitting timetable extension request is for reasons outside the government's control. 42 U.S.C. 4370m–2(c)(2)(D)(iii)(I).

Likewise, and contrary to the assertions of some commenters, FAST–41 does not limit the rights of the public to provide input into the project review process, nor does it affect the discretion of agencies to establish or extend comment periods to obtain essential environmental information. Although FAST–41 establishes default comment periods for various environmental documents,[4] agencies retain discretion to extend any comment period ''for good cause.'' This allows agencies to extend comment periods to provide affected parties sufficient opportunity for timely input, or to obtain any environmental information essential for project review. This requirement is analogous to other Federal programs intended to foster timely and deliberate agency decision making. *See, e.g.,* 23 U.S.C. 139(g)(2) (minimum comment periods for NEPA documents that are subject to Department of Transportation efficient environmental review provisions may be extended when agencies agree or ''for good cause''); 23 CFR 771.123(k) (default comment period for environmental assessments and environmental impact statements that are subject to Department of Transportation efficient environmental review provisions is 45–60 days).

Finally, the FAST 41 provisions that require early development of NEPA alternatives and specify that agencies may develop preferred alternatives to a higher level of detail than other alternatives do not constrain agency discretion to subsequently develop additional NEPA alternatives when needed, and are entirely consistent with controlling CEQ NEPA implementing regulations. 42 U.S.C. 4370m–4(c); *see* 40 CFR 1501.2, 1502.14, 1502.17.

*Federal and State Coordination*

One commenter expressed concern that the application of FAST–41 may interfere with cooperation between state and Federal officials with respect to review and authorization of covered projects. However, FAST–41 encourages Federal-state cooperation by providing states the opportunity to ''opt-in'' to the FAST–41 process (42 U.S.C. 4370m–2(c)(3)), and additionally requires Federal agencies to consult with states before taking certain actions, such as establishing a covered project permitting timetable. 43 U.S.C. 4370m–2(c)(2)(A), *see also* 42 U.S.C. 4370m–3 (interstate compacts); 42 U.S.C. 4370m–5 (delegated state permitting programs).

*FAST–41 Limitations Period*

Several commenters expressed concern that the two-year FAST–41 limitations period contained in 42 U.S.C. 4370m–6(a)(1)(A) may prevent access to the courts by parties affected by mining pollution or violations by mine operators of permit conditions or applicable regulations. Although the FAST–41 limitations period is shorter than the six-year limitations period for claims against the government brought under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* the two-year limitations period applies exclusively to Federal authorizations of FAST–41 covered projects. The limitations period does not apply to lawsuits alleging noncompliance with applicable regulations or permit conditions, or to tort claims. Moreover, because all FAST–41 covered project Federal authorizations are publically posted on the Permitting Dashboard,[5] FAST–41 ensures that anyone wishing to challenge the validity of a Federal agency authorization with respect to a covered project will have adequate opportunity to do so.

*Consultation With Indian Tribal Governments; Environmental Justice*

Several commenters assert that the Permitting Council is required to engage in government-to-government consultation with Indian Tribal Governments pursuant to section 5 of E.O. 13175 because Tribes are affected by mining projects. Several commenters similarly argue that the Permitting Council is required to identify and address the disproportionate effects that mining can have on minority and low-income populations pursuant to E.O. 12898.

Designating mining as a FAST–41 sector is a ministerial act that has no effect on Tribes and does not disproportionately affect minority or low-income populations. As explained in the preamble to the proposed rule, only prospective covered project

[4] The default comment period for environmental impact statements is 45–60 days and 45 days for all other NEPA documents. 42 U.S.C. 4370m–4(b)(1)(D) & (d).

[5] Available at *https://www.permits.performance.gov/.*

sponsors and Federal agencies are affected by the rule. Designating mining as a FAST–41 sector does not extend FAST–41 coverage to any project, affect any agency's discretion to issue or deny a mining project permit or authorization, or displace any existing requirement for public involvement or environmental review associated with any covered project. It remains the responsibility of each authorizing agency to weigh the relative environmental and economic merits of their decisions with respect to a covered project in accordance with their own statutory and regulatory authorities and policies. Designating mining as a FAST–41 sector likewise does not affect any Federal agency's obligation to engage in government-to-government consultation with respect to any mining project. Because adding mining as a FAST–41 sector does not affect Tribes or minority and low-income populations, the Permitting Council is not required to engage in government-to-government consultation pursuant to E.O. 13175 or to identify and address any disproportionate effect that mining may have on minority and low-income populations.

*Proposed Definition of ''Mine''*

Two commenters recommended that the Permitting Council consider adopting the definition of ''mine'' from 40 CFR 440.132(g), which includes land and property under or above the surface of an active mining area that is used in, or results from, the work of extracting metal ore or minerals from their natural deposits. The commenters' referenced definition also includes such lands that are used for secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps, and mill tailings derived from the mining, cleaning, or concentration of metal ores.

The Permitting Council appreciates the suggestion, but for the purpose of adding a FAST–41 sector pursuant to 42 U.S.C. 4370m(6)(A), the Permitting Council seeks to define ''mining,'' rather than ''mine.'' The Permitting Council did not change the definition of ''mining'' in response to the comment, and believes that the definition in the proposed rule is sufficiently broad to capture the range of mining activities intended (*i.e.,* extracting ore, minerals, or raw materials from the ground).

**Economic Analysis**

Adding mining as a sector with infrastructure projects eligible for coverage under FAST–41could result in improved timeliness, predictability, and transparency associated with the projects that ultimately become FAST–41 covered projects, and for the Federal agencies participating in the FAST–41 process for those covered projects. However, quantifying any potential economic benefits that might result from adding mining as a FAST–41 sector is speculative. Simply providing the option of FAST–41 coverage to qualified mining projects does not assure how many, if any, mining project FAST–41 Initiation Notices (FINs) will be submitted to the Permitting Council for coverage, or how many projects ultimately will be covered. *See* 42 U.S.C. 4370m–2(a)(1)(A) & (C). Nor does it guarantee that any economic benefits would result from such coverage, particularly given that the permitting and environmental review requirements and permitting timetables for each covered project are unique.

Although the Permitting Council cannot predict precisely how many mining projects may become covered projects, the number will be small. The eligibility criteria for FAST–41 coverage are selective; only the largest projects that are the most prepared for Federal review may become covered projects. *See* 42 U.S.C. 4370m(6) (definition of ''covered project'' including $200 million project value threshold or alternative permitting complexity requirement); 4370m–2(c)(1)(A) & (B)(ii), 4370m–2(c)(2)(A) (sponsors must provide agencies with information sufficient to create a comprehensive and complete project permitting timetable within 60 days of initial project coverage); OMB M–17–14, *Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects* (FAST–41 Guidance), Sec. 3 (Jan. 17, 2017) (project description must be sufficient at the outset to facilitate appropriate level of analysis under NEPA and interagency coordination on all required permits/authorizations). Since the enactment of FAST–41 in 2015, a total of 54 projects have been covered. Of these projects, only 20 were covered as the result of successfully submitted FINs that met the FAST–41 coverage criteria. The remaining 34 projects were statutorily covered as pending projects immediately after the enactment of FAST–41. *See* 43 U.S.C. 4370m–1(c)(1)(A)(i) and 4370m–2(b)(2)(A)(i). The 20 successfully submitted FINs include one conventional energy production project, one electricity transmission project, two pipeline projects, one ports and waterways project, 13 renewable energy production projects, and two water resource projects.

Some commenters expressed the belief that the Permitting Council will receive more interest from potential mining project sponsors, and ultimately cover more mining projects, than estimated in the preamble to the proposed rule. But the Permitting Council continues to anticipate that very few—likely 10 or fewer—mining project FINs will be submitted before the FAST–41 sunset date of December 4, 2022. 42 U.S.C. 4370m–12. This is in part because the Permitting Council expects the sunset date to act as a disincentive to the project sponsors who are likely to be most interested in FAST–41 coverage. Such sponsors include proponents of large or complex mining projects with a significant number of Federal and state authorizations and with longer permitting horizons. It is questionable whether these project sponsors would be able to derive the full benefits of FAST–41 coverage if the FAST–41 program may terminate before the Federal review and decision-making process for the project can be completed.

The Permitting Council notes that the statutory criteria for becoming a FAST–41 covered project is different from the criteria for whether a project is subject to the provisions of E.O. 13807, or E.O. 13766, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, 82 FR 8567 (Jan. 30, 2017). Accordingly, the fact that a federal agency may have determined that a project is subject to one or both of these E.O.s does not indicate that that project is, would, or could become a FAST–41 covered project. The exclusive means by which a project can become a FAST–41 covered project is through the submission and review of a project FIN in accordance with the FAST–41 covered project criteria at 42 U.S.C. 4370m(6), and the subsequent addition of the project to the Permitting Dashboard by the Permitting Council Executive Director in accordance with 42 U.S.C. 4370m–2(b)(2).

Based on historical experience, only a portion of submitted FINs become covered projects. Since the inception of FAST–41, only 20 submitted FINs have become covered projects across all 10 FAST–41 sectors. To date, the Permitting Council has received fewer than five FINs for projects that involve mining that may potentially have been eligible for coverage under the statutory FAST–41 sectors (*e.g.,* conventional energy). But all of these FINs either were rejected for failing to meet other FAST–41 eligibility criteria or were withdrawn by the project sponsor for other reasons. It is therefore unlikely that adding mining to the 10 statutory

FAST–41 sectors will result in the coverage of a substantial number of new projects.

Designating mining as a FAST–41 sector could result in reduced costs for any mining project sponsor that obtains FAST–41 coverage for its project and for the Federal agencies with review and permitting responsibilities for the covered project by virtue of potentially improved timeliness, predictability, and transparency, associated increased Federal agency coordination, and reduced duplication of Federal and project sponsor effort. However, these benefits are difficult to quantify, particularly given that the Federal permitting and environmental review requirements and the permitting timetable for each project are unique and vary widely from project to project. Because the Permitting Council does not know in advance how many mining projects will become FAST–41 covered projects, what the permitting or environmental review requirements might be for any potential future covered mining project, or what opportunities might exist to coordinate any Federal agency reviews that might be necessary for any such covered mining project, it is impossible to predict with any specificity what, if any, economic benefit might broadly accrue as a result of designating mining as a FAST–41 sector.

Adding mining as a FAST–41 sector will not directly increase or decrease the costs to agencies of complying with the substantive provisions of FAST–41, although there will be costs to the Permitting Council associated with any additional project that might become a covered project.

FAST–41 does not impose any regulatory requirements on covered project sponsors; FAST–41 implementation obligations fall primarily on the government. However, because FAST–41 is a voluntary program, sponsors of mining projects potentially eligible for FAST–41 coverage would incur some costs associated with seeking FAST–41 coverage. These costs associated with a request to be a covered project likely will be small. Seeking FAST–41 coverage involves formulating and submitting a project FIN, which is expected to take only a few hours. *See* 42 U.S.C. 4370m–2(a)(i)(C). Because the Permitting Council anticipates receiving few additional project FINs as a result of adding mining as a FAST–41 sector, and the burden associated with preparing a FIN is minimal, the additional economic cost associated with adding mining as a FAST–41 sector, if any, would be negligible, and likely would be counterbalanced by the benefits of FAST–41 coverage.

**Procedural Matters**

*Regulatory Planning and Review (E.O. 12866) and Improving Regulation and Regulatory Review (E.O. 13563)*

This action is not a significant regulatory action and was not submitted to OMB for further review.

*Reducing Regulation and Controlling Regulatory Costs (E.O. 13771)*

This rule is an E.O. 13771 deregulatory action. A discussion of the potential economic benefits of this rule can be found in the rule's Economic Analysis section.

*Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 601 et seq.*

Pursuant to 5 U.S.C. 605(b), the Permitting Council certifies that providing the option of FAST–41 coverage for qualified mining projects that are not already eligible for FAST–41 coverage under any of the statutory FAST–41 sectors will not have a significant economic impact on a substantial number of small entities.

The Permitting Council anticipates that the addition of mining as a FAST–41 sector will result in the submission of 10 or fewer mining project FINs, at least some of which, based on the Permitting Council's past experience with project FINs that involve mining, likely will not become FAST–41 covered projects. Though the Permitting Council does not conduct an analysis of the business structures of FAST–41 project sponsors to determine whether they are small entities, it is possible that at least some of the 10 or fewer project sponsors that submit FINs for mining projects could be small entities. However, because 10 or fewer entities likely will be affected, the Permitting Council does not anticipate that adding mining as a FAST–41 sector will affect a substantial number of small entities.

Nor will adding mining as a FAST–41 sector significantly or disproportionately impose costs on any small entity that is affected by the rule. The requirements for submitting a project FIN are simple and not burdensome. The FAST–41 statute only requires the project sponsor to formulate and send to the Permitting Council and the lead or facilitating agency a project FIN that contains: (1) A statement of the purpose and objectives of the project; (2) a description of the general project location; (3) any available geospatial information about project and environmental, cultural, and historic resource locations; (4) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project; (5) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and (6) an assessment that the proposed project meets the definition of a covered project pursuant to 42 U.S.C. 4370m(6)(A) with supporting rationale. 42 U.S.C. 4370m–2(a)(1)(A) & (C). Any project sponsor credibly seeking Federal authorization and environmental review for a project that requires $200 million or more in investment will have the information required to submit a project FIN readily available, and preparing and submitting a project FIN should require only a few hours of effort. FAST–41 contains no pre-FIN requirements (although project sponsors are free to consult the Permitting Council with any questions about the FAST–41 program and FIN preparation or submission), and there are no regulations implementing FAST–41 that impose any additional requirements on the project sponsor. The lead or facilitating agency (and in some instances, the Permitting Council Executive Director) will review the FIN in accordance with sections 4.4–4.12 of the FAST–41 Guidance to determine whether the project is a FAST–41 covered project. *See* Fast-41 Guidance at 30–34. If the project is a covered project, FAST–41 imposes no requirements or obligations on the project sponsor that are additional to those imposed by the substantive Federal authorization or environmental review statutes that otherwise apply to the project. Accordingly, adding mining as FAST–41 sector will not significantly affect a substantial number of small entities, and the RFA does not apply.

*Congressional Review Act (CRA), 5 U.S.C. 804*

This rule is not a ''major rule'' as defined under 5 U.S.C. 804(2) because it will not cause a major increase in costs or prices for consumers; individual industries; Federal, state, or local government agencies; or geographic regions. The rule will not have an annual effect on the economy of $100 million or more.

*Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1501 et seq.*

This rule does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector of more than $100 million per year. The rule does not have a significant or unique effect on state,

local, or tribal governments or the private sector. Therefore, a statement containing the information required by the UMRA is not required. The rule also is not subject to the requirements of UMRA section 203 because it contains no regulatory requirements that might significantly or uniquely affect small governments. The rule contains no requirements that apply to small governments, nor does it impose obligations upon them.

*Federalism (E.O. 13132)*

This action does not have federalism implications under E.O. 13132. The rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the levels of government. The rule affects only the eligibility of mining project proponents to participate in the voluntary FAST–41 program; it will not affect the obligations or rights of states or local governments or state or local governmental entities.

*Civil Justice Reform (E.O. 12988)*

This rule complies with section 3(a) of E.O. 12988, which requires agencies to review all rules to eliminate errors and ambiguity and to write all regulations to minimize litigation. This rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

*Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.*

The PRA provides that 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 control number issued by OMB. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. *See* 44 U.S.C. 3502(3); 5 CFR 1320.3(c) & (k). The rule does not involve an agency request for information, nor does it require an information response. The rule would not alter any of the other FAST–41 eligibility criteria or implementation of FAST–41, and does not change the information collected from project sponsors seeking FAST–41 coverage. The rule could result in a small increase in the number of project sponsors submitting FINs to the Permitting Council.

*NEPA, 42 U.S.C. 4321 et seq.*

NEPA requires agencies to consider the reasonably foreseeable environmental consequences of major Federal actions significantly affecting the quality of the human environment. The rule does not make any project-level decisions and does not authorize any activity or commit resources to a project that may affect the environment. Furthermore, under FAST–41 all covered projects are subject to NEPA review. 42 U.S.C. 4370m(6)(A).

FAST–41 focuses on facilitating interagency coordination and agency accountability for meeting self-imposed environmental review and permitting timetables and providing certain legal protections for covered projects. The statute expressly does not supersede NEPA or affect any internal procedure or decision-making authority of any agency. *See* 42 U.S.C. 4370m–6(d); 42 U.S.C. 4370m–6(e); 42 U.S.C. 4370m–11. Because FAST–41 coverage does not alter or affect the discretion of any agency to approve or deny any permit or authorization for any project, extending potential FAST–41 eligibility to otherwise qualified mining projects does not make any mining project more or less likely to be permitted, authorized, or constructed, or any environmental effect that may be associated with such a project to occur. *See* 42 U.S.C. 4370m–6(d)(2).

*Effects on the Energy Supply (E.O. 13211)*

This rule is not a significant energy action for the purposes of E.O. 13211 because it will not have any discernible effect on the energy supply. Qualified energy-related mining projects such as coal and uranium are eligible for coverage under FAST–41's ''conventional energy production'' sector. The only additive effect of the rule would be to make mining projects that are unrelated to energy production (and not covered under other statutory FAST–41 sectors) eligible for coverage under FAST–41.

Adding mining as a FAST–41 sector will not extend FAST–41 coverage to any specific project—energy related or otherwise—nor will it permit or authorize any mining project. Qualified applicants must first seek and obtain FAST–41 coverage. Participation in the FAST–41 program does not alter any agency's existing discretion to approve or deny project permits or authorizations, and does not make ultimate project authorization more or less likely. Accordingly, this final rule that adds mining as a FAST–41 sector will not affect the supply, distribution, or use of energy, and is not a ''significant energy action'' for the purpose of E.O. 13211.

*Immediate Effective Date (5 U.S.C. 553(d))*

Section 553(d) of the APA generally requires agencies to publish a rule in the **Federal Register** at least 30 days prior to its effective date. The purpose of this requirement is to inform affected parties and give them a reasonable time to adjust to the requirements of the new rule. *Am. Federation of Gov't Empl., AFL–CIO* v. *Block,* 655 F.2d 1153, 1157 (D.C. Cir. 1981). Pursuant to 5 U.S.C. 553(d)(3), an agency may dispense with the 30-day requirement for good cause.

In this circumstance good cause exists to dispense with the 30 day requirement because the rule designating mining as a FAST–41 sector does not impose any short-term requirement or obligation on any party other than the Permitting Council members who promulgated the rule. The other parties affected by the rule are prospective covered project sponsors, who will not be required to take any prompt action or comply with any new regulatory requirements. Instead, the rule extends to prospective covered project sponsors the opportunity to voluntarily apply for and receive FAST–41 coverage benefits at their discretion. The rule does not require timely project sponsor action to receive potential FAST–41 benefits.

Because a 30-day delayed effective date in this circumstance would not serve the purpose of 5 U.S.C. 553(d), good cause exists to dispense with the requirement. Accordingly this rule takes immediate effect upon publication in the **Federal Register**.

**List of Subjects in 40 CFR Part 1900**

Critical infrastructure, Infrastructure, Mines, Mineral resources, Permitting, Reporting and recordkeeping requirements, Underground mining.

■ For the reasons stated in the preamble to the proposed rule and the preamble above, under the authority stated below, the Federal Permitting Improvement Steering Council hereby adds 40 CFR chapter IX, consisting of part 1900, to read as follows:

## CHAPTER IX—FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

## PART 1900—FEDERAL PERMITTING IMPROVEMENT

Sec.
1900.1 Definitions.
1900.2 FAST–41 sectors.

**Authority:** 42 U.S.C. 4370m *et seq.*

### § 1900.1 Definitions.

For the purposes of this part, the following terms shall have the meaning indicated:

*FAST–41* means Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. 4370m *et seq.*

*Federal Permitting Improvement Steering Council* or *Permitting Council* means the Federal agency established pursuant to 42 U.S.C. 4370m–1(a).

*Mining* means the process of extracting ore, minerals, or raw materials from the ground. *Mining* does not include the process of extracting oil or natural gas from the ground.

**§ 1900.2 FAST–41 sectors.**

Pursuant to 42 U.S.C. 4370m(6)(A), the Federal Permitting Improvement Steering Council has added the following sectors to the statutorily defined list of FAST–41 sectors:

(a) Mining.

(b) [Reserved]

**Nicholas Falvo,**

*Attorney Advisor, Federal Permitting Improvement Steering Council.*

[FR Doc. 2021–00088 Filed 1–7–21; 8:45 am]

**BILLING CODE 6820–PL–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### 44 CFR Part 333

**[Docket ID FEMA–2020–0019]**

**RIN 1660–AB04**

## Emergency Management Priorities and Allocations System (EMPAS)

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security (DHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, with minor technical edits, an interim final rule with request for comments published in the **Federal Register** on May 13, 2020, establishing standards and procedures by which the Federal Emergency Management Agency (FEMA) may require certain contracts or orders that promote the national defense be given priority over other contracts or orders and setting new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. These regulations are part of FEMA's response to the ongoing COVID–19 emergency.

**DATES:** *Effective Date:* This final rule is effective January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Marc Geier, Office of Policy and Program Analysis, 202–924–0196, *FEMA-DPA@fema.dhs.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background and Legal Authority

On May 13, 2020, FEMA published in the **Federal Register** an interim final rule establishing standards and procedures by which FEMA may require certain contracts or orders that promote the national defense be given priority over other contracts or orders and setting new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. *See* 85 FR 28500.

Section 101 of the Defense Production Act of 1950, as amended (DPA or the Act), authorizes the President to require that performance under contracts or orders (other than contracts of employment) which the President deems necessary or appropriate to promote the national defense take priority over performance under any other contract or order. For the purpose of assuring such priority, the President may require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person the President finds to be capable of their performance.[1] Section 101 also authorizes the President to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as the President shall deem necessary or appropriate to promote the national defense.[2] Executive Order 13911, ''Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19,'' 85 FR 18403 (Apr. 1, 2020), delegated the President's authority under Section 101 to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of Coronavirus Disease 2019 (COVID–19) within the United States. The Secretary of Homeland Security has further delegated these authorities to the FEMA Administrator.[3] FEMA published its interim final rule to comply with Section 101(d), which requires agencies delegated authority under Section 101 to issue final rules to establish standards and procedures by which the priorities and allocations authority is used to promote the national defense.

The interim final rule established the Emergency Management Priorities and Allocations System (EMPAS), which became part of the Federal Priorities and Allocations System (FPAS), the body of regulations that establishes standards and procedures for implementing the President's authority under Section 101(a) of the DPA. This rule finalizes the interim final rule.

### II. Discussion Public Comments and FEMA's Responses

The public comment period on the interim final rule closed on June 12, 2020, and four germane public comments were received. One comment was generally supportive of the regulation, pointing out that having the EMPAS rule in place allows FEMA to leverage the DPA in response to the COVID–19 pandemic over an extended period of time or eventually extend it to more general emergency preparedness activities. Given the ongoing COVID–19 pandemic, FEMA is considering use of the EMPAS regulation to combat the COVID–19 pandemic over an extended period of time. Since implementation of the regulation in May, FEMA has modified and extended an order allocating certain scarce and critical materials for domestic use to ensure the resources were not exported from the United States without specific approval by FEMA, and continues to consider options for using EMPAS to address mission needs. *See* 85 FR 48113 (Aug. 10, 2020). Finalizing the EMPAS regulation allows FEMA to respond to public comments in a timely manner and ensures FEMA's continued ability to use its authorities as appropriate in response to the COVID–19 pandemic. FEMA is also better prepared should delegations of priorities and allocations authority for other types of resources be issued in the future, as it will already have a regulatory framework in place.

The commenter suggested that EMPAS authority should be extended to include vaccine active ingredients as well as adjuvant or booster additions to vaccines; measures to permit fill and finish of large numbers of vaccine doses, including glass vials and other packaging; and provide for distribution systems and medical facilities to distribute vaccines when available at the most rapid rate. FEMA's authority pursuant to EMPAS is clear; the

[1] 50 U.S.C. 4511(a)(1).

[2] 50 U.S.C. 4511(a)(2).

[3] DHS Delegation 09052 Rev. 00.1, ''Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency'' (Apr. 1, 2020).

President delegated FEMA [4] the authority to exercise section 101 of the DPA with respect to health and medical resources needed to respond to the spread of COVID–19 within the United States. The EMPAS regulation defines ''health and medical resources'' as ''drugs, biological products, medical devices, materials, facilities, health supplies, services, and equipment required to diagnose, mitigate, prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.'' This definition mirrors the definition of ''health resources'' established by the Department of Health and Human Services (HHS) in their Health Resources Priority and Allocations System (HRPAS) regulation [5] to ensure consistency across agencies delegated authority by the President to utilize these resources to respond to the COVID–19 pandemic. Vaccines, which are defined as biological products under section 351(i) of the Public Health Service Act (42 U.S.C. 262(i)), are considered a health and medical resource and thus would fall within the scope of the HRPAS and EMPAS regulations, including any materials associated with vaccines, including glass vials and other packaging.[6] Similarly, distribution systems and medical facilities for vaccine distribution also constitute health and medical resources under EMPAS.[7] Given the need for consistency across agencies to ensure a unified response in combating this pandemic and avoid any confusion in implementation, FEMA is retaining the definition of ''health and medical resources'' from the interim final rule and believes the definition provides sufficient clarity regarding the resources covered by the rule.

The same commenter pointed out that, while FEMA already possesses subdelegated authority to use both the Department of Commerce's Defense Priority and Allocations System (DPAS) and the Department of Agriculture's Agriculture Priority and Allocations System (APAS) regulations, having the EMPAS regulations should enhance predictability. The commenter noted the EMPAS regulations were generally patterned after other Federal Priority and Allocations System (FPAS) regulations, with some exceptions. For example, the EMPAS regulations discuss rated orders placed by FEMA or a Delegate Agency to facilitate sales to third parties. The commenter noted this distinction could refer to contracts placed in support of hospitals or other health entities or serve as a more general reference to the overarching distributor-style role FEMA and other Federal entities have played during the COVID–19 pandemic response to date. The distinction could also set up a type of hybrid rated order/allocation action. FEMA may leverage the EMPAS regulation to facilitate sales to third parties with respect to contracts placed in support of entities seeking scarce and critical health and medical resources and to assist in the distribution of these resources as appropriate. The agency does not intend to create a hybrid rated order/allocation action.

This commenter urged FEMA to be prepared to exercise EMPAS authority and delegate authority to assure the ability to produce, manufacture, fill, and finish coronavirus vaccines, specifically requesting the regulation make clear that emergency authority includes the ability to pre-manufacture vials and syringes as necessary to provide a large number of vaccine doses. As explained above, although vaccines and associated materials are within the authority delegated by Executive Order 13911, HHS is the agency with expertise in vaccine development and FEMA does not anticipate having a role in that process. FEMA believes the regulation provides sufficient clarity regarding the resource authority delegated by Executive Order 13911 and no changes are required in this final rule.

Another commenter offered suggested improvements to § 333.13 regarding timelines for responses to rated order requests. Specifically, the commenter recommended changes to § 333.13(d)(2) to allow for responses within 6 or 12 hours ''after confirmation of receipt by vendor/contractor personnel during normal business hours.'' FEMA appreciates that the proposed change would allow vendors and contractors more time to handle rated order requests consistent with their normal business practices, but rated orders are designated as such specifically because of the need to handle them differently than ordinary orders. The language in § 333.13(d)(2) mirrors the existing Department of Commerce DPAS regulations at 15 CFR 700.13(d)(2). As explained in the preamble to the interim final rule, FEMA adopted language consistent with the DPAS regulation because rated orders placed for the purpose of emergency preparedness would require a shorter timeframe to ensure delivery in time to provide disaster assistance, emergency response, or similar activities. Further, the timeframes given in § 333.13(d)(2) are the minimum allowed and only apply when ''expedited action is necessary or appropriate.'' As such, FEMA does not expect 6- or 12-hour response deadlines to be used frequently, and therefore does not expect the regulatory provision to impose a substantial burden on vendors and contractors. To ensure consistency across FPAS regulations, and because of the nature of FEMA's mission, FEMA is retaining the language from the interim final rule in the final rule. Additionally, the commenter suggested the use of the term ''immediately'' in § 333.13(d)(3) and elsewhere could not be realistically defined. The commenter recommended alternative language, such as, ''as soon as reasonably practicable'' or ''promptly with commercially reasonable efforts.'' Again, the language in EMPAS is consistent with the Department of Commerce's DPAS regulations, where this provision has been in use since 2014. Given the exigent circumstances under which FEMA must provide emergency preparedness, mitigation, response, and recovery services, the requirement for immediate notification is necessary to ensure the ultimate timely delivery of these services. In addition, FEMA does not believe that the alternative terms provide a significantly more definite meaning. Therefore, FEMA is retaining the language from the interim final rule to ensure consistency across FPAS regulations.

Two commenters focused their comments exclusively on vaccines, a topic not directly addressed by EMPAS. One commenter requested an ethically produced vaccine that is not developed from aborted fetal cells. The EMPAS regulation does not discuss vaccine development. As explained above, FEMA's EMPAS regulation is limited to establishing standards and procedures for priority and allocation orders for ''health and medical resources'' as defined in the interim final rule at § 333.8. Although vaccines fall within the scope of ''health and medical resources'' authority delegated to HHS and to FEMA, FEMA has not played a substantial role in the development of

[4] See Executive Order 13911, 85 FR 18403 (Apr. 1, 2020), DHS Delegation 09052 Rev. 00 ''Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency'' (Jan. 3, 2017), and DHS Delegation 09052 Rev. 00.1, ''Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency'' (Apr. 1, 2020).

[5] *See* 45 CFR 101.20.

[6] HHS has long held resource authority for health resources. *See* Executive Order 13603, 77 FR 16651 (Mar. 22, 2012) and more recently Executive Order 13909, 85 FR 16227 (Mar. 23, 2020). While Executive Order 13911 delegated the same authorities to DHS, HHS's extensive expertise in this area would be required for any vaccine development-related efforts.

[7] *See* 44 CFR 333.8. *See also* 45 CFR 101.20.

the vaccine given HHS's expertise in the field and long-standing resource authority in the area. Thus, FEMA is not revising the interim final rule in this regard. Finally, one commenter stated her lack of trust in vaccines and indicated she did not want vaccines to be required for school attendance. The EMPAS regulations set standards and procedures for priority and allocation orders for health and medical resources to promote the national defense in response to the COVID–19 pandemic. The regulations do not require individuals to be vaccinated.

**III. Technical Changes**

This rule makes technical changes to the interim final rule. The authority citation for the final rule is being updated to include DHS Delegation Number 09052 Rev. 00 (Jan. 3, 2017), and to make non-substantive formatting revisions to authorities previously included. The interim final rule contained a placeholder reference to an OMB clearance number for an information collection under the Paperwork Reduction Act. *See* 44 CFR 333.20(c). OMB issued the related Paperwork Reduction Act Notice of Action on May 13, 2020, the same day the interim final rule published in the **Federal Register**. As a result of OMB's action, FEMA now has a permanent OMB clearance number. Therefore, FEMA is removing from § 333.20(c) the placeholder reference, ''1660–NW122'' and adding in its place the permanent number, ''1660–0149.''

**IV. Regulatory Analysis**

*A. Administrative Procedure Act (APA)*

This rule is effective immediately because the delayed effective date generally required by the APA is unnecessary. *See* 5 U.S.C. 553(d)(3). The interim final rule that this final rule makes final, with only technical changes, is already in effect.

*B. Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (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. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

This final rule has been drafted and reviewed in accordance with Executive Order 12866. This rule has been designated a ''significant regulatory action'' and economically significant under Section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

This final rule adopts the interim final rule (IFR) that established standards and procedures by which FEMA may require certain contracts or orders that promote the national defense be given priority over other contracts or orders and setting new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. Accordingly, relative to a post-IFR baseline, this final rule has no economic impact. Below, FEMA also examines the rule's impacts relative to a pre-IFR baseline.

This rule sets criteria and procedures under which FEMA will authorize prioritization of certain orders or contracts as well as criteria under which FEMA will issue orders allocating materials, services, and facilities. Under prioritization, FEMA will designate certain orders as one of two possible priority levels. Once so designated, such orders are referred to as ''rated orders.'' The recipient of a rated order must give it priority over an unrated order or an order with a lower priority rating. A recipient of a rated order may place orders of the same priority level with their suppliers and subcontractors for supplies and services necessary to fulfill FEMA's rated order. The suppliers and subcontractors must treat the request from the recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for any action or inaction required to maintain compliance with the rule.

The impact of EMPAS on private companies receiving priority orders is expected to vary. FEMA's issuance of a priority-rated order will generally only modify the timing in which other orders are completed. Deferred orders may face delays, which impose a burden on potential recipients of these orders. FEMA's exercise of its priorities and allocations authorities under section 101 of the DPA and EMPAS is expected to have an overall positive impact on the U.S. public and industry by creating a framework by which FEMA exercises its delegated authorities, as discussed above.

Since implementation of the regulation in May, FEMA has modified and extended an allocation order allocating certain scarce and critical materials for domestic use to ensure those resources were not exported from the United States without specific approval by FEMA, and FEMA continues to consider options for using EMPAS to address mission needs. *See* 85 FR 48113 (Aug. 10, 2020). Finalizing the EMPAS regulation allows FEMA to respond to public comments in a timely manner and ensures FEMA's continued ability to use its authorities as appropriate in response to the COVID–19 pandemic. FEMA is also better prepared should delegations of priorities and allocations authority for other types of resources be issued in the future.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency to consider the impacts of certain rules on small entities. The RFA's regulatory flexibility analysis requirements apply to only those rules for which an agency was required to publish a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b) or any other law. *See* 5 U.S.C. 604(a). As discussed previously, FEMA did not issue a notice of proposed rulemaking for this action, and was not required to do so under any law. Thus, the RFA's requirements relating to a final regulatory flexibility analysis do not apply.

*D. Unfunded Mandates Reform Act of 1995*

As noted above, no notice of proposed rulemaking was published in advance of this action. Therefore, the written statement provisions of the Unfunded Mandates Reform Act of 1995, as amended, do not apply to this regulatory action. *See* 2 U.S.C. 1532.

*E. Paperwork Reduction Act of 1995*

This rule contains information collections necessary to support FEMA's implementation of the President's priorities and allocations authority under Title I of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, *et seq.*). The purpose of this authority is to ensure the timely delivery of products, materials, and services necessary or appropriate to promote the national defense.

The Requests for Special Priorities Assistance collection, 1660–0149, was submitted under OMB's emergency clearance procedures. Currently, FEMA is seeking public comment on collection 1660–0149 through the normal clearance process (see 85 FR 65066, Oct. 14, 2020 [8]).

The new Rated Orders, Adjustments, Exceptions, or Appeals Under the Emergency Management Priorities and Allocations System (EMPAS) collection, 1660–0150, cleared OMB's emergency clearance procedures and has an expiration date of 4/30/21. Additionally, FEMA will seek public comments on the collection through the normal clearance process.

*F. Privacy Act*

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A ''record'' is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed two Privacy Threshold Analyses (PTAs). DHS has determined that this rulemaking does not affect the 1660–1660–0149 and the 1660–0150 OMB Control Numbers' compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. Specifically, DHS has concluded that the 1660–0149 and 1660–0150 OMB Control Numbers are covered by the DHS/ALL/PIA–065 Electronic Contract Filing System (ECFS) Privacy Impact Assessment (PIA). Additionally, DHS has decided that the 1660–0149 and the 1660–0150 OMB Control Numbers are covered by the DHS/ALL–021 Department of Homeland Security Contractors and Consultants, 73 FR 63179 (Oct. 23, 2008) System of Records Notice (SORN).

*G. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

FEMA has reviewed this final rule under Executive Order 13175 and has determined that this final rule 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.

*H. Executive Order 13132, Federalism*

Executive Order 13132, ''Federalism,'' 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have ''substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has determined that this rulemaking does 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, and therefore does not have federalism implications as defined by the Executive order.

*I. National Environmental Policy Act of 1969 (NEPA)*

Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.,* an agency must prepare an environmental assessment or environmental impact statement for any rulemaking that significantly affects the quality of the human environment. FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an environmental assessment or environmental impact statement.

Rulemaking is a major Federal action subject to NEPA. Categorical exclusion A3 included in the list of exclusion categories at Department of Homeland Security Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act, Appendix A, issued November 6, 2014, covers the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, and advisory circulars if they meet certain criteria provided in A3(a–f). This interim final rule meets Categorical Exclusion A3(a), ''[t]hose of a strictly administrative or procedural nature,'' and A3(b), ''[t]hose that implement, without substantive change, statutory or regulatory requirements.''

*J. Congressional Review of Agency Rulemaking*

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801–808, before a rule can take effect, the Federal agency promulgating the rule must: Submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant Executive orders.

[8] Collection 1660–0149's 30-day comment period ended on November 13, 2020.

FEMA has submitted this final rule to the Congress and to GAO pursuant to the CRA. The Office of Management and Budget has determined that this rule is a ''major rule'' within the meaning of the CRA. As this rule contains FEMA's finding for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, there is not a required delay in the effective date. *See* 5 U.S.C. 808(2).

**List of Subjects in 44 CFR Part 333**

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements, Strategic and critical materials.

For the reasons stated in the preamble, the interim rule adding 44 CFR part 333, which was published at 85 FR 28500 on May 13, 2020, is adopted as final with the following changes:

## PART 333—EMERGENCY MANAGEMENT PRIORITIES AND ALLOCATIONS SYSTEM

■ 1. The authority citation for part 333 is revised to read as follows:

**Authority:** 6 U.S.C. 313, 314; 50 U.S.C. 4511, *et seq.;* E.O. 13603, 77 FR 16651; E.O. 13909, 85 FR 16227; E.O. 13911, 85 FR 18403; DHS Delegation 09052, Rev. 00 (Jan. 3, 2017); DHS Delegation 09052 Rev 00.1 (Apr. 1, 2020).

**§ 333.20 [Amended]**

■ 2. In § 333.20, amend paragraph (c) by removing ''1660–NW122'' and adding in its place ''1660–0149.''

**Pete Gaynor,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2020–29287 Filed 1–7–21; 8:45 am]

**BILLING CODE 9111–19–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 571

**[Docket No. NHTSA–2020–0110]**

**RIN 2127–AL48**

## Federal Motor Vehicle Safety Standards; Motorcycle Brake Systems; Motorcycle Controls and Displays

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule; technical corrections.

**SUMMARY:** This document amends Federal Motor Vehicle Safety Standards (FMVSS) Nos. 122 and 123 to allow the use of an internationally recognized symbol. It also relocates the telltale specifications for anti-lock braking system (ABS) malfunction from FMVSS No. 101 to the appropriate table in FMVSS No. 123 since the latter applies to motorcycles. In addition, this final rule makes two technical corrections: It corrects motorcycle category references in S6.3.2 of FMVSS No. 122 and an outdated table reference found in FMVSS No. 135.

**DATES:** This final rule is effective on January 8, 2021.

*Petitions for reconsideration:* Petitions for reconsideration of this final rule must be received by February 22, 2021.

**ADDRESSES:** Petitions for reconsideration of this final rule must refer to the docket number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Michael Pyne, Office of Crash Avoidance Standards, by telephone at 202–366–4171 or Callie Roach, Office of the Chief Counsel, by telephone at 202–366–2992. You may send mail to both officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

### I. Summary of the November 2014 Notice of Proposed Rulemaking

On August 24, 2012, the agency published a final rule amending Federal Motor Vehicle Safety Standard (FMVSS) No. 122, *Motorcycle brake systems.*[1] The final rule updated provisions of FMVSS No. 122 to reflect the performance of modern motorcycle brake systems. The final rule adopted requirements and test procedures derived from Global Technical Regulation (GTR) No. 3 for motorcycle brakes. Adopted in 2006, GTR No. 3 combined the best practices from requirements and test procedures available internationally, drawn primarily from FMVSS No. 122, United Nations Economic Commission for Europe (UNECE) Regulation No. 78, and Japanese Safety Standard JSS12–61.[2]

The revised FMVSS No. 122 adopted performance requirements for antilock brake system (ABS) performance. Although FMVSS No. 122 as amended in 2012 does not require motorcycles to be equipped with ABS, it includes performance requirements for motorcycles that are equipped with ABS. These requirements apply to motorcycles manufactured on or after September 1, 2014.

Both the GTR and the 2008 notice of proposed rulemaking (NPRM) for FMVSS No. 122[3] specified that all motorcycles equipped with ABS must also be fitted with a yellow warning lamp that illuminates whenever there is a malfunction that affects the generation or transmission of signals in the motorcycle's ABS system. The prior version of FMVSS No. 122 did not include any requirements for an ABS malfunction telltale.

The final rule, consistent with other FMVSS addressing ABS system failure,[4] and with FMVSS No. 101, *Controls and displays,*[5] required that motorcycle ABS system failure be indicated to the operator with a telltale identified by the words ''Antilock'' or ''Anti-lock'' or ''ABS.''[6] The final rule also added a specification that the telltale be labeled in letters at least 3/32 inch (2.4 mm) high.[7] This minimum letter height specification is consistent with the existing requirement for a brake failure telltale identifier for motorcycles.[8]

Several months after the agency published the final rule in August 2012, the American Honda Motor Company (Honda), manufacturer of Honda motorcycles, contacted the agency to inform NHTSA that the ABS-equipped motorcycles it and other manufacturers produce already are equipped with ABS malfunction warning lamps and told the agency that the current practice is to use the International Organization for Standardization (ISO) symbol for ABS

[1] 77 FR 51649.

[2] A copy of GTR No. 3 was placed in the docket for the NPRM associated with the final rule revising FMVSS No. 122. *See* Docket No. NHTSA–2008–0150–0002.

[3] 73 FR 54020 (Sept. 17, 2008).

[4] 49 CFR 571.121, S5.1.6.2.

[5] We referenced FMVSS No. 101, notwithstanding the fact that it does not apply to motorcycles, because it had an existing labeling requirement for ABS malfunction in Table 1.

[6] 49 CFR 571.122, S5.1.10.2(c).

[7] 49 CFR 571.122, S5.1.10.2(c).

[8] 49 CFR 571.122a, S5.1.3.1(d).

malfunction. The ISO symbol is pictured in Figure 1. The ISO symbol incorporates the letters ''ABS'' consistent with the requirement in FMVSS No. 122. However, GTR No. 12, the global technical regulation concerning the location, identification, and operation of motorcycle controls, telltales, and indicators, does not specify a size for the ISO symbol, nor is there a specification regarding the size of the lettering within the symbol.


Figure 1 – ISO Symbol Indicating ABS Malfunction

Honda informed NHTSA that the typical height of the symbol on a production motorcycle equipped with ABS is 7 millimeters, and the letters ''ABS'' are approximately 2 millimeters high, though the dimensions may vary. NHTSA lacks any other information on the range of symbol or letter sizes among various makes and models, and is unaware of a standardized symbol size or letter size to which manufacturers adhere.

According to the information provided by Honda and conversations that the agency had with the Motorcycle Industry Council, Inc. (MIC) and Harley-Davidson Motor Company (Harley-Davidson), to comply with the letter height requirement for the ABS malfunction telltale identifier in FMVSS No. 122, manufacturers would have to enlarge the telltale considerably so that the letters ''ABS'' contained within the ISO symbol are at least 3/32 inch (2.4 millimeters) in height. Alternatively, they would have to add a separate label using ''ABS'' or ''Antilock'' or ''Anti-lock'' displayed at the specified minimum height in place of, or in addition to, the ISO symbol. Motorcycle manufacturers stated that this would constitute a costly redesign of the telltale or instrument panel on many ABS-equipped motorcycles without any discernible safety benefit from the redesign.

Upon consideration of the concerns raised by the MIC, Honda, and Harley-Davidson, the agency issued an NPRM on November 26, 2014 (79 FR 70491). The agency proposed removing the letter height specification for the ABS malfunction telltale if manufacturers use the ISO symbol for ABS malfunction. However, if only text is used for the ABS malfunction telltale, the minimum letter height requirement would still apply. We also proposed removing the reference to the specifications for ABS malfunction telltales in Table 1 of FMVSS No. 101 because that standard does not apply to motorcycles. Instead, we proposed adding both the FMVSS No. 101 telltale specifications and the ISO ABS malfunction symbol to Table 3 of FMVSS No. 123, *Motorcycle controls and displays,* which is the relevant FMVSS applicable to motorcycles.[9]

The agency sought comments on whether there should be a minimum height requirement for an ABS malfunction telltale that uses the ISO symbol and, if so, how large the symbol should be. Specifically, we asked whether the 7-millimeter height suggested by Honda as a minimum height (or a different height) would ensure readability without requiring a redesign of the telltale or instrument panel on many ABS-equipped motorcycles.

Furthermore, in light of the proposed changes, the agency announced in the NPRM that it was adopting a policy not to enforce the minimum height requirement for the ABS malfunction telltale for any motorcycle that uses the ISO symbol for ABS malfunction until a final rule implementing the proposal became effective. This non-enforcement policy provided relief to motorcycle manufacturers that use the ISO symbol for ABS malfunction but that could not meet the September 1, 2014, deadline for compliance without redesigning the telltale or instrument panel. Again, we have no information indicating that adverse safety consequences would result from allowing motorcycle manufacturers to use the ISO symbol for the ABS malfunction telltale as an alternative to the currently permissible ABS malfunction telltales.

We also proposed correction of an error in FMVSS No. 122. In paragraph S6.3.2(d), which contains the test procedure for the dry stop test with a single brake control actuated, the brake actuation force specified for motorcycles in categories 3–1, 3–2, 3–3, and 3–5 is specified as ≤ 350 N and, for category 3–4 motorcycles, ≤ 500 N. However, the higher actuation force was intended for category 3–5 motorcycles rather than category 3–4 motorcycles. We proposed this correction in the NPRM to be consistent with GTR No. 3 and with NHTSA's intention in the August 2012 final rule.

## II. Summary of Comments

NHTSA received 39 comments on the proposal; the MIC, Harley-Davidson, Honda, and 36 individuals provided comments.[10] The MIC, Harley-Davidson, Honda, and six individuals supported allowing the ISO symbol. Two commenters opposed allowing the ISO symbol to be used, stating that it is either not easily recognizable or is ambiguous.

## III. Response to Comments

### *A. Use of the ISO Symbol for an ABS Malfunction as an Alternative to the Required Text*

In general, the commenters agreed with the proposal. However, two commenters opposed the use of the symbol, stating that the symbol is not easily recognizable. The agency does not agree that the ISO symbol is less recognizable than the currently permissible ABS malfunction telltales because the acronym ''ABS,'' which is a permissible telltale under the current regulation if it meets the height requirement, is contained in the ISO symbol. Therefore, allowing the ISO symbol to be used as the ABS malfunction telltale does not make the telltale less recognizable than is currently permissible.

Furthermore, the agency believes that unfamiliarity with the ISO telltale symbol does not pose an undue immediate safety risk for the rider because an ABS malfunction warning only indicates that the anti-lock

[9] The inclusion of the ISO symbol for ABS malfunction in FMVSS No. 123 is also consistent with the recently adopted GTR No. 12, related to the location, identification, and operation of motorcycle controls, telltales, and indicators. *See http://www.unece.org/fileadmin/DAM/trans/main/wp29/wp29wgs/wp29gen/wp29registry/ECE-TRANS-180a12e.pdf.* However, this rulemaking is not intended to implement provisions of GTR No. 12.

[10] The comments may be viewed at *http://www.regulations.gov* in Docket No. NHTSA–2014–0117.

functionality is compromised while the overall brake system functionality is maintained. Motorcycle operators who are unfamiliar with the symbol may then look up its meaning in the instruction manual when they are able after seeing the notification on the display. Concerns about whether an ABS-related telltale is instantly recognizable might be of more concern in the context of telltales that illuminate because the ABS is activated, but the malfunction telltale, as explained, serves a different purpose. Currently, there is no requirement for motorcycles to have telltales that indicate when ABS is activated, and drivers are usually notified of an ABS activation by the haptic feedback (vibration or pulsing) caused by the ABS cycling.

As stated in the NPRM, the agency has no reason to believe that using the ISO symbol in lieu of text labeling at a minimum height would affect the safety of motorcycles or the public. The types of failure indicated by the ABS malfunction telltale are electronic failures that result in the loss of ABS functionality, but do not cause loss of foundation braking ability. FMVSS No. 122 contains a performance requirement to ensure minimum braking capability in the event of an ABS system malfunction. Moreover, the agency has minimum performance requirements to ensure that a minimum level of braking capability is maintained even if there is a more severe system failure such as a brake fluid leak. Therefore, NHTSA is adopting the proposal in the NPRM to allow the ISO symbol as an alternative to the text ''ABS,'' ''Anti-lock,'' or ''Antilock.''

*B. Height Requirements of the ISO Symbol or Letters Within the Symbol*

NHTSA solicited comments regarding whether there should be a minimum height for the ISO symbol or for the letters ''ABS'' that appear within the symbol. NHTSA received comments from the MIC, Harley-Davidson, Honda, and 10 individuals opposed to setting a minimum height requirement for the ISO symbol. The MIC, Harley-Davidson, and Honda opposed adding a height requirement for the letters within the ISO symbol, stating that there is no corresponding minimum height requirement in GTR No. 12 and emphasizing their desire for harmonization.

The agency agrees with the commenters that mandating a minimum height is unnecessary because NHTSA does not believe that, in the absence of a minimum height requirement, original equipment manufacturers (OEMs) will create illegible ABS telltales. As Harley-Davidson's comment noted, GTR No. 12 has a qualitative visibility requirement for ABS telltales, specifying that the symbol must be located so that it is ''visible to the driver when seated in the driving position.'' Although NHTSA is not specifying such a requirement in FMVSS No. 123, NHTSA believes manufacturers will ensure that ABS ISO symbols are large enough to be read by drivers. Additionally, OEMs have been using the symbol for years and, as far as NHTSA is aware, have done so without negative consequences. Moving forward with the proposal, the agency will not implement a height requirement for the ISO symbol which will ensure harmonization with GTR No. 3 and to some extent with GTR No. 12.

*C. Height Requirements for the ''ABS,'' ''Anti-lock,'' or ''Antilock'' Lettering if the ISO Symbol Is Not Used*

Although the agency did not request comment on this issue in the NPRM, NHTSA received comments from the MIC and two individuals suggesting that the agency remove the lettering height requirement for ''ABS,'' ''Anti-lock,'' or ''Antilock'' when the ISO symbol is not used. The MIC states that it is unaware of any science that was relied on to establish or support the use of 3/32-inch letter height for this specific application. The MIC also states that the corresponding GTR does not reference any lettering heights or symbol dimensions.

The agency understands the inconsistency perceived by the MIC in NHTSA not including a lettering height requirement if the ISO symbol is used, but including a lettering height requirement if only text is used. However, the agency is not prepared to implement any changes to the existing height requirement if only text is used and does not believe that there is an inconsistency.

This issue was not included in the NPRM, and there are factors the agency would need to consider and request public comment on should it decide to change or remove this requirement. As stated in the 2012 final rule implementing the requirement, use of a 3/32 inch (2.4 mm) letter height is consistent with other FMVSS.[11] The existing height requirement is also consistent with the requirement for the split service brake failure telltale, which has been present in FMVSS No. 122 for many years.[12] Support for maintaining that particular height requirement also comes from a NHTSA research report, ''Specification of Control Illumination Limits'' (DOT–HS–4–00864, 1974), which found that letters that were 0.09 inch or 2.3 mm could not be read by older drivers, regardless of letter brightness or background contrast. In addition, any change to the letter height when the ISO symbol is not used would not have any harmonization benefits. That is, the minimum lettering height requirement for this option has no bearing on consistency with GTR No. 12 because the GTR only specifies use of the ISO symbol and does not provide the option of using the text ''ABS,'' ''Anti-lock,'' or ''Antilock.'' Thus, NHTSA is retaining, at this time, the existing height requirement for the text ''ABS,'' ''Anti-lock,'' or ''Antilock'' telltale when the ISO symbol is not used.

Further, NHTSA does not believe this is inconsistent with NHTSA's conclusion that a height requirement is unnecessary when the ISO symbol is used because recognition of the ISO symbol comes not only from the letters ''ABS,'' but also from shape of the symbol as a whole. The ISO symbol is a graphic representation of a brake drum with letters inside of it, and the entire symbol is illuminated in the event of an ABS failure condition. Also, the symbol as a whole will likely be significantly larger than the 2.4-millimeter-high letters that can be used in lieu of the symbol. For example, as noted above, Honda informed NHTSA that the typical height of the ISO symbol on its production motorcycles equipped with ABS is 7 millimeters, and the letters ''ABS'' are approximately 2 millimeters high. This suggests that the typical height of the ISO symbol will be appreciably larger than the minimum height requirement for the ABS telltale if the ISO symbol is not used. Accordingly, NHTSA concludes that it is appropriate to view the need for a height requirement for telltales that use the ISO symbol differently from telltales that rely exclusively on lettering to warn of ABS failure.

*D. Technical Correction*

NHTSA received two comments that addressed a technical correction included in the NPRM, and those comments supported the correction. The agency is adopting the correction of the

[11] 77 FR 51649. FMVSS No. 122 S5.1.9(d) and S5.1.10.1 require 3/32-inch lettering. FMVSS Nos. 120 and 110 also contain 3/32-inch lettering requirements. As a comparison, under FMVSS No. 135 the warning lamp for ABS in light vehicles must include the words ''Antilock,'' ''Anti-lock'' or the abbreviation ''ABS'' and must be at least ⅛ inch (or 3.2 mm) in height.

[12] The requirement for 3/32 inch letters for the split service brake failure has been in place since FMVSS No. 122 was issued in 1972. 37 FR 5034 (March 9, 1972).

error in FMVSS No. 122 S6.3.2(d), which stated that category 3–5 motorcycles are to be tested with a brake actuation force of ≤350 N and category 3–4 motorcycles are tested with a brake actuation force of ≤500 N. The agency is amending FMVSS No. 122 S6.3.2(d) such that the category 3–4 motorcycles are tested with a brake actuation force of ≤350 N and category 3–5 motorcycles are tested with a brake actuation force of ≤500 N.

*E. Removing the Reference to FMVSS No. 101*

FMVSS No. 101, *Controls and displays,* sets forth standardized symbols, lettering, and colors for various telltales, notifications, and warning lamps in passenger vehicles. In the NPRM, the agency proposed removing the reference to the ABS malfunction telltale specified in FMVSS No. 101 from FMVSS No. 122 S5.1.10.2(c) because FMVSS No. 101 does not apply to motorcycles. The agency proposed to change FMVSS No. 122 so that it references FMVSS No. 123 instead of FMVSS No. 101 and to insert the ABS telltale specification into Table 3 of FMVSS No. 123.

NHTSA received only one comment, from the MIC, on that proposed change. The comment favored the change because it is consistent with GTR No. 12, the global technical regulation concerning the location, identification and operation of motorcycle controls, telltales, and indicators. The agency is amending FMVSS No. 122 S5.1.10.2(c) by replacing the reference to FMVSS No. 101 with a reference to FMVSS No. 123. The agency is amending FMVSS No. 123 by adding the ISO ABS malfunction telltale into FMVSS No. 123, Table 3.

*F. Clarifying the Illumination Requirement for the ABS Telltale*

NHTSA received one comment from Harley-Davidson suggesting that the agency include an illumination requirement in FMVSS No. 123 similar to the requirement in FMVSS No. 101 S5.3.3(a) which provides that telltales must be ''visible to the driver under daylight and nighttime driving conditions.'' Harley-Davidson stated that inserting such language in FMVSS No. 123 would align with a similar illumination requirement specified in GTR No. 12.

The agency recognizes that there is no illumination requirement that applies to FMVSS No. 123. However, FMVSS No. 122 S1.10.2(a) contains a provision which requires the warning lamp to be illuminated by activation of the ignition switch and extinguished when the diagnostic check has been completed. The warning lamp is also required to remain on while a failure condition exists whenever the ignition switch is in the ''on'' position. While this illumination requirement in FMVSS No. 122 is not as detailed as the requirement in FMVSS No. 101 that Harley-Davidson suggested using, it applies regardless of external lighting conditions, and it seems likely that manufacturers will continue to equip motorcycles with an ABS malfunction telltale that is visible in both daylight and nighttime driving conditions, as they do in current practice. More critically, adding the suggested language to FMVSS No. 123 would be outside the scope of this rulemaking. Therefore, the agency is not amending FMVSS No. 123 to add an illumination requirement.

## IV. Additional Technical Correction

On August 17, 2005, (70 FR 48295) NHTSA published a final rule amending FMVSS No. 101, *Controls and displays,* to modernize the standard. The final rule changed the tables in FMVSS No. 101 by reorganizing the tables and adding additional information. As a result, the table data for antilock brake systems was moved from Table 2 to Table 1. The final rule, however, did not update the cross references located in other standards. FMVSS No. 135, *Light vehicle brake systems,* contains a reference to Table 2 of FMVSS No. 101, which should now be a reference to Table 1 of FMVSS No. 101. This rulemaking makes the technical correction to update Standard No. 135 to include the correct reference.

## V. Effective Date and Administrative Procedure Act Requirements

A rule ordinarily cannot take effect earlier than 30 days after it is published pursuant to 5 U.S.C. 553(d) unless the rule falls under one of three enumerated exceptions. In addition, 49 U.S.C. 30111(d) provides that a Federal motor vehicle safety standard may not become effective before the 180th day after the standard is prescribed or later than one year after it is prescribed except when a different effective date is, for good cause shown, in the public interest.

This rule does not impose any substantive requirements. Instead, it removes a restriction by allowing manufacturers of motorcycles to use the ISO symbol which is specified in GTR No. 12. Since this final rule merely provides motorcycle manufacturers the option of using an ISO symbol for the ABS malfunction telltale and thus greater flexibility in meeting the requirements of FMVSS No. 122, the rule falls under the exception at 5 U.S.C. 553(d)(1) as a rule that relieves a restriction. In addition, NHTSA believes that the public interest would be served by not delaying the effective date. This final rule changes NHTSA's FMVSS to reflect NHTSA's current policy to allow the use of an internationally recognized symbol as the antilock brake system (ABS) malfunction telltale on motorcycles and makes technical corrections. NHTSA anticipates that the impact of this rule will be small and limited to providing greater flexibility to manufacturers. Therefore, the agency finds that there is good cause under 49 U.S.C. 30111 to make these amendments effective immediately.

This final rule makes one technical change to the regulatory text that was not proposed in the notice of proposed rulemaking. The final rule merely adjusts an outdated and incorrect cross-reference in a Table in FMVSS No. 135. The technical correction, thus, does not make any substantive change to the standard and the agency has determined that notice and opportunity for public comment pursuant to 5 U.S.C. 553(b) are unnecessary for this technical correction.

## VI. Rulemaking Analyses and Notices

*A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures*

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's administrative procedures at 49 CFR part 5. This rulemaking is not considered significant and was not reviewed by the Office of Management and Budget under Executive Order 12866, ''Regulatory Planning and Review.'' Given the minimal impact of the rule, we have not prepared a full regulatory evaluation. The agency has further determined that the impact of this final rule is so minimal that the preparation of a full regulatory evaluation is not required.

NHTSA believes this final rule to allow the use of the ISO ABS malfunction symbol without a minimum letter height would not impact motorcycle safety since the rule has no effect on ABS effectiveness and adoption rates. Further, the agency does not believe that these minor changes to the telltale will have any effect on a rider's ability to understand the telltale. However, we estimate that it would positively impact manufacturers by eliminating the need to incur costs to redesign ABS telltales.

The availability of ABS either as standard or optional equipment on

motorcycles varies among manufacturers. The agency does not have access to a detailed make and model breakdown of the number of motorcycles produced for sale in the U.S. that are equipped with ABS and that use ISO ABS symbols and do not comply with letter height requirements that were included in NHTSA's 2012 final rule. Based on communications with members of the motorcycle industry, the agency believes that some manufacturers made design changes even after NHTSA announced its non-enforcement policy in 2014. Consequently, some of the motorcycle manufacturers who used ISO ABS symbols that did not comply with the letter height requirement when it went into effect in 2014 now use ISO ABS symbols that meet the letter height requirement.

Based on communication with motorcycle manufacturers, NHTSA is aware of at least one large manufacturer and two small-volume manufacturers that currently use ISO symbols that do not meet the letter height requirement. One of the small-volume manufacturers estimated that it would cost approximately $150,000 to redesign their ABS telltales on motorcycles for sale in the U.S. to comply with the letter height requirement. This estimated cost includes tooling, engineering resources, and recertification and homologation. This one-time cost for manufacturers would have been allocated over a number of years of production and was expected to have minimal effect on the consumer price of motorcycles. NHTSA estimates that this final rule prevents a cost to motorcycle manufacturers of at least $450,000 that manufacturers would have had to incur between the publication date of the final rule and its effective date if NHTSA had not announced the non-enforcement policy. This is based on estimated one-time design cost of $150,000 per manufacturer and information from three manufacturers who use ISO symbols that do not meet the letter height requirement. NHTSA believes the actual cost incurred would likely have been larger had all manufacturers complied with the 2012 rule, but does not have sufficient information to estimate how many more manufacturers would benefit from this final rule and how their behavior would or would not have changed had NHTSA determined to keep the original requirements in effect and withdraw the non-enforcement policy.

*B. Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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 effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this final rule under the Regulatory Flexibility Act and certifies that it will not have a significant economic impact on a substantial number of small entities. This final rule will directly impact manufacturers of motorcycles equipped with ABS. Although NHTSA believes many manufacturers affected by this final rule are considered small businesses, we do not believe this rule will have a significant economic impact on those manufacturers. This final rule will not impose any costs upon manufacturers and may prevent costs from being incurred. This final rule will relieve motorcycle manufacturers of the burden and costs associated with changing from using the ISO symbol to using text of a minimum height to indicate an ABS malfunction.

*C. Executive Order 13132 (Federalism)*

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rulemaking does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

NHTSA rules can preempt in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law addressing the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' 49 U.S.C. 30103(e). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of such State common law tort causes of action by virtue of NHTSA's rules, even if not expressly preempted. This second way that NHTSA rules can preempt is dependent upon an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer, notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. *See Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Orders 13132 and 12988, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the

likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.,* the language and structure of the regulatory text) and objectives of today's rule and finds that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, NHTSA does not intend that this rule preempt State tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule. Establishment of a higher standard by means of State tort law would not conflict with the minimum standard announced here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

*D. Executive Order 13771 (Regulatory Reform)*

NHTSA has reviewed this final rule for compliance with Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs''), which requires Federal agencies to offset the number and cost of new regulations through the repeal, revocation, or revision of existing regulations. As provided in OMB Memorandum M–17–21 (''Implementing E.O. 13771''), a ''regulatory action'' subject to Executive Order 13771 is a significant regulatory action as defined in section 3(f) of Executive Order 12866 that has been finalized and that imposes total costs greater than zero. For the reasons identified in the previous sections, this final rule is not a significant regulatory action under Executive Order 12866 and thus does not require any offsetting deregulatory action. In fact, this rule is a ''deregulatory action'' under Executive Order 13771 because it reduces regulatory burden on industry by allowing additional compliance flexibility and improving international harmonization.

*E. Executive Order 12988 (Civil Justice Reform)*

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Executive order, NHTSA notes the issue of preemption is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

*F. Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045, ''Protection of Children from Environmental Health and Safety Risks'' (62 FR 19855, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental, health, or safety risk that the agency has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

This notice is part of a rulemaking that is not expected to have a disproportionate health or safety impact on children. Consequently, no further analysis is required under Executive Order 13045.

*G. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. There is not any information collection requirement associated with this final rule.

*H. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.,* the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical. Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specification and related management systems practices.'' They pertain to ''products and processes, such as size, strength, or technical performance of a product, process or material.''

Examples of organizations generally regarded as voluntary consensus standards bodies include ASTM International, the Society of Automotive Engineers (SAE), and the American National Standards Institute (ANSI). If NHTSA does not use available and potentially applicable voluntary consensus standards, we are required by the Act to provide Congress, through OMB, an explanation of the reasons for not using such standards.

This final rule allows the use of a symbol from an international voluntary standard.

*I. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted for inflation with base year of 1995). Before promulgating a NHTSA rule for which a written statement is needed, section 205 of the UMRA generally requires the agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted.

This final rule would not result in any expenditure by State, local, or tribal governments or the private sector of more than $100 million, adjusted for inflation.

*J. National Environmental Policy Act*

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would not have any significant impact on the quality of the human environment.

*K. Regulation Identifier Number (RIN)*

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

*L. 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 signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*M. Congressional Review Act*

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

**List of Subjects in 49 CFR Parts 571**

Imports, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, NHTSA amends 49 CFR part 571 as follows:

## PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 of Title 49 continues to read as follows:

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

■ 2. Amend § 571.122 by revising S5.1.10.2(c) and S6.3.2(d)(2)(i) and (ii) to read as follows:

**§ 571.122 Standard No. 122; Motorcycle brake systems.**

* * * * *

S5.1.10.2 *Antilock brake system warning lamps.*

* * * * *

(c) The warning lamp shall be labeled in accordance with the specifications in Table 3 of Standard No. 123 (49 CFR 571.123) for ''ABS Malfunction'' (Item No. 13).

* * * * *

S6.3.2 *Test conditions and procedure.*

* * * * *

(d) * * *

(2) * * *

(i) ≤350 N for motorcycle categories 3–1, 3–2, 3–3, and 3–4.

(ii) ≤500 N for motorcycle category 3–5.

* * * * *

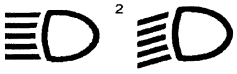
■ 3. Amend § 571.123 by revising Table 3 to read as follows:

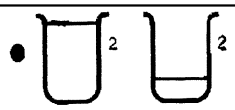
**§ 571.123 Standard No. 123; Motorcycle controls and displays.**

* * * * *

BILLING CODE 4910–59–P

**Table 3 to § 571.123--Motorcycle Control and Display Identification Requirements**

| No. | Column 1 | Column 2 | Column 3 | Column 4 |
|---|---|---|---|---|
| | *Equipment* | *Control and Display Identification Word* | *Control and Display Identification Symbol* | *Identification at Appropriate Position of Control and Display* |
| 1 | Ignition | Ignition | _____ | Off |
| 2 | Supplemental Engine Stop (Off, Run) | Engine Stop |  | Off, Run |
| 3 | Manual Choke or Mixture Enrichment | Choke or Enrichener |  | _____ |
| 4 | Electric Starter | _____ |  | Start [1] |
| 5 | Headlamp Upper-Lower Beam Control | Lights |  [2] | Hi, Lo |
| 6 | Horn | Horn |  | _____ |
| 7 | Turn Signal | Turn |  [2] [3] | L, R |
| 8 | Speedometer | MPH<br>OR<br>MPH and km/h [5] | _____ | MPH [4]<br>MPH, km/h [5] |
| 9 | Neutral Indicator | Neutral |  | _____ |
| 10 | Upper Beam Indicator | High Beam |  [2] | _____ |

| | | | | |
|---|---|---|---|---|
| 11 | Tachometer | R.P.M. or r/min. | _____ | _____ |
| 12 | Fuel Tank Shutoff Valve (Off, On, Res.) | Fuel |  | Off, On, Res. |
| 13 | ABS Malfunction | ABS or Anti-lock or Antilock [6] |  | _____ |

[1] Required only if electric starter is separate from ignition switch.

[2] Framed areas may be filled.

[3] The pair of arrows is a single symbol. When the indicators for left and right turn operate independently, however, the two arrows will be considered separate symbols and may be spaced accordingly.

[4] MPH increase in a clockwise direction. Major graduations and numerals appear at 10 mph intervals, minor graduations at 5 mph intervals. (37 F.R. 17474 – August 19, 1972. Effective: 9/1/74)

[5] If the speedometer is graduated in miles per hour (MPH) and in kilometers per hour (km/h), the identifying words or abbreviation shall be "MPH" and "km/h" in any combination of upper or lower case letters.

[6] Letters shall be at least 2.4 mm (3/32 in.) high.

■ 4. Amend § 571.135 by revising S5.5.5(d)(3) to read as follows:

**§ 571.135 Standard No. 135; Light Vehicle Brake Systems.**

* * * * *

S5.5.5. *Labeling.*

* * * * *

(d) * * *

(3) If a separate indicator is provided for the condition specified in S5.5.1(b), the letters and background shall be of contrasting colors, one of which is yellow. The indicator shall be labeled with the words ''Antilock'' or ''Anti-lock'' or ''ABS''; or ''Brake Proportioning,'' in accordance with Table 1 of Standard No. 101.

* * * * *

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.4.

**James C. Owens,**

*Deputy Administrator.*

[FR Doc. 2020–27375 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–59–C**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 200227–0066]**

**RTID 0648–XA778**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processors Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by American Fisheries Act (AFA) trawl catcher/processors in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season apportionment of the 2021 Pacific cod total allowable catch (TAC) allocated to AFA trawl catcher/processors in the BSAI.

**DATES:** Effective 1200 hours, Alaska local time (A.l.t.), January 20, 2021, through 1200 hours, A.l.t., April 1, 2021.

**FOR FURTHER INFORMATION CONTACT:** Krista Milani, 907–581–2062.

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

The A season apportionment of the 2021 Pacific cod TAC allocated to AFA trawl catcher/processors in the BSAI is 1,928 metric tons (mt) as established by the final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020) and

inseason adjustment (85 FR 83473, December 22, 2020).

In accordance with §§ 679.20(d)(1)(i) and 679.20(d)(1)(ii)(B), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season apportionment of the 2021 Pacific cod TAC allocated to AFA trawl catcher/processors in the BSAI is necessary to account for the incidental catch in other anticipated fisheries. Therefore, the Regional Administrator is establishing a directed fishing allowance of 0 mt and is setting aside the remaining 1,928 mt as incidental catch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by AFA trawl catcher/processors in the BSAI.

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

### Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by AFA trawl catcher/processors in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 31, 2020.

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

Dated: January 4, 2021.

**Jennifer M. Wallace,**

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

[FR Doc. 2021–00110 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 200227–0066]**

**RTID 0648–XA769**

## Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; reallocation.

**SUMMARY:** NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters) length overall using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the A season apportionment of the 2021 total allowable catch of Pacific cod to be harvested.

**DATES:** Effective January 7, 2021, through 2400 hours, Alaska local time (A.l.t.), December 31, 2021.

**FOR FURTHER INFORMATION CONTACT:** Krista Milani, 907–581–2062.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season apportionment of the 2021 Pacific cod total allowable catch (TAC) specified for vessels using jig gear in the BSAI is 939 metric tons (mt) as established by the final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020) and inseason adjustment (85 FR 83473, December 22, 2020).

The 2021 Pacific cod TAC allocated to catcher vessels less than 60 feet (18.3 meters (m)) length overall (LOA) using hook-and-line or pot gear in the BSAI is 2,222 mt as established by final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020) and inseason adjustment (85 FR 83473, December 22, 2020).

The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that jig vessels will not be able to harvest 900 mt of the A season apportionment of the 2021 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*1*). Therefore, in accordance with § 679.20(a)(7)(iv)(C), NMFS apportions 900 mt of Pacific cod from the A season jig gear apportionment to the annual amount specified for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

The harvest specifications for 2021 Pacific cod included in final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020) and inseason adjustment (85 FR 83473, December 22, 2020) are revised as follows: 39 mt to the A season apportionment and 665 mt to the annual amount for vessels using jig gear, and 3,122 mt to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

### Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 30, 2020.

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

Dated: January 4, 2021.

**Jennifer M. Wallace,**

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

[FR Doc. 2021–00079 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

**[Docket No. 200221–0062; RTID 0648–XA772]**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 in the Gulf of Alaska

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for pollock in Statistical Area 610 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2021 total allowable catch of pollock for Statistical Area 610 in the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), January 20, 2021, through 1200 hrs, A.l.t., May 31, 2021.

**FOR FURTHER INFORMATION CONTACT:** Krista Milani, 907–581–2062.

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

The A season allowance of the 2021 total allowable catch (TAC) of pollock in Statistical Area 610 of the GOA is 799 metric tons (mt) as established by the final 2020 and 2021 harvest specifications for groundfish in the GOA (85 FR 13802, March 10, 2020) and inseason adjustment (85 FR 83834, December 23, 2020).

In accordance with §§ 679.20(d)(1)(i) and 679.20(d)(1)(ii)(B), the Regional Administrator has determined that the A season allowance of the 2021 TAC of pollock in Statistical Area 610 of the GOA is necessary to account for the incidental catch in other anticipated fisheries. Therefore, the Regional Administrator is establishing a directed fishing allowance of 0 mt and is setting aside the remaining 799 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

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

### Classification

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

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 610 in the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 30, 2020.

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

Dated: January 4, 2021.

**Jennifer M. Wallace,**

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

[FR Doc. 2021–00109 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 86, No. 5
Friday, January 8, 2021

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.

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 204

**Docket No. R–1737**

**RIN 7100–AG07**

### Regulation D: Reserve Requirements of Depository Institutions

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notice of proposed rulemaking, request for public comment.

**SUMMARY:** The Board of Governors of the Federal Reserve System (''Board'') proposes to amend its Regulation D (Reserve Requirements of Depository Institutions) to eliminate references to an ''interest on required reserves'' rate and to an ''interest on excess reserves'' rate and replace them with a reference to a single ''interest on reserve balances'' rate. The Board also proposes to simplify the formula used to calculate the amount of interest paid on balances maintained by or on behalf of eligible institutions in master accounts at Federal Reserve Banks, and to make other conforming changes.

**DATES:** Comments must be received on or before March 9, 2021.

**ADDRESSES:** You may submit comments, identified by Docket Number R–1737; RIN 7100–AG07, by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include the docket number and RIN in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** Sophia H. Allison, Senior Special Counsel, (202–452–3565), Legal Division, or Matthew Malloy (202–452–2416), Division of Monetary Affairs, or Heather Wiggins (202–452–3674), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact 202–263–4869; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:**

## I. Statutory and Regulatory Background

Section 19(b)(2) of the Federal Reserve Act (''Act'') [1] requires each depository institution to maintain reserves against its transaction accounts, nonpersonal time deposits, and Eurocurrency liabilities within ratios prescribed by the Board for the purpose of implementing monetary policy. Reserve requirement ratios for nonpersonal time deposits and Eurocurrency liabilities have been set at zero percent since 1990. Effective March 24, 2020, the Board amended Regulation D to set all reserve requirement ratios for transaction accounts to zero percent, eliminating all reserve requirements.[2]

Section 19(b)(12) of the Act provides that balances maintained by or on behalf of ''eligible institutions'' in accounts at Federal Reserve Banks may receive earnings to be paid by the Reserve Bank at least once each quarter, at a rate or rates not to exceed the general level of short-term interest rates.[3] Eligible institutions include depository institutions and certain other institutions as specified in the Act.[4] Section 19(b)(12) also provides that the Board may prescribe regulations concerning the payment of earnings on balances at a Reserve Bank.[5]

Regulation D currently establishes an ''interest on required reserves'' (''IORR'') rate of 0.10 percent and an ''interest on excess reserves'' (''IOER'') rate of 0.10 percent.[6] Regulation D also applies the IORR rate and the IOER rate to balances maintained by or on behalf of eligible institutions based on whether such balances are or are not maintained to satisfy reserve balance requirements. Specifically, the IORR rate applies to balances that an eligible institution maintains, on average over the maintenance period, that are equal to or lower than ''the top of the penalty-free band.'' [7] The ''top of the penalty-free band'' is defined as ''an amount equal to an institution's reserve balance requirement plus an amount that is the greater of 10 percent of the institution's reserve balance requirement or $50,000.'' [8] A ''reserve balance requirement'' is defined as ''the balance that a depository institution is required to maintain on average over a reserve maintenance period in an account at a Federal Reserve Bank if vault cash does not fully satisfy the depository institution's reserve requirement imposed by this part.'' [9] Regulation D applies the IOER rate to balances maintained in excess of the top of the penalty-free band.[10]

With the setting of transaction account reserve requirement ratios to zero, depository institutions no longer have to maintain balances to satisfy a reserve balance requirement. To account for such changes, the Board is proposing to amend Regulation D in two ways. First, the proposed amendments would replace references to an IORR rate and an IOER rate with references to a single ''interest on reserve balances'' (''IORB'') rate. Second, the proposed amendments would streamline the calculation of interest by multiplying the IORB rate on a day by the balances maintained on that day. The proposed amendments would eliminate the unnecessary distinction between institutions that maintain balances above or below an amount related to reserve requirements.

[1] 12 U.S.C. 461(b)(2).

[2] Regulation D (Reserve Requirements of Depository Institutions) Interim Final Rule, 85 FR 16525 (March 24, 2020).

[3] 12 U.S.C. 461 (b)(12)(A).

[4] See 12 U.S.C. 461(b)(1)(A) & (b)(12)(C); see also 12 CFR 204.2(y).

[5] See 12 U.S.C. 461(b)(12)(B).

[6] 12 CFR 204.10(b)(5).

[7] 12 CFR 204.10(b)(1)–(3).

[8] 12 CFR 204.2(gg).

[9] 12 CFR 204.2(ee).

[10] 12 CFR 204.2(z).

In addition, the Board is proposing to amend Regulation D to refer to balances maintained in ''excess balance accounts'' [11] (''EBAs'') as ''balances'' rather than as ''excess balances'' and to apply the proposed ''IORB'' rate and proposed interest calculation to such balances.

**II. Discussion**

*A. Section-by-Section Analysis*

1. Section 204.2(aa)

Section 204.2(aa) currently defines an EBA as ''an account at a Reserve Bank pursuant to § 204.10(d) of this part that is established by one or more eligible institutions through an agent and in which only excess balances of the participating eligible institutions may at any time be maintained. An excess balance account is not a ''pass-through account'' for purposes of this part.'' [12] The Board proposes to amend section 204.2(aa) to delete the word ''excess'' from the first sentence of this definition. As revised, the first sentence of section 204.2(aa) would define an EBA as ''an account at a Reserve Bank pursuant to § 204.10(d) of this part that is established by one or more eligible institutions through an agent and in which only balances of the participating eligible institutions may at any time be maintained.''

2. Section 204.10(b)

Section 204.10(b) establishes the interest paid on different types of balances maintained by or on behalf of eligible institutions at Reserve Banks. Sections 204.10(b)(1)–(3) describe how the IORR and IOER rates apply to balances of eligible institutions above and below the top of the penalty-free band and how interest is calculated on those balances. Section 204.10(b)(5) sets forth the current IORR and IOER rates. (Section 204.10(b)(4) addresses term deposits; the Board is not proposing any amendments to this section other than the redesignation discussed below.)

a. Proposed Section 204.10(b)(1)

The Board proposes to delete current 204.10(b)(1) through (3) and replace them with a new section 204.10(b)(1) that would establish interest on balances maintained in a master account at a Reserve Bank by or on behalf of an eligible institution and describe how that interest is calculated. The Board proposes to establish interest on such balances as the amount equal to the IORB rate on a day multiplied by the total balances maintained on that day.[13] Finally, proposed section 204.10(b)(1) would establish the IORB rate.

Section 204.10(b)(5) of Regulation D currently sets forth the IORR rate and the IOER rate. In light of the proposed replacement of such rates with a proposed IORB rate set forth in proposed section 204.10(b)(1), the Board proposes to delete current section 204.10(b)(5) in its entirety.

b. Proposed Section 204.10(b)(2)

The Board proposes to redesignate current section 204.10(b)(4), dealing with term deposits, as proposed section 204.10(b)(2). No changes to the content of current section 204.10(b)(4) are proposed.

a. Proposed Section 204.10(b)(3)

The Board proposes to add a new section 204.10(b)(3) defining ''master account'' for purposes of section 204.10 as ''the record maintained by a Federal Reserve Bank of the debtor-creditor relationship between the Federal Reserve Bank and a single eligible institution with respect to deposit balances of the eligible institution that are maintained with the Federal Reserve Bank. A 'master account' is not a 'term deposit,' an 'excess balance account,' a 'joint account,' [14] or any deposit account maintained with a Federal Reserve Bank governed by an agreement that states the account is not a master account.''

3. Section 204.10(d)

a. Current Section 204.10(d)

Current section 204.10(d)(1) authorizes the establishment of EBAs and specifies that balances in an EBA represent a liability of the Reserve Bank holding the EBA solely to the participating eligible institutions. Current section 204.10(d)(2) requires eligible institutions participating in an EBA to authorize another institution to act as agent of the participating institutions for purposes of general account management (including transferring balances in and out of the EBA), and requires an EBA to be established at the Reserve Bank holding the agent's master account. Current section 204.10(d)(2) also prohibits the agent from maintaining any of its own balances in the EBA. Current section 204.10(d)(3) provides that balances in an EBA do not satisfy any institution's reserve balance requirement, and current section 204.10(d)(4) provides that EBAs are solely for the purpose of maintaining ''excess balances'' of participating institutions and may not be used for general payments or other activities. Current section 204.10(d)(5) establishes interest on balances in an EBA as ''the amount equal to the IOER rate in effect each day multiplied by the total balances maintained on that day for each day of the maintenance period.'' Current section 204.10(d)(6) authorizes Reserve Banks to establish additional terms and conditions with respect to the operation of EBAs.

b. Proposed Section 204.10(d)

Proposed section 204.10(d) would remove references to ''excess balances'' when describing the balances in an EBA and replace them with references to ''balances.'' The Board proposes to retain the name ''excess balance account.'' Specifically, the second sentence of proposed section 204.10(d)(1) would delete the reference to ''excess balances of eligible institutions'' in an EBA and replace it with a reference to ''balances maintained by eligible institutions'' in an EBA. Proposed section 204.10(d)(2) would delete the word ''excess'' from the reference to ''transferring the excess balances of participating institutions in and out'' of an EBA.

Current section 204.10(d)(3) provides that ''balances maintained in an excess balance account will not satisfy any institution's reserve balance requirement.'' The Board proposes to delete current section 204.10(d)(3) and redesignate current section 204.10(d)(4) as section 204.10(d)(3). Current section 204.10(d)(4) provides that an EBA ''must be used exclusively for the purpose of maintaining the excess balances of participants'' and may not be used for general payments or other activities. Proposed section 204.10(d)(3) would provide that ''[b]alances maintained in an [EBA] may not be used for general payments or other activities.'' Finally, proposed section 204.10(d)(4) would delete the references in current section 204.10(d)(5) to the ''IOER rate'' in establishing interest paid on EBAs and replace it with a reference to the ''IORB rate.'' Proposed section 204.10(d)(4) would also revise the reference to the rate ''in effect each day'' and to ''total balances maintained on that day for each day of the maintenance period'' to provide that interest on balances in an EBA is the amount equal to ''the IORB rate in effect on a day

[11] See 12 CFR 204.2(aa) (definition of excess balance account).

[12] The Board authorized excess balance accounts in 2009 to permit eligible institutions to maintain established correspondent-respondent relationships while mitigating the implications for the correspondent's balance sheet and its leverage ratio for capital adequacy purposes. Proposed Rule, 74 FR 5628, 5629 (Jan. 30, 2009); *see* Final Rule, 74 FR 25620, 25625–25628 (May 29, 2009).

[13] The amount of a balance in an account maintained by or on behalf of an eligible institution at a Reserve Bank is determined at the close of the Reserve Bank's business day. 12 CFR 204.10(a)(2).

[14] *See* Final Guidelines for Evaluating Joint Account Requests, 82 FR 41951 (Sep. 5, 2017).

multiplied by the total balances maintained on that day.''

**III. Request for Comment**

The Board seeks comment on all aspects of the proposed rule.

**IV. Regulatory Flexibility Act**

The Regulatory Flexibility Act (''RFA'') [15] generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities. However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million.

The Board has considered the potential impact of the proposal on small entities in accordance with the RFA. The Board believes that the proposal will not have a significant economic impact on a substantial number of small entities. As discussed in the Supplementary Information above, the proposed rule would apply to all eligible institutions regardless of size. The Board's proposed rule would also not impose any new recordkeeping, reporting, or compliance requirements. The Board does not believe that the proposed rule duplicates, overlaps, or conflicts with any other Federal rules. The Board also does not believe that there are any significant alternatives to the proposal which accomplish its stated objectives. In light of the foregoing, the Board does not believe that the proposal, if adopted in final form, would have a significant economic impact on a substantial number of small entities. Nonetheless, the Board seeks comment on whether the proposal would impose undue burdens on, or have unintended consequences for, small banking organizations and whether there are ways such potential burdens or consequences could be minimized in a manner consistent with the purpose of the proposal.

**V. Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act,[16] the Board has reviewed the proposed rule under authority delegated to the Board by the Office of Management and Budget. The proposed rule contains no collections of information pursuant to the Paperwork Reduction Act.

**VI. Plain Language**

Section 772 of the Gramm-Leach-Bliley Act [17] requires the Board to use ''plain language'' in all proposed and final rules. In light of this requirement, the Board has sought to present the interim final rule in a simple and straightforward manner. The Board invites comment on whether the Board could take additional steps to make the rule easier to understand.

**List of Subjects in 12 CFR Part 204**

Banks, banking, Reporting and recordkeeping requirements.

**Authority and Issuance**

For the reasons set forth in the **SUPPLEMENTARY INFORMATION**, the Board proposes to amend 12 CFR part 204 as follows:

## PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

**Authority:** 12 U.S.C. 248(a), 248(c), 461, 601, 611, and 3105.

■ 2. Amend § 204.2 by revising paragraph (aa) to read as follows:

**§ 204.2 Definitions.**

* * * * *

(aa) *Excess balance account* means an account at a Reserve Bank pursuant to § 204.10(d) that is established by one or more eligible institutions through an agent and in which only balances of the participating eligible institutions may at any time be maintained. An excess balance account is not a ''pass-through account'' for purposes of this part.

■ 3. Amend § 204.10 by revising paragraphs (b) introductory text through (b)(3) and paragraphs (d) introductory text through (d)(4) to read as follows:

**§ 204.10 Payment of interest on balances.**

* * * * *

(b) *Payment of interest.* Interest on balances maintained at Federal Reserve Banks by or on behalf of an eligible institution is established as set forth in paragraphs (b)(1) and (b)(2) of this section.

(1) For balances maintained in an eligible institution's master account, interest is the amount equal to the interest on reserve balances rate (''IORB rate'') on a day multiplied by the total balances maintained on that day. The IORB rate is 0.10 percent.

(2) For term deposits, interest is:

(i) The amount equal to the principal amount of the term deposit multiplied by a rate specified in advance by the Board, in light of existing short-term market rates, to maintain the federal funds rate at a level consistent with monetary policy objectives; or

(ii) The amount equal to the principal amount of the term deposit multiplied by a rate determined by the auction through which such term deposits are offered.

(3) For purposes of § 204.10(b), a ''master account'' is the record maintained by a Federal Reserve Bank of the debtor-creditor relationship between the Federal Reserve Bank and a single eligible institution with respect to deposit balances of the eligible institution that are maintained with the Federal Reserve Bank. A ''master account'' is not a ''term deposit,'' an ''excess balance account,'' a ''joint account,'' or any deposit account maintained with a Federal Reserve Bank governed by an agreement that states the account is not a master account.

* * * * *

(d) *Excess balance accounts.* (1) A Reserve Bank may establish an excess balance account for eligible institutions under the provisions of this paragraph (d). Notwithstanding any other provisions of this part, the balances maintained by eligible institutions in an excess balance account represent a liability of the Reserve Bank solely to those participating eligible institutions.

(2) The participating eligible institutions in an excess balance account shall authorize another institution to act as agent of the participating institutions for purposes of general account management, including but not limited to transferring the balances of participating institutions in and out of the excess balance account. An excess balance account must be established at the Reserve Bank where the agent maintains its master account, unless otherwise determined by the Board. The agent may not commingle its own funds in the excess balance account.

(3) Balances maintained in an excess balance account may not be used for general payments or other activities.

(4) Interest on balances of eligible institutions maintained in an excess balance account is the amount equal to the IORB rate in effect on a day multiplied by the total balances maintained on that day.

* * * * *

[15] 5 U.S.C. 601 *et seq.*

[16] 44 U.S.C. 3506.

[17] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

By order of the Board of Governors of the Federal Reserve System.

**Margaret McCloskey Shanks,**

*Deputy Secretary of the Board.*

[FR Doc. 2020–28755 Filed 1–7–21; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1241

**RIN 2590–AB09**

### Enterprise Liquidity Requirements

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) requests comment on a proposed rule that would implement four liquidity and funding requirements for Fannie Mae and Freddie Mac (the Enterprises). The 2008 financial crisis demonstrated substantial weaknesses in the liquidity positions of the Enterprises. Liquidity and funding challenges were a significant contributing factor to establishment of the conservatorships in September 2008. The proposed rule builds on the improvements made to the U.S. banking supervision framework's regulation of institutions' liquidity requirements, and on experience since the 2008 financial crisis including with the more recent 2020 COVID–19-related financial market stress. FHFA believes that a robust Enterprise liquidity framework will improve market confidence in the Enterprises' ability to fulfill their mission and provide countercyclical support to housing finance markets in times of stress, while further minimizing the likelihood that they will need further taxpayer support. FHFA envisions that an appropriate framework would incent the Enterprises to build their liquidity portfolios in good times, so that it is available to be deployed as necessary in times of stress.

**DATES:** Comments must be received on or before March 9, 2021.

**ADDRESSES:** You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590–AB09, by any one of the following methods:

- *Agency Website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AB09.
- *Hand Delivered/Courier:* The hand delivery address is Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB09, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB09, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Jamie Newell, Associate Director, Division of Resolutions, (202) 649–3530, *Jamie.Newell@fhfa.gov;* Ming-Yuen Meyer-Fong, Associate General Counsel, Office of General Counsel, (202) 649–3078, *Ming-Yuen.Meyer-Fong@fhfa.gov;* or Mark Laponsky, Deputy General Counsel, Office of General Counsel, (202) 649–3054, *Mark.Laponsky@fhfa.gov.* These are not toll-free numbers. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** The proposed rule establishes four quantitative liquidity requirements that address the short, intermediate and long-term liquidity needs of the Enterprises. The short-term 30-day liquidity requirement is designed to promote the short-term resilience of the liquidity risk profile of the Enterprises, thereby improving the Enterprise's ability to absorb shocks arising from financial market and economic stresses. In addition, the proposed rule includes an intermediate-term 365-day liquidity requirement to ensure that the Enterprises manage their liquidity needs beyond the short-term, and to provide additional incentives to fund their activities in a more stable fashion. Finally, the proposed rule includes two longer-term liquidity and funding requirements that encourage the issuance of an appropriate mix of longer-term debt to reduce the Enterprises' rollover risk. FHFA expects that this more appropriate mix of longer-term debt will also reduce the risk that the Enterprises would have to sell less-liquid assets in distressed markets.

#### Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. Copies of all comments will be posted without change, and will include any personal information you provide such as your name, address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic rulemaking docket for this proposed rule also located on the FHFA website.

#### Table of Contents

## I. Introduction

### *A. Background*

Liquidity risk management is a part of any safety and soundness regulatory framework for financial institutions. The 2008 financial crisis demonstrated substantial weaknesses in the liquidity positions of the Enterprises, and liquidity and funding challenges were a significant contributing factor to establishment of the conservatorships in September 2008. The Enterprises had more than five trillion dollars in agency MBS and agency unsecured debt outstanding, held by various types of investors. Certain investors expressed significant concern about the credit worthiness of the Enterprises in the absence of an explicit guarantee from the U.S. government given the possible Enterprise losses arising from the 2008 housing crisis.

On September 6, 2008, the Enterprises were placed into conservatorship by FHFA. In connection with this action, the U.S. Department of the Treasury (U.S. Treasury) agreed to backstop losses by the Enterprises based on the terms of Senior Preferred Stock Purchase Agreements (PSPAs) entered into with each Enterprise in conservatorship. Even after receiving this public support from the U.S. government, the Enterprises had significant difficulty issuing longer term debt in late 2008. Their primary source of funding was through the issuance of short-term discount notes, most of which had maturities significantly less than one year. The Enterprises eventually increased their ability to issue longer-term debt in 2009 and 2010 as the U.S. Treasury amended the PSPAs and increased its support to the Enterprises.

Banks in the United States and globally also experienced difficulty meeting their obligations during the crisis due to a breakdown of funding markets. As a result, many governments and central banks across the world provided unprecedented levels of liquidity support to companies in the financial sector in an effort to sustain the global financial system. In the United States, the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Federal Deposit Insurance Corporation (FDIC) established various temporary liquidity facilities to provide sources of funding for a range of asset classes.

These severe market stress events came in the wake of a period characterized by ample liquidity in the U.S. financial system. The rapid reversal in market conditions and the declining availability of liquidity during the financial crisis illustrated both the speed with which liquidity can evaporate and the potential for protracted illiquidity during and following these types of market events. In addition, the recent COVID–19-related financial crisis reminded market participants of the speed at which the detrimental effects of a liquidity and funding crisis can manifest, as the majority of funding markets ''locked up'' in mid-March 2020. For example, the Enterprises had significant difficulty issuing longer-term fixed rate unsecured term debt in mid-March 2020, and that lack of investor demand lasted into June 2020. Market participants noted stress even in the U.S. Treasury markets.

In 2008, the Enterprises' failure to adequately address these challenges was in part due to lapses in basic liquidity risk management practices, such as establishing an adequate portfolio of highly liquid assets to serve as a buffer in a crisis. During the 2008 financial crisis, the Enterprises maintained a liquidity portfolio largely composed of credit card asset backed securities, auto asset backed securities and other corporate unsecured debt, with minimal amounts of U.S. Treasury securities.

Recognizing the need for the Enterprises to improve their liquidity risk management and to control their liquidity risk exposures, in 2009 FHFA convened an interagency task force composed of examiners from the New York Federal Reserve Bank, the Federal Reserve Board, U.S. Treasury staff, Enterprise staff, and FHFA examiners. The discussions included draft standards being developed by U.S. banking and foreign jurisdictions to establish international liquidity standards. These standards included the principles based on supervisory expectations for liquidity risk management in the ''Principles for Sound Liquidity Management and Supervision'' (Basel Liquidity Principles). In addition to these principles, quantitative standards for liquidity were introduced to the U.S. banking supervision framework in the form of a liquidity coverage ratio (LCR) in 2013 (and subsequently approved in 2014) and a net stable funding ratio (NSFR) in 2016 [1] (and subsequently approved in 2020).

After consultation with the U.S. banking regulators about these developing liquidity risk quantitative standards and how they might apply to the Enterprises, FHFA issued a supervisory letter in December 2009 that established minimum 30-day and 365-day liquidity requirements for Fannie Mae. FHFA issued similar supervisory guidance to Freddie Mac and added a requirement that Freddie Mac build out the capability to measure the cumulative net daily cash needs out to 365 days. FHFA's supervisory letters also required that 50 percent of the Enterprises' 30-day cumulative net cash need requirement be held in cash at the Federal Reserve or in U.S. Treasury securities, with the balance of the liquidity portfolio limited to other defined highly liquid assets. These FHFA supervisory requirements were adopted by the Enterprises as board liquidity risk limits and serve as the foundation for the currently proposed 30-day and 365-day liquidity requirements.

The most significant change made by the proposed rule to the Enterprises' liquidity management regimes would be the addition of certain assumptions involving stressed cash inflows and outflows. Maintaining a sufficient portfolio of high quality liquid assets to meet these stressed cash outflow and limited cash inflow assumptions would position the Enterprises to provide mortgage market liquidity in times of market stress even if they cannot issue debt. In effect, FHFA proposes to require that certain contingencies, like additional cash outflows from buying loans through the cash window (also known as the whole loan conduit at Fannie Mae), and buying delinquent loans out of pools assuming a distressed mortgage market, be prefunded and backed by an appropriately-sized portfolio of U.S. Treasury securities and other high quality liquid assets.

FHFA standards for safe and sound operations for the Enterprises include those set forth in the Prudential Management and Operations Standards (PMOS) [2] at 12 CFR part 1236 Appendix. Standard 5 (Adequacy and

[1] Following the 2008 financial crisis, the Basel Committee on Banking Supervision established two international liquidity standards as a part of the Basel III reform package: A short-term liquidity metric, the Basel LCR standard, to address the risk that banking organizations may face significantly increased net cash outflows in a short-term period of stress, and the Basel NSFR standard, to address structural funding risks at banking organizations over a longer-term horizon. *See* ''Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools'' available at *https://www.bis.org/publ/bcbs238.htm;* Basel III: the net stable funding ratio'' available at *https://www.bis.org/bcbs/publ/d295.htm.*

[2] *See* 12 CFR part 1236 (Prudential Management and Operations Standards).

Maintenance of Liquidity and Reserves) states that each Enterprise should establish a liquidity management framework, articulate liquidity risk tolerances; and establish a process for identifying, measuring, monitoring, controlling, and reporting its liquidity position and liquidity risk exposures. In addition, Standard 5 includes guidelines for conducting stress tests to identify sources of potential liquidity strain and guidelines for establishing contingency funding plans. The proposed rule amplifies that standard by setting forth detailed regulatory requirements.

Furthermore, FHFA's Corporate Governance regulation specifies obligations of Enterprise management and of the Board of Directors regarding, among other things, Enterprise risk management. *See* § 1239.4(a) (management of a regulated entity is by or under the direction of its Board of Directors, which is ultimately responsible for overseeing the management of the regulated entity). The Board of Directors of each Enterprise is responsible for approving and maintaining an enterprise-wide risk management program that, among other things, addresses the Enterprise's exposure to liquidity risk. *See* § 1239.11(a) (''Each regulated entity's board of directors shall approve, have in effect at all times, and periodically review an enterprise-wide risk management program that establishes the regulated entity's risk appetite, aligns the risk appetite with the regulated entity's strategies and objectives . . .'').

In developing and adopting this proposed rule, FHFA exercises general regulatory and supervisory authority under section 1311(b) of the Federal Housing Enterprises Financial Safety and Soundness Act (Safety and Soundness Act) providing that each regulated entity ''be subject to the supervision and regulation of the Agency.'' 12 U.S.C. 4511(b). By establishing minimum liquidity requirements and a supervisory framework to address shortfalls and exigencies requiring temporary increases to the required minimum liquidity, the proposed rule supports FHFA in carrying out its duty under section 1313(a) of the Safety and Soundness Act ''to oversee the prudential operations of each regulated entity'' and ''to ensure that . . . each regulated entity operates in a safe and sound manner, including maintenance of adequate capital and internal controls.'' 12 U.S.C. 4513(a) (FHFA duties also include ensuring that the operations and activities of the Enterprises foster ''liquid'' national housing finance markets). Section 1313(a) of the Safety and Soundness Act provides maintenance of adequate capital as an example but does not limit the scope of FHFA oversight of Enterprise prudential operations solely to ensuring that the Enterprises maintain adequate capital. Lack of adequate liquidity is a safety and soundness concern in itself but could also affect Enterprise capital. FHFA's oversight of prudential operations necessarily includes oversight of Enterprise liquidity.

The proposed rule also supports FHFA oversight of Enterprise prudential management, including compliance with standards pertaining to ''adequacy and maintenance of liquidity and reserves.'' 12 U.S.C. 4513b(a)(5). This regulation is an additional standard on that subject. By implementing FHFA authority in a manner to permit, during market stress, temporary reductions in required minimum liquidity and, thus, to allow previously built-up liquidity to be deployed during periods of market stress, the proposed rule also supports Congressional intent for FHFA to maintain the ''continued ability'' of the Enterprises to accomplish their public missions. 12 U.S.C. 4501(2); *see also* 12 U.S.C. 1716 and 12 U.S.C. 1451 *note* (Enterprise public mission includes providing ''ongoing assistance to the secondary market for residential mortgages . . . by increasing the liquidity of mortgage investments'').

Current FHFA regulations do not require the Enterprises to meet a quantitative liquidity standard. Rather, FHFA evaluates the Enterprises' methods for measuring, monitoring, and managing liquidity risk on a case-by-case basis in conjunction with its supervisory processes and guidance. On August 22, 2018, FHFA issued Advisory Bulletin (AB) 2018–06 titled ''Liquidity Risk Management''. The Liquidity Risk Management AB incorporates liquidity risk management elements consistent with the Basel Liquidity Principles. The Liquidity Risk Management AB also emphasizes the central role of corporate governance, cash-flow projections, stress testing, ample liquidity resources, intra-day funding risk management, and formal contingency funding plans as necessary tools for effectively measuring and managing liquidity risk. However, as guidance, these FHFA pronouncements are not quantitative and lack the force of a duly adopted regulation.

The proposed rule would enhance the supervisory efforts and liquidity risk management practices described in AB 2018–06, which are aimed at measuring and managing liquidity risk, by implementing four minimum quantitative liquidity requirements. The proposed rule would establish a minimum short-term liquidity requirement that would be similar to the LCR approved by the Office of the Comptroller of the Currency, Department of the Treasury (OCC), Federal Reserve Board, and FDIC (U.S. banking regulators), with some modifications to reflect characteristics and risks of specific aspects of the Enterprises businesses, as described in this preamble.

FHFA notes that the U.S. banking regulators recently issued a final NSFR rule (NSFR final rule) that was initially included in the Basel liquidity framework when it was first published in 2010. While the Basel III LCR is focused on measuring liquidity resilience over a short-term period of severe stress, the NSFR final rule is intended to promote resilience by creating additional incentives for banking organizations and other financial companies to fund their activities with more stable sources and encouraging a sustainable maturity structure of assets and liabilities. Similarly, to encourage the Enterprises to issue appropriate amounts of longer-term debt and maintain a sustainable debt term structure, FHFA is proposing a 365-day intermediate term and two longer-term liquidity requirements to provide quantitative limits on the liquidity and funding risks of the Enterprises. A key objective of these liquidity and funding requirements is to ensure that the Enterprises have sufficient long-term funding to minimize rollover risk and fund less-liquid assets with longer-term debt and thus avoid having to sell such less-liquid assets into distressed markets.

*B. Overview of the Proposed Rule*

FHFA is requesting comment on a proposed rule that would implement four liquidity and funding requirements. The proposed rule would also require daily reporting to FHFA of the Enterprises' liquidity positions and other information, as well as monthly disclosures to the public.

- The short-term (30-day) requirement is substantially similar to the U.S. banking regulator's LCR final rule (LCR final rule) [3] and would require the Enterprises to maintain a liquidity portfolio composed of high quality liquid assets large enough to cover the

[3] *See* 79 FR 61440 (October 10, 2014) (Liquidity Coverage Ratio: Liquidity Risk Measurement Standards—OCC 12 CFR part 50; Federal Reserve Board 12 CFR part 249; FDIC 12 CFR part 329).

sum of: (i) The highest cumulative daily net cash outflows over 30 calendar days under certain specified stressed market assumptions, including a complete inability of the Enterprises to issue debt; and (ii) An excess requirement in the amount of $10 billion.

- The intermediate-term (365-day) liquidity requirement is designed to promote intermediate-term management of liquidity risks and to encourage an appropriate amount of longer-term funding to reduce debt rollover risks. It is substantially similar to the 30-day requirement and based on similar stressed assumptions, except that certain stressed assumptions last 365 days. The proposed rule would require the Enterprises to maintain a portfolio of high quality liquid assets, together with mortgage-backed securities (MBS) eligible to be pledged as collateral to the Fixed Income Clearing Corporation (FICC) (subject to a haircut), large enough to cover the worst daily cumulative net cash outflow over 365 calendar days under those stress assumptions. FHFA proposes not to include an excess requirement in connection with the 365-day liquidity requirement.
- The first long-term liquidity requirement is designed to encourage an appropriate amount of long-term unsecured debt to support less-liquid retained portfolio assets so that the Enterprises have the ability to hold such assets for at least a year without having to sell them into potentially distressed markets. Intended to be a simple, transparent metric, this requirement is conceptually similar to the NSFR proposed rule, recently finalized, and would require the Enterprises to maintain a minimum ratio of long-term unsecured debt to less-liquid assets exceeding 120 percent.[4]
- The second long-term requirement is also designed to encourage the Enterprises to issue an appropriate amount of longer-term unsecured debt to support all retained portfolio assets, not just less-liquid assets. This requirement sets a minimum ratio for the duration of an Enterprise's unsecured agency debt over the duration of all its retained portfolio assets and requires that such ratio exceed 60 percent.

As described earlier, the proposed rule's four quantitative minimum liquidity requirements build upon the U.S. banking supervision framework. These new liquidity and funding requirements also build upon existing Enterprise board liquidity risk limits and methodologies used by the Enterprises to assess exposures to contingent liquidity events but are more conservative than the Enterprises' existing board risk limits. The proposed rule would also complement existing FHFA supervisory guidance provided in AB 2018–06, and add to FHFA's standards for safe and sound operations for the Enterprises as set forth in the PMOS.

Given that the Enterprises do not have access to the Federal Reserve Discount Window or a stable customer deposit base, FHFA proposes to define high quality liquid assets as: (i) Cash held in a Federal Reserve account; (ii) U.S. Treasury securities; (iii) Short-term secured loans through U.S. Treasury repurchase agreements that clear through the FICC or are offered by the Federal Reserve Bank of New York; and (iv) A limited amount of unsecured overnight deposits with eligible U.S. banks.

For purposes of the 365-day liquidity requirement only, FHFA proposes to allow the Enterprises to augment the high quality liquid asset portfolio discussed above with cash inflows from pledging FICC-eligible collateral using a repurchase agreement that clears through the FICC as a source of cash to meet the 365-day requirement.

The enterprise-wide cumulative net cash flows includes all daily inflows and outflows of cash from any corporate source and use (as detailed below) and includes, but is not limited to, mortgage operations that use cash, like MBS payments to investors, repayment to servicers for advances of principal and interest (P&I), advancement of P&I to MBS investors, the daily purchase of loans, and any other uses of cash and excludes any cash inflows from expected unsecured debt issuance.

As further described below, the measure of the enterprise-wide cumulative daily net cash flows is meant to include certain stress events experienced during the recent financial crisis, and to position the Enterprises to continue to provide mortgage market liquidity through such stresses. These stressed cash flow assumptions included in the proposed rule take into account the potential impact of idiosyncratic and market-wide shocks, including those that would result in: (1) A complete loss of the Enterprise's ability to issue unsecured debt during the relevant period; (2) An increased cash outflow associated with additional daily single-family and multifamily cash window or whole loan conduit purchases to support the mortgage market, particularly small lenders, during a crisis; (3) A decreased cash inflow due to the assumed increase in the number of borrowers who fail to make their scheduled principal, interest, tax, and insurance payments to the servicers under a stressed economic environment; (4) An increased cash outflow requirement to fund delinquent loan buyouts under a stressed economic environment; (5) An increased cash outflow based on the Enterprise's best estimate of the collateral needed to be posted to support FICC-related activities for the next month; (6) An increased cash outflow from unscheduled draws on committed liquidity facilities that the Enterprises have provided to their clients related to variable-rate demand bonds; and (7) A decreased cash inflow due to the assumed failure of the Enterprise's five top non-bank servicers by unpaid principal balance (UPB) to make timely principal, interest, and tax, and insurance payments to the Enterprises during the next month under a stressed economic environment. To determine decreased cash inflows and increased cash outflows due to higher numbers of delinquent borrowers and to higher loan buy-out from MBS trusts, the proposed rule would require the Enterprises to formulate their projections assuming stressed conditions corresponding to the more severe of FHFA's Dodd-Frank Act Stress Test (DFAST) assumptions or other supervisory stress assumptions as ordered by FHFA.

The proposed rule also sets forth two long-term liquidity and funding requirements. The objective of these two liquidity and funding requirements is to reduce unsecured debt rollover risk, ensure that the Enterprises maintain sufficient long-term unsecured debt so they do not have to sell less-liquid assets into distressed markets, incent the Enterprises to issue an appropriate amount of long-term unsecured debt, and incent the Enterprises to reduce the amount of less-liquid assets funded by unsecured debt held within the retained portfolio that are not eligible collateral for the FICC.

The proposed rule, as described below, would require each Enterprise to report to FHFA its compliance with the four liquidity requirements daily, along with additional information regarding its liquidity position and assumptions as specified by FHFA. The Enterprises shall submit such reports at the close of each business day, treated as Day 0, reflecting the liquidity positions and other required information as of 6 p.m. EST on Day 0. Such reports shall include, at a minimum, the key stress

[4] *See* **Federal Register** notice, ''Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements,'' Federal Reserve Board, October 20, 2020. Access at: *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201020b1.pdf.*

scenario assumptions discussed below, including a summary of the respective cash flows and other significant information and any other assumptions used to calculate the four liquidity requirements. In some cases, this may require supplemental reports to explain individual key stress cash flows, like the purchases of delinquent loans out of pools, the purchases of cash window and whole loan conduit loans and the reduced cash flows arising from increased numbers of delinquent borrowers not making scheduled principal, interest, tax, and insurance payments.

The proposed rule would require daily minimum liquidity reporting about the short-term, intermediate-term and long-term liquidity and funding profile of the Enterprises to management, and to FHFA supervisory personnel. FHFA, by order, may require supplemental reporting. With this information, the Enterprise's management and supervisors would be better able to assess the Enterprise's ability to meet its projected liquidity needs during periods of liquidity stress; take appropriate actions to address liquidity needs; and, in situations of failure, implement an orderly resolution of the Enterprise.

As noted above, for the 30-day requirement the proposed rule would require the Enterprises to maintain a high quality liquid asset portfolio sufficient in size to meet the highest cumulative net cash need, plus an additional $10 billion excess amount. FHFA recognizes that certain market circumstances, for example, may require that an Enterprise be provided flexibility to meet a reduced 30-day liquidity minimum in order to fund severe stress liquidity needs and to support continued liquidity in the secondary mortgage markets. Therefore, the proposed rule would provide for temporary reductions in minimum liquidity requirements to address economic or market stress conditions. Specifically, it would provide for FHFA to make a determination that, due to economic or market conditions, temporary adjustments to reduce the minimum liquidity requirements are appropriate to address those conditions. FHFA's exercise of this authority would further Enterprise public purposes in supporting secondary mortgage market liquidity consistent with safety and soundness.

The proposed rule would also, as described below, establish a supervisory framework to address Enterprise liquidity shortfalls and non-compliance with the minimum liquidity requirements when an Enterprise's 30-day liquidity coverage metric falls below the $10 billion excess requirement or any of the other three liquidity and funding requirements.

Under the proposed rule, an Enterprise would be required to notify FHFA on any business day that any of the four liquidity requirements is not met, triggering a requirement for the Enterprise to submit a plan for approval to FHFA to achieve compliance, unless FHFA instructs otherwise. Alternatively, if FHFA determines that the Enterprise is otherwise non-compliant with the requirements of this part, FHFA may also require the Enterprise to submit a plan to achieve compliance. FHFA may take additional supervisory or enforcement action at its discretion to address Enterprise non-compliance.

In addition, if FHFA determines that, due to economic, market, or Enterprise-specific circumstances, temporary modified Enterprise liquidity and funding requirements above those established under this part are necessary or appropriate for an Enterprise, a process would be available to modify the minimum requirements. In such an instance, FHFA will notify the Enterprise in writing of the proposed modified Enterprise liquidity and funding requirements and provide the Enterprise with an opportunity to respond before making a determination as set forth in proposed § 1241.31.

These procedures, which are described in further detail in this preamble, are intended to enable FHFA to monitor and respond appropriately to the particular economic, market, or Enterprise-specific circumstances requiring an adjustment to the minimum liquidity requirements. FHFA invites public comment on all aspects of the proposed procedures for FHFA to respond timely and appropriately to address economic, market, Enterprise-specific, or other circumstances affecting Enterprise liquidity, safety and soundness, and ability to meet their public purposes.

The proposed rule's four liquidity requirements would use Enterprise projections based on stressed market assumptions. While the short-term and intermediate-term liquidity requirements would impose specific stress assumptions, FHFA expects the Enterprises to maintain robust stress testing frameworks that incorporate additional scenarios, like lower rate environments that might trigger calling debt. The Enterprises should use these additional scenarios in conjunction with the proposed rule's liquidity requirements to appropriately determine their board and management liquidity and funding buffers. FHFA notes that the four proposed liquidity requirements are minimum requirements, and that organizations like the Enterprises that pose systemic risk to the U.S. financial system, or whose liquidity stress testing indicates a need for higher liquidity and funding buffers, may need to take additional steps beyond meeting the proposed rule's minimum requirements in order to meet supervisory expectations for safe and sound operation. Moreover, nothing in the proposed rule would limit the authority of FHFA under any other provision of law or regulation to take supervisory or enforcement actions, including actions to address unsafe or unsound practices or conditions, deficient liquidity levels, or violations of law.

The proposed rule, once finalized, would be effective as of September 2021. FHFA requests comment on all aspects of the proposed rule, including comment on the specific issues raised throughout this preamble. FHFA requests that commenters provide detailed qualitative or quantitative analysis, as appropriate, as well as any relevant data and impact analysis to support their positions.

## II. Liquidity and Funding Requirements

As discussed above, the proposed rule would establish four quantitative liquidity requirements for the Enterprises, as well as certain qualitative requirements for risk management practices. The four quantitative liquidity requirements would be measured daily and supported by detailed management reporting:

- A short-term 30-day liquidity requirement based on: (i) The Enterprise's highest cumulative daily net cash outflows over 30 calendar days under certain specified stressed market assumptions, including a complete inability to issue debt; and (ii) An excess requirement in the amount of $10 billion;
- An intermediate 365-day liquidity requirement based on the Enterprise's highest cumulative daily net cash outflows over 365 calendar days under certain specified stressed market assumptions, including a complete inability of the Enterprises to issue debt;
- A simple long-term liquidity and funding requirement based on the amount of an Enterprise's long-term unsecured debt divided by the amount of its less-liquid assets, as defined below; and
- A second, model-based long-term liquidity and funding requirement based on an Enterprise's spread duration of its

unsecured debt divided by the spread duration of its retained portfolio assets.

The short-term and intermediate-term requirements are cashflow based and will be discussed in this section II.A, while the two long-term liquidity and funding requirements are calculated based on defined ratios discussed in section II.B.

*A. Short-Term and Intermediate Term Liquidity Requirements*

The purpose of these cashflow-based requirements is to establish minimum short-term (discussed throughout as the 30-day requirement) and intermediate-term (discussed throughout as the 365-day requirement) liquidity requirements for the Enterprises. These two requirements are determined based on cash flows under a series of stress assumptions including, among other things, that the Enterprises are unable to access the debt markets for an extended period and, as a result, must fund their enterprise-wide net cash needs, including funding mortgage operations, with an appropriately sized portfolio of high quality liquid assets, as defined below.

1. High Quality Liquid Assets

Given the lack of Enterprise access to the discount window at any Federal Reserve Bank and the need to provide mortgage market liquidity in a crisis, FHFA proposes to significantly limit those assets that qualify as high quality liquid assets for the liquidity portfolio under this proposed rule. As a result, FHFA proposes that high quality liquid assets be limited to cash held in a Federal Reserve bank account, U.S. Treasury securities, U.S. Treasury repurchase agreements where the Enterprise lends cash secured by U.S. Treasury securities cleared through the FICC or as offered by the Federal Reserve Bank of New York, and a limited amount of unsecured overnight bank deposits with eligible U.S. banks.

To be included in high quality liquid assets, an asset would be required to be unencumbered as provided under the proposed rule. First, the asset must be free of legal, regulatory, contractual, or other restrictions on the ability of an Enterprise to monetize the asset. FHFA believes that, as a general matter, high quality liquid assets should only include assets that could be converted easily into cash. Second, the asset cannot have been pledged, explicitly or implicitly, to secure or provide credit-enhancement to any transaction.

a. Federal Reserve Bank Balances

In the United States, Federal Reserve Banks are generally authorized under the Federal Reserve Act to maintain balances only for ''depository institutions'' and for other limited types of organizations, like the Enterprises. Under the proposed rule, all balances the Enterprises maintain at a Federal Reserve Bank would be considered a high quality liquid asset.

b. U.S. Treasury Securities

The proposed rule would include the fair market value of securities issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Treasury. U.S. Treasury securities have exhibited high levels of liquidity even in times of extreme stress to the U.S. financial system, and typically are the securities that experience the most ''flight to quality'' when investors react in a crisis.

FHFA proposes that U.S. Treasury securities qualify as a high quality liquid asset because they are easily and immediately convertible into cash during times of market stress. U.S. Treasury securities have active outright sale or repurchase agreement markets at all times with significant diversity in market participants as well as high volume. U.S. Treasury securities have exhibited this market-based liquidity characteristic historically, including evidence during the 2008 financial crisis and the more recent 2020 COVID–19-related financial market stress. Even during these recent crises, U.S. Treasury securities demonstrated low bid-ask spreads, high trading volumes, a large and diverse number of market participants, and other factors. Diversity of U.S. Treasury security market participants, on both the buy and sell sides, is particularly important because it tends to reduce market concentration and is a key indicator that a market will remain liquid. Also, the presence of multiple committed market makers in U.S. Treasury securities is another sign that a market is liquid.

c. U.S. Treasury Repurchase Agreements Cleared Through the FICC

The proposed rule would allow the Enterprises to treat certain secured loans backed by U.S. Treasury securities as highly liquid assets. Specifically, if the Enterprise lends cash secured by U.S. Treasury securities in a repurchase agreement cleared through the FICC (FICC Treasury repurchase agreements) then it may treat those assets as highly liquid. As the collateral backing investments in FICC Treasury repurchase agreements is legally allowed to be rehypothecated, the proposed rule assumes that the FICC Treasury repurchase agreements are fungible with U.S. Treasury securities and would be counted as such. The proposed rule limits any such investment in FICC Treasury repurchase agreements to those with a remaining maturity term no longer than the greater of: (i) 15 days; or (ii) The number of days until the next agency Uniform Mortgage Backed Security (UMBS) principal and interest payment date which is typically on, or the next business day after, the 25th day of the month.[5]

Under the proposed rule, for collateral received in FICC Treasury repurchase agreements where the Enterprise has rehypothecation rights to withdraw the asset without remuneration at any time during a 30 calendar-day stress period, such collateral if rehypothecated would be included in high quality liquid assets. If the collateral can be substituted with non-U.S. Treasury securities, then the Enterprises cannot count them as high quality liquid assets.

In addition, the Federal Reserve Bank of New York offers a program whereby the Enterprises are eligible to lend cash supported by repurchase agreements backed by U.S. Treasury securities. If an Enterprise lends cash in a secured transaction through this Federal Reserve Bank of New York reverse repurchase agreement program, the proposed rule would allow the Enterprise to treat these as high quality liquid assets. The proposed rule would similarly limit the maturity of secured lending transactions to the greater of 15 days or the number of days until the next agency UMBS principal and interest payment date.

d. Overnight Unsecured Deposits in Eligible Banks

The proposed rule would allow the Enterprises to include as high quality liquid assets a limited amount of unsecured overnight bank deposits provided they are held at a U.S. bank that is subject to quarterly reporting under the Federal Reserve System's FR Y–15 reporting requirements and has at least $250 billion in assets. FHFA believes these overnight deposits can be readily transferred to the Enterprises' Federal Reserve bank accounts early the following morning, which can help the Enterprises better manage intra-day funding requirements. The proposed rule would limit such overnight deposits to a maximum of $10 billion and require that each Enterprise have adequate single-name counterparty credit risk limits in place.

[5] Appropriate adjustment should be made for the number of days for non-UMBS MBS, such as MBS backed by adjustable rate mortgages and non-exchanged Freddie Mac Participation Certificates (PCs).

Question 1. Is allowing any amount of unsecured overnight deposits to qualify as highly liquid assets appropriate? If so, is the limitation to banks that are subject to the Federal Reserve Systems' FR Y–15 reporting requirements and have at least $250 billion in assets appropriate? Would greater or lesser restrictions be appropriate?

2. Non-Allowable Investments and Wrong-Way Risk

The proposed rule intentionally limits Enterprise investment in non-mortgage related investments to those high quality liquid assets discussed above. In addition, certain assets that may be highly liquid under normal conditions could experience ''wrong-way'' risk and could become less liquid during a period of stress and would not be appropriate for consideration as high quality liquid assets. Wrong-way risk is commonly defined as the risk that occurs when exposure to a counterparty is adversely correlated with the credit quality of that counterparty.'' Securities issued or guaranteed by the Enterprises have been more prone to lose value and, as a result, become less liquid and lose value in times of liquidity stress due to the high correlation between the health of the Enterprises and the health of the housing markets generally. This correlation was evident during the 2008 financial crisis, as most Enterprise unsecured debt and Enterprise MBS traded at significant discounts for a prolonged period. Because of this high potential for wrong-way risk, the proposed rule would exclude assets issued by the Enterprises from high quality liquid assets.

FHFA understands that most securities issued and guaranteed by the Enterprises consistently trade in very large volumes and generally have been highly liquid. However, the Enterprises remain privately owned corporations, and their obligations do not have the explicit guarantee of the full faith and credit of the United States. The U.S. banking regulatory agencies have long held the view that obligations of the Enterprises should not be accorded the same treatment as obligations that carry the explicit guarantee of the U.S. government and, under the U.S. banking regulatory agencies' capital regulations, have currently and historically assigned a 20 percent risk weight to their obligations and guarantees, rather than the zero percent risk weight assigned to securities guaranteed by the full faith and credit of the United States.

Similarly, the proposed rule does not allow the Enterprises to lend cash through repurchase agreements secured by agency MBS even through strong counterparties, like the FICC. Enterprise MBS, even short-term repurchase agreements secured by agency MBS, that may be highly liquid under normal conditions can experience wrong-way risk and could become less liquid during a period of stress. FHFA does not think it would be appropriate to consider agency MBS, or repurchase agreements backed by agency MBS, to be included as a high quality liquid asset for the 30-day liquidity requirement for the Enterprises.

Question 2. Does the proposed exclusion of repurchase agreements secured by agency MBS appropriately address the concerns expressed above? Are there other ways that FHFA could address those concerns, including wrong-way risk? If so, FHFA encourages commenters to provide historical evidence, including evidence during recent periods of market liquidity stress, of low bid-ask spreads, high trading volumes, a large and diverse number of market participants, and other factors.

3. Operational Requirements for High Quality Liquid Assets

Under the proposed rule, to be eligible to be included as a high quality liquid asset, an asset would need to meet the following operational requirements. These operational requirements are intended to better ensure that an Enterprise's high quality liquid assets can in fact be liquidated in times of stress. Several of these requirements relate to the monetization of an asset, by which FHFA means the receipt of funds from the outright sale of an asset or from the transfer of an asset pursuant to a repurchase agreement.

First, an Enterprise would be required to have the operational capability to monetize the high quality liquid assets. This capability would be demonstrated by: (1) Implementing and maintaining appropriate procedures and systems to monetize the asset at any time in accordance with relevant standard settlement periods and procedures; and (2) Periodically monetizing a sample of high quality liquid asset that reasonably reflects the composition of the covered company's total high quality liquid asset portfolio, including with respect to asset type, maturity, and counterparty characteristics. This requirement is designed to ensure an Enterprise's access to the market, the effectiveness of its processes for monetization, and the availability of the assets for monetization and to minimize the risk of negative signaling during a period of actual stress. FHFA would monitor the procedures, systems, and periodic sample liquidations through its supervisory process.

Second, an Enterprise would be required to implement policies that require all high quality liquid assets to be under the control of the management function of the Enterprise that is charged with managing liquidity risk. To do so, an Enterprise would be required either to segregate the assets from other assets, with the sole intent to use them as a source of liquidity, or to demonstrate its ability to monetize the assets and have the resulting funds available to the liquidity risk management function without conflicting with another business or risk management strategy. This requirement is intended to ensure that a central function within the Enterprise has the authority and capability to liquidate high quality liquid asset to meet its obligations in times of stress without exposing the Enterprise to risks associated with specific transactions and structures. There were instances at specific firms during the 2008 financial crisis where unencumbered assets of the firms were not available to meet liquidity demands because the firms' treasury functions were restricted or did not have access to such assets.

Third, an Enterprise would be required to implement and maintain policies and procedures that determine the composition of the assets in its high quality liquid asset portfolio on a daily basis by: (1) Identifying where its high quality liquid assets are held by legal entity, geographical location, currency, custodial or bank account, and other relevant identifying factors; and (2) Determining that the assets included as high quality liquid assets for liquidity compliance continue to qualify as high quality liquid assets under the proposed rule.

FHFA notes that assets that meet the criteria of high quality liquid assets and are held by an Enterprise as ''trading'', ''available-for-sale'', or ''held-to-maturity'' can be included as high quality liquid assets, regardless of such designations.

4. Cash Flows

The proposed rule would require the Enterprises to meet the following cash flow-based metrics by holding high quality liquid assets (as defined above) that equal or exceed, under the seven stressed cash flow scenarios described below, the following:

- 30-day Requirement. The sum of: (i) The Highest Cumulative Daily Net Cash Outflows over 30 calendar days under certain specified stressed market assumptions, including a complete inability of the Enterprises to issue

unsecured debt; and (ii) $10 billion (*i.e.,* the Daily Excess Requirement).

• 365-day Requirement. The Highest Cumulative Daily Net Cash Outflows over 365 days, including cash inflows from possible (though not scheduled) FICC MBS repurchase transactions where the Enterprise pledges its FICC-eligible collateral (assuming a 15 percent haircut) to raise cash on its worst cumulative net cash outflow day. The proposed rule assumes a conservative haircut of 15 percent given FHFA's wrong-way risk concerns. The proposed rule limits this ability to pledge FICC-eligible MBS collateral solely for purposes of meeting the 365-day requirement; such collateral is not eligible for purposes of meeting the 30-day liquidity requirement. Moreover, the proposed rule does not include non-FICC-eligible collateral as eligible for meeting any of the liquidity requirements.

To determine the 30-day requirement as of calculation date, the proposed rule would require an Enterprise to calculate its highest stressed cumulative net cash outflow amount for the next 30 calendar days following the calculation date, thereby establishing the dollar value that must be offset by the high quality liquid asset portfolio. Similarly, to determine the 365-day requirement as of calculation date, the proposed rule would require an Enterprise to calculate its highest stressed cumulative net cash outflow amount for the next 365 calendar days following the calculation date, thereby establishing the dollar value that must be offset by the high quality liquid asset portfolio combined with cash inflows from possible (though not scheduled) secured borrowings using FICC cleared repurchase transactions where the Enterprise raises cash by pledging its FICC-eligible collateral (assuming a 15 percent haircut) on its worst cumulative net cash outflow day.

Under the proposed rule, the highest cumulative daily net cash outflow amount would be the dollar amount on the day within a 30 calendar-day and 365-day stress period that has the highest amount of net cumulative cash outflows, respectively. The FHFA believes that using the highest cumulative daily calculation (rather than using total cash outflows over a 30 calendar-day or 365-day stress period) is necessary because it takes into account potential timing mismatches between an Enterprise's outflows and inflows, that is, the risk that an Enterprise could have a substantial amount of contractual inflows late in a 30 calendar-day stress period while also having substantial outflows earlier in the same period. Such mismatches could threaten the liquidity of the Enterprise. By requiring the recognition of the highest net cumulative outflow day of a particular 30 calendar-day stress period and a particular 365-day stress period, FHFA believes that the proposed liquidity requirements would better capture an Enterprise's liquidity risk and help foster more sound liquidity management.

The proposed rule would require that the high quality liquid asset portfolio be sufficient to fund all enterprise-wide net cash flows, which includes all corporate daily inflows and outflows of cash from whatever source and includes, but is not limited to, mortgage operations that use cash such as MBS payments to investors, reimbursement of servicer advances of P&I payments to the MBS trusts, the continued purchase of loans through the cash window or whole loan conduit, increases in collateral requirements arising from Enterprise derivative positions, and other uses of corporate cash.

Sources of cash include principal and interest payments from servicers that include guaranty fees from the single-family business, including the Temporary Payroll Tax Cut Continuation Act of 2011 fees. Other sources of cash, like existing To-be-announced (TBA) contracts in place as of 6 p.m. EST on Day 0, are assumed to be valid and represent cash inflows on the contract settlement date. Other sources of cash for the 365-day liquidity requirement include the borrowing of cash secured by FICC-eligible securities post 15 percent haircut. Less-liquid assets, like non-performing loans and re-performing loans, are not considered sources of cash unless the assets have been sold and are awaiting settlement. In this case, the Enterprise may assume that the cash inflow occurs on the expected settlement date.

With respect to any MBS trust-related cash flows, an Enterprise must include, at a minimum, the net corporate cash flows to and from the MBS trust(s). The proposed rule stresses the expected corporate cash flows by excluding expected cash inflows from expected future debt issuance (with an exception for Enterprise debt issued but not yet settled, described below), and by imposing six other stress assumptions that increase cash outflows or limit cash inflows (see discussion below).

The proposed rule defines ''Daily Net Cash Flows'' to mean, for any day, the total cash outflows minus the total cash inflows for that day. The proposed rule further defines the ''Cumulative Daily Net Cash Outflows'' to mean, for any day, the sum of the Daily Net Cash Flows for each day in the period up through and including the measurement day. The proposed rule further defines the ''Highest Cumulative Daily Net Cash Outflows'' to mean, with respect to either the 30-day or 365-day metric, the maximum Cumulative Daily Net Cash Outflows amount over the respective period, see the 30-day example in Table 1 below.

TABLE 1—EXAMPLE DETERMINATION OF HIGHEST DAILY CUMULATIVE NET CASH OUTFLOW

[$B]

| Day | Cash outflows | Cash inflows | Daily net cash outflow | Daily cumulative net cash outflow |
|---|---|---|---|---|
| Day 1 | $100 | $90 | $10 | $10 |
| Day 2 | 40 | 45 | (5) | 5 |
| Day 3 | 25 | 30 | (5) | ..... |
| Day 4 | 50 | 40 | 10 | 10 |
| Day 5 | 90 | 70 | 20 | 30 |
| Day 6 | 60 | 60 | ..... | 30 |
| Day 7 | 40 | 50 | (10) | 20 |
| Day 8 | 60 | 50 | 10 | 30 |
| Day 9 | 50 | 50 | ..... | 30 |
| Day 10 | 25 | 30 | (5) | 25 |
| Day 11 | 30 | 25 | 5 | 30 |
| Day 12 | 40 | 40 | ..... | 30 |
| Day 13 | 40 | 75 | (35) | (5) |

TABLE 1—EXAMPLE DETERMINATION OF HIGHEST DAILY CUMULATIVE NET CASH OUTFLOW—Continued

[$B]

| Day | Cash outflows | Cash inflows | Daily net cash outflow | Daily cumulative net cash outflow |
|---|---|---|---|---|
| Day 14 | 40 | 40 | ..... | (5) |
| Day 15 | 20 | 15 | 5 | ..... |
| Day 16 | 45 | 25 | 20 | 20 |
| Day 17 | 10 | 20 | (10) | 10 |
| Day 18 | 90 | 150 | (60) | (50) |
| Day 19 | 40 | 35 | 5 | (45) |
| Day 20 | 50 | 15 | 35 | (10) |
| Day 21 | 30 | 20 | 10 | ..... |
| Day 22 | 30 | 10 | 20 | 20 |
| Day 23 | 10 | 20 | (10) | 10 |
| Day 24 | 15 | 15 | ..... | 10 |
| Day 25 | 140 | 70 | 70 | 80 |
| Day 26 | 20 | 25 | (5) | 75 |
| Day 27 | 40 | 45 | (5) | 70 |
| Day 28 | 10 | 10 | ..... | 70 |
| Day 29 | 30 | 30 | ..... | 70 |
| Day 30 | 25 | 30 | (5) | 65 |

Table 1 illustrates the determination of the total net cash outflow amount using hypothetical daily outflow and inflow calculations for a given 30 calendar-day stress period. Based on the example provided, the peak net cash need would occur on Day 25, resulting in a Highest Daily Cumulative Net Cash Outflow of $80 billion.

The proposed rule does not permit an Enterprise to double count items in this computation. For example, if the fair market value of an asset is included as a part of the highly liquid asset portfolio, such asset may not also be counted as a cash inflow on its maturity date.

Question 3. Does the method FHFA is proposing for cumulative net cash outflows appropriately capture the potential mismatch between the timing of inflows and outflows under the 30 calendar-day stress period? Why or why not?

5. Daily Excess Requirement

For purposes of the 30-day requirement, the proposed rule would require that the Enterprises must maintain a minimum daily excess requirement of at least $10 billion for each day within the first 30 days (aka the Daily Excess Requirement). The purpose of this Daily Excess Requirement is to address the possibility of errors and other unforeseen operational errors.

Question 4. For the 30-day requirement, does the proposed $10 billion Daily Excess Requirement adequately address possible forecasting errors and other residual liquidity risks? Should FHFA consider a larger Daily Excess Requirement than $10 billion? A smaller amount?

For purposes of the 365-day requirement, the proposed rule would require no minimum Daily Excess Requirement. FHFA does not propose a daily excess requirement for the 365-day requirement because of the longer-term nature of the requirement.

Question 5. For the 365-day requirement, should FHFA consider a Daily Excess Requirement like the one for the 30-day requirement? If so, what would be an appropriate Daily Excess Requirement for the 365-day minimum liquidity requirement?

6. Stressed Cash Flow Scenarios

As noted above, the proposed rule would require each Enterprise to forecast expected corporate cash outflows and expected cash inflows from all sources. As described below, the proposed rule would further require that the measure of the enterprise-wide cumulative net cash flows reflects the impact of the stress events.

Given the importance of the Enterprises as key providers of mortgage market liquidity, the proposed rule would assume seven stressed cash outflow and inflow assumptions. These stressed cash flow assumptions included in the proposed rule take into account the potential impact of idiosyncratic and market-wide shocks, including those that would result in:

(1) A complete loss of Enterprise ability to issue unsecured debt during the relevant period (see section below entitled ''Complete Loss of Ability to Issue Unsecured Debt'');

(2) An increased cash outflow associated with additional daily single-family and multifamily cash window or whole loan conduit purchases to support the mortgage market, particularly small lenders, during a crisis (*see* section below entitled ''Cash Window or Whole Loan Conduit Purchases'');

(3) A decreased cash inflow due to the assumed increase in the number of borrowers who fail to make their scheduled principal, interest, tax, and insurance payments to the servicers under a stressed economic environment (*see* section entitled ''Borrower Scheduled Principal, Interest, Tax, and Insurance Remittances'');

(4) An increased cash outflow requirement to fund delinquent loan buyouts under a stressed economic environment (*see* section entitled ''Delinquent Loan Buyouts from MBS Trusts'');

(5) An increased cash outflow based on the Enterprise's best estimate of the collateral it will be required to post with the FICC for the next month (*see* section entitled ''FICC Collateral Needs'');

(6) An increased cash outflow from unscheduled draws on committed liquidity facilities that the Enterprises have provided to their clients related to variable-rate demand bonds (*see* section entitled ''Liquidity Facility for Variable-Rate Demand Bonds''); and

(7) A decreased cash inflow due to the assumed failure of the Enterprise's five top non-bank servicers by UPB to make timely principal, interest, tax, and insurance payments to the Enterprises during the next month under a stressed economic environment (*see* section entitled ''Non-Bank Seller/Servicer Shortfalls'').

To determine decreased cash inflows and increased cash outflows due to higher numbers of delinquent borrowers and to higher loan buy-out from MBS trusts, the proposed rule would require

the Enterprises to formulate their projections assuming stressed conditions corresponding to the more severe of FHFA's DFAST assumptions or other supervisory assumptions as ordered by FHFA.

a. Complete Loss of Ability To Issue Unsecured Debt

The proposed rule, specifically the 30-day and 365-day liquidity requirements, would require the Enterprises to assume that they could not issue any new unsecured debt and receive the proceeds. The proposed rule would allow the Enterprises to include cash inflows from unsecured debt already traded but not yet settled on the appropriate settlement date.

FHFA recognizes that each Enterprise has the contractual right to issue discount notes to their respective MBS trusts in exchange for cash. Most MBS trusts receive P&I and other payments in the form of cash from the seller/servicers on or around the 18th of each month and have to pay such principal and interest to investors on the 25th of each month. The proposed rule would not include the cash inflows from such sales of discount notes to their respective MBS trusts. If an Enterprise needed to issue discount notes to an MBS trust to raise cash in an unexpected liquidity event, it could legally do so but FHFA does not expect the Enterprise to rely on such funds in the normal course of liquidity risk management.

b. Cash Window or Whole Loan Conduit Purchases

The proposed rule also requires that the Enterprises maintain a sufficient portfolio of high quality liquid assets to continue to fund the purchase of single-family loans through the Cash Window or Whole Loan Conduit (CW/WLC) during a short-term crisis of up to 60 days initially, and then 30 days for the remainder of the year. In essence, this stress assumes that the Enterprises cannot sell forward or securitize the single family mortgage loans purchased through the CW/WLC for the next 60 days during the most acute period of assumed stress, and thereafter can only sell such loans after holding them for a minimum of 30 days.

Similarly, the proposed rule would require that the Enterprises maintain a sufficient liquidity portfolio to fund the purchase of multifamily loans during a market crisis for six months. Assuming that an Enterprise can demonstrate that it historically has securitized and sold multifamily loans within six months, the proposed 365-day requirement would allow the Enterprise to assume that it can sell multifamily loans six months after it purchases them through the multifamily cash window. For example, if an Enterprise can document that over the past 12 months, the average time it took to securitize multifamily loans into securities was six months, then FHFA would consider that adequate support. FHFA examiners would validate that there is adequate documentation to support such an assumption. FHFA notes that Fannie Mae's multifamily program uses guarantor swap transactions for the purchase of every multifamily loan and thus does not purchase multifamily loans with cash. If that Fannie Mae business practice were to change and multifamily loans were purchased for cash, then these cash outflows would need to be included in the 30-day and 365-day cash forecasts.

While the proposed rule would allow TBA contracts to count as cash inflows at the contracted settlement dates, an additional stress for the 30-day and 365-day requirements is that forecasted purchases of loans cannot be assumed to be forward sold in the TBA market, nor can they be assumed to be securitized and sold, until day 61. As a result, the proposed rule would require that the Enterprises must have a high quality liquid asset portfolio large enough to prefund the first 60 days of cash window or whole loan conduit purchases during a market crisis.

FHFA recognizes that TBA contracts are a useful risk management tool that allows the Enterprises to minimize the risk arising from purchasing loans through the cash window and whole loan conduit. The proposed rule would allow cash inflows from existing TBA contracts subject to the following limitations as follows:

1. An Enterprise will only be allowed to include expected cash inflows from existing TBA contracts in place on Day 0 as of 6 p.m. EST and an Enterprise will not be allowed to assume cash inflows arising from forecasted (as opposed to existing) TBA contracts for the 30-day and 365-day forecast periods.

2. Existing TBA contracts in excess of the amount needed to minimize the risk of existing loans purchased through the cash window or whole loan conduit or existing commitments to buy loans will not count as cash inflows. FHFA expects that Enterprises will only enter into TBA contracts that offset existing loan purchases or forward commitments to buy loans.

3. To reduce the risk that the associated cash inflow from the TBA contract is not received due to counterparty issues, the proposed rule only permits cash inflows from TBA contracts cleared through the FICC. The proposed rule does not allow the Enterprises to include cash inflows from TBA contracts not cleared through the FICC.

4. Enterprises cannot include cash inflows from the securitization and sale of loans that have an associated TBA contract as this would double count the cash inflows.

Question 6. Should FHFA allow the Enterprises to consider additional TBA contracts as cash inflows on the settlement date or just those TBA contracts cleared through the FICC?

Question 7. Should FHFA not allow the Enterprises to consider any existing TBA contracts as cash inflows on the settlement date?

After Day 30, the proposed rule permits the Enterprises to assume they continue to fund their forecasted 365-day single-family cash window and whole loan conduit needs with a less conservative securitization and sale assumption. The proposed rule assumes that after the first 30 days, forecasted purchases of single-family loans can be securitized and sold after holding for only 30 days.

For example, the Enterprises may assume that single family loans scheduled to be purchased on:

- Day 1 can be securitized and sold on day 61;
- Day 2 can be securitized and sold on day 61;
- Day 31 can be securitized and sold on day 61;
- Day 45 can be securitized and sold on day 75; and
- Day 61 can be securitized and sold on day 91.

For delivered single-family loans owned by an Enterprise at close of business on Day 0, the proposed rule would allow that an Enterprise can include cash inflows from the sale and securitization of such single-family loans on Day 61, assuming that the Enterprise did not already assume a corresponding cash inflow from a matched TBA position on the settlement date.

For non-delivered single-family loans where the Enterprise has a commitment to buy the loan as of close of business on Day 0, the proposed rule would require that the cash outflow be assumed for the contracted settlement date, and that the cash inflow associated with a corresponding TBA contract settlement date for that commitment to sell provided that if no such TBA contract exists at the close of business on Day 0, then the earliest cash inflow is Day 61 based upon its securitization and sale.

For multifamily loans, the proposed rule would require a liquidity portfolio

large enough to fund the first three months of multifamily loan purchases through the cash window. The proposed rule assumes that the Enterprises will forecast expected multifamily loan cash purchases for the entire 365-day period.

For multifamily loans, the typical holding period prior to securitization is approximately three to four months but for some multifamily loans it is much longer. If the Enterprises can demonstrate that they can securitize and sell all of their multifamily loans within 180 days, the proposed rule would allow them to assume that multifamily loans purchased on:

- Day 1 can be securitized and sold on day 181;
- Day 31 can be securitized and sold on day 211; and
- Day 61 can be securitized and sold on day 241.

For existing multifamily loans delivered and owned by an Enterprise at the close of business on Day 0, the proposed rule would allow an Enterprise to include cash inflows from the sale and securitization of such multifamily loans on Day 91, which reflects a simplifying assumption that the weighted average time that the Enterprise held the existing multifamily loans in the cash window portfolio at the close of business on Day 0 is approximately 90 days.

Question 8. For the 365-day requirement, should the proposed rule allow for a shorter or longer time period than six-month assumption for the securitization and sale of multifamily loans? Should the proposed rule consider an alternative cash inflow process arising from the securitization and sale of multifamily loans?

c. Borrower Scheduled Principal, Interest, Tax, and Insurance Remittances

The proposed rule would require that the 30-day and 365-day requirements have an additional cash inflow stress that assumes that an increased number of borrowers fail to make scheduled principal, interest, tax, and insurance payments consistent with the specified stress scenario. These reduced cash inflows from borrowers would increase cash outflows needed to be made by the Enterprises to the MBS investors and to other entities when the servicers are not required to advance full scheduled payments to the Enterprises, including where servicers are under an ''actual'' [6] contractual remittance obligation to the Enterprises or are otherwise not required to make such advances. FHFA proposes that the Enterprises estimate these cash outflows based on the greater of the cash outflows estimated using: (1) The most recent DFAST scenario assumptions and resulting delinquencies: or (2) Such other scenario(s) prescribed by order of FHFA. Effectively this stress scenario increases the Enterprises' cash outflows in months one through 12 and so it affects both the 30-day and the 365-day requirement.

d. Delinquent Loan Buyouts From MBS Trusts

The proposed rule would require that the Enterprises must fund delinquent single-family loan buyouts from MBS pools assuming an increase in delinquent mortgage loans under an assumed stress scenario prescribed by FHFA under its DFAST scenarios or other stress scenarios by order. The objective is to ensure that the Enterprises have a liquidity portfolio large enough to continue to fund the purchase of delinquent loans from MBS Trusts in a stress scenario. FHFA proposes that the Enterprises estimate these cash outflows based on the greater of the cash outflows estimated using: (1) The most recent DFAST scenario assumptions and resulting delinquencies: or (2) Such other stress scenario(s) prescribed by FHFA order.

For the proposed 30-day and 365-day requirements, the Enterprises must project the cash outflows arising from delinquent loan buyouts over the relevant period assuming the most recent DFAST scenario assumptions and resulting delinquencies or such other stress scenario(s) prescribed by FHFA order. In June 2020, FHFA directed the Enterprises to use the greater of DFAST scenarios or more recent forbearance history if more stressful. Provided that the Enterprises can adequately support the following assumption, the proposed rule would allow the Enterprise to forecast cash inflows based on sales of reperforming loans that were purchased from pools but only after 180 days of re-performance history which would allow them to be readily securitized into MBS assets eligible as collateral for funding transactions cleared through the FICC. For example, if an Enterprise can document that over the past 12 months, the average time it took to securitize reperforming loans into securities was six months, then FHFA would consider that adequate support. The FHFA supervisory team would validate that there is adequate documentation to support such an assumption.

e. FICC Collateral Needs

The proposed rule would require that the Enterprises estimate the cash outflow needed to prefund its expected FICC collateral requirement for the next month. The Enterprises heavily rely on the FICC to conduct their mortgage purchase operations and FICC access to clear trades on the appropriate settlement dates, as well as to support U.S. Treasury functions like the purchase of Treasury repurchase agreements through the FICC. The FICC, specifically its capped contingency liquidity facility (CCLF) requires a minimum amount of collateral be posted each month with the FICC. The CCLF collateral requirement has two components, that is, a Mortgage Backed Securities Division within the FICC component arising from the Enterprises TBA clearing activity and a Government Securities Division within the FICC component arising from the Enterprises FICC-cleared repo activity. The proposed rule would require that an Enterprise's liquidity portfolio be large enough to accommodate a cash outflow on Day 1 of the forecast equal to the CCLF collateral requirement for the next month. The FICC provides the Enterprises with the collateral requirement each month based on the Enterprise's use of the FICC.

The proposed rule would require that the Enterprises assume that there is a 100 percent cash outflow for the expected next month's FICC collateral requirement on Day 1.

f. Liquidity Facility for Variable-Rate Demand Bonds

The proposed rule would require that the Enterprises assume that all contingent liabilities, and associated cashflows, related to the Enterprises' variable-rate demand bonds (VRDBs) are treated as cash outflows on Day 1.

As part of the Enterprises' guarantee arrangements pertaining to certain multifamily housing revenue bonds and securities backed by multifamily housing revenue bonds, in the past the Enterprises provided commitments to advance funds, commonly referred to as ''liquidity guarantees.'' These liquidity guarantees require the Enterprises to advance funds to third parties that enable them to repurchase tendered bonds or securities that cannot be remarketed during the weekly auction process. Given such weekly auctions, these multifamily customers are likely to need backstop funding in a short-term stress environment, such as those

[6] The Enterprises have contracts with servicers to remit borrower principal, interest, tax, and insurance payments. Some of these contracts allow the servicers to remit only the actual principal or actual interest payments made by the borrowers. In cases where the servicer is not obligated to advance missed borrower payments, the Enterprises must make the payment of principal and interest to the MBS investor.

experienced during the 2008 financial crisis. During that period, some VRDB auctions failed and the Enterprises had to step in and provide temporary liquidity under those guarantee arrangements.

The proposed rule would require that the Enterprise assume that there is a cash outflow equal to 100 percent of its existing liquidity facilities related to variable-rate demand bonds on Day 1.

g. Non-Bank Seller/Servicer Shortfalls

The proposed rule would require that the Enterprises must assume that their five largest non-bank single-family seller/servicers (*i.e.,* those seller/servicers that do not have funding from depositors) by UPB fail to make scheduled principal, interest, tax, and insurance payments on the next scheduled remittance date, (*i.e.,* usually by the 18th of the month). Effectively, this reduces the expected cash inflows from the top-five non-bank seller/servicers and requires that the Enterprises be able to fund such a shortfall using proceeds from the high quality liquid asset portfolio. Experience with the past financial crisis and in the recent COVID–19-related stress suggest that non-bank seller/servicers can experience acute financial stress in periods of tight liquidity, which could impose significant losses or delays on Enterprise receipt of P&I and other payments with respect to acquired mortgage loans. The proposed rule would require the Enterprises to hold sufficient high quality liquid assets to ensure that one or more failures by these counterparties would not threaten the Enterprises' ability to support housing finance markets through such periods. This assumption applies only to the first month, as the servicing for these five non-bank servicers is assumed to be resolved in the second month. The proposed rule would allow the Enterprises to assume that such principal, interest, tax, and insurance is repaid by the original seller/servicer on day 61.

Question 9. For the 365-day requirement, should the proposed rule allow for the cash inflow on Day 61 related to the repayment by these five non-bank seller/servicers? Should the proposed rule assume a longer period before repayment?

Question 10. FHFA solicits commenters' views on the seven stress scenarios discussed above, their proposed cash outflows and inflows, and the associated underlying assumptions for the proposed treatment. Are there specific cash inflow or outflow assumptions for other types of transactions that have not been included, but should be? If so, please specify the types of transactions and the applicable inflow or outflow rates that should be applied and the reasons for doing so.

7. Unsecured Callable Debt

The proposed rule does not require the Enterprises to maintain a liquidity portfolio large enough to fund the cash outflows associated with exercising the call option on all unsecured callable debt that was in-the-money at the close of business on Day 0. Because the Enterprises have the right to call, but not the obligation to call, certain callable debt instruments, the proposed rule would allow the Enterprises to assume that the cash outflow is at maturity of the callable debt and not the next call date.

During the 2008 financial crisis, the Enterprises did not efficiently exercise their right to call debt as the debt markets were not liquid enough for them to replace that debt with similar maturity debt instruments. Similarly, in March 2020 during the COVID–19-related financial market stress, the Enterprises did not exercise their right to call debt efficiently because they could not reissue similar longer-term debt. Subsequently, after the March 2020 COVID–19 stress period, both Enterprises were able to exercise calls on the next available date and replace that called debt with similar callable debt or fixed rate debt at favorable terms.

Question 11. FHFA solicits commenters' views on the proposed treatment for Enterprise callable debt. Specifically, what are commenters' views on the proposed provisions that would allow the Enterprises to not call their unsecured callable debt even if it was in-the-money at the close of business on Day 0?

8. Changes in Financial Condition

Certain contractual clauses in derivatives and other transaction documents, such as material adverse change clauses and downgrade triggers, are aimed at capturing changes in the Enterprises financial condition and, if triggered, would require an Enterprise to post more collateral or accelerate demand features in certain obligations that require collateral.

The proposed rule would not require an Enterprise to count as an outflow any additional amounts that the Enterprise would need to post or fund as additional collateral under a contract as a result of a change in its financial condition. If the proposed rule did require such an assumption, an Enterprise could calculate this outflow amount by evaluating the terms of such contracts and calculating any incremental additional collateral that would need to be posted as a result of the triggering of clauses tied to a ratings downgrade or similar event, or change in the Enterprise's financial condition.

Question 12. Should the proposed rule require that the Enterprises hold high quality liquid assets to cover potential increases in collateral needed assuming a significant change in their financial condition?

*B. Long-Term Liquidity and Funding Requirements*

1. Background

The 2008 financial crisis exposed the vulnerability of the Enterprises to liquidity shocks. For example, before the crisis, the Enterprises and many banking organizations lacked robust liquidity risk management metrics and relied excessively on short-term wholesale funding to support less-liquid assets. In addition, the Enterprises and many banks did not sufficiently plan for longer-term liquidity risks, and the risk management and control functions of the Enterprises failed to challenge such decisions or sufficiently plan for possible disruptions to the Enterprises regular sources of funding. Instead, the risk management and control functions reacted only after demand for longer term agency unsecured debt evaporated.

During the crisis, the Enterprises and many banking organizations experienced severe contractions in the supply of funding. As access to longer-term funding became limited, many in the financial markets were forced to sell and as a result certain asset prices, including for private label securities (PLS), fell significantly. When prices fell, the Enterprises and many banking organizations faced the possibility of significant capital losses and failure. The threat this presented to the U.S. financial system caused the U.S. government to provide significant levels of support to the Enterprises and many U.S. banks to maintain global financial stability. This experience demonstrated a need to address these shortcomings at the Enterprises and banking organizations and to implement a more rigorous approach to identifying, measuring, monitoring, and limiting reliance on short-term sources of funding that results in additional debt rollover risk.

Since the 2008 financial crisis, FHFA (as noted above) has developed qualitative standards focused on strengthening the Enterprises' overall risk management, liquidity positions, and liquidity and funding risk

management. By improving the Enterprises' ability to absorb shocks arising from financial and economic stress, these measures, in turn, promote a more resilient mortgage funding market and U.S. financial system.

FHFA has supervisory guidance to address the risks arising from excessive reliance on short-term funding, such as short-term discount notes, that increases rollover risk both before and after the 2008 financial crisis. In 2009, for example, FHFA issued a supervisory letter that required, among other things, that the Enterprises develop capabilities to measure cash inflows and outflows daily for one year.

As previously discussed, AB 2018–06 incorporates liquidity risk management elements consistent with Basel Liquidity Principles. Under the AB, FHFA expects an Enterprise's measurement of liquidity to include metrics for intraday liquidity, short-term cash needs (*e.g.,* 30 days), access to collateral to manage cash needs over the medium term (*e.g.,* 365 days), and a general congruence between the maturity profiles of the assets and liabilities. FHFA also encouraged the Enterprise to consider common industry practices and regulatory standards.

The proposed long-term liquidity and funding requirements would complement the proposed short-term 30-day and intermediate-term 365-day requirements. For example, these two long-term liquidity and funding requirements complement the 30-day requirement's goal of improving resilience to short-term economic and financial stress by focusing on the stability of an Enterprise's structural funding profile over a longer, one-year time horizon. In a financial crisis, financial institutions like the Enterprises during the crisis that lack longer-term stable funding sources may be forced by creditors to monetize assets at the same time, driving down asset prices, like those price declines in the PLS market and commercial mortgage backed securities market in the 2008 financial crisis. The proposed rule would mitigate such risks by directly increasing the funding resilience of the Enterprises, thereby indirectly increasing the overall resilience of the U.S. financial system.

The proposed two longer-term requirements would also provide a standardized means for measuring the stability of an Enterprise's funding structure, promote greater comparability of funding structures across the Enterprises, improve transparency, and increase market discipline through the proposed rule's monthly public disclosure requirements.

Given the lack of retail and wholesale deposits and the relative simplicity of the Enterprises' funding structure, FHFA proposes a simplified approach for its first long-term liquidity and funding requirement, which compares the amount of an Enterprise's long-term unsecured debt (*i.e.,* longer than one year to maturity) to the amount of its less-liquid assets in the retained portfolio. Under the proposed rule, the minimum ratio for this metric is 120 percent. While proposing a simpler approach than the U.S. banking regulators, the proposed rule makes conservative assumptions about what constitutes a less-liquid asset that requires longer term funding, like collateralized mortgage obligations (CMOs) noted below.

Because the Enterprises lack access to the discount windows of any of the twelve Reserve Banks in the Federal Reserve System, FHFA proposes that only assets that are eligible to be posted as collateral through the FICC can be counted as liquid assets and all other assets, even some agency securities like agency CMOs, would be considered less-liquid and require long-term funding.

To address the funding of other long-term assets, FHFA also proposes to include a second long-term liquidity and funding requirement based on the ratio of the spread duration of the Enterprise's unsecured agency debt divided by the spread duration of its retained portfolio assets. The proposed rule would require that an Enterprise's spread duration ratio exceed 60 percent. This proposed long-term requirement will cause the Enterprises to maintain an appropriate amount of long-term unsecured debt and reduce rollover risk. As a result of this requirement, the Enterprises will have incentive to better match the repricing risk of their debt with the repricing of their assets. It will also minimize the risk that an Enterprise would be forced to sell significant amounts of long-term asset into distressed markets.

2. Long-Term Liquidity and Funding Requirements

The proposed rule would require the Enterprises to meet two long-term liquidity and funding requirements for the purpose of: (i) Reducing Enterprise debt maturity rollover risk; (ii) Ensuring that the Enterprises have sufficient long-term unsecured debt so they do not have to sell less-liquid assets into potentially stressed markets for at least one year; (iii) Incenting the Enterprises to issue an appropriate amount of long-term unsecured debt; and (iv) Incenting the Enterprises to reduce the amount of less-liquid assets held in the retained portfolio that are not eligible collateral for inclusion in the 365-day liquidity requirement. These two long-term liquidity and funding requirements complement each other. The first ensures that less-liquid assets are funded with long-term unsecured debt. The second ensures that the rollover and repricing of the unsecured debt is tied to the repricing of all the retained portfolio assets, not simply the less-liquid assets.

a. Long-Term Unsecured Debt to Less-Liquid Asset Ratio

The proposed rule would include a long-term liquidity and funding requirement that the Enterprises manage their issuance of long-term unsecured debt and their holdings of less-liquid securities to ensure that the ratio of the Enterprises' long-term unsecured debt to its less-liquid assets is greater than 1.2, or 120 percent.

Under the proposed rule, the numerator is the three-month moving average of the UPB of all outstanding Enterprise unsecured debt with one year or longer to maturity. The maturity of the unsecured debt is based on the final maturity of unsecured debt and not the call date. The denominator is the three-month moving average of all assets held in the retained portfolio that are not eligible collateral to be pledged to the FICC. For example, CMOs held by the Enterprises are not eligible to be pledged to the FICC and would be included in calculating the denominator.

The proposed rule would allow the Enterprises to exclude certain relatively liquid loans from the denominator. For example, the proposed rule assumes that cash window loans or whole loan conduit loans, and reperforming loans that have no delinquencies in prior six months, can be readily converted into FICC-eligible collateral. Therefore, these loans would not be included in the denominator. In addition, certain multifamily pass-through securities held by the Enterprises are eligible to be pledged to the FICC but other multifamily structured securities arising from the K-deals are not eligible to be pledged to the FICC and would be included in the denominator.

Question 13. Should FHFA broaden the definition of ''liquid assets'' to include certain non-FICC eligible assets, such as multifamily agency securities arising from K-deal transactions? If so, what criteria should FHFA use?

b. Spread Duration of Unsecured Debt To Spread Duration of Assets Requirement

The proposed rule would include a second long-term requirement that measures the ratio of the spread duration of an Enterprise's unsecured debt to the spread duration of its retained portfolio assets. FHFA recognizes that effective duration is often defined as the percentage change in the price of financial instruments with embedded options from a 100-basis point change in interest rates. Financial instruments with positive duration increase in value as interest rates decline. Conversely, financial instruments with negative duration increase in value as interest rates rise. FHFA also recognizes that spread duration is often defined as the percentage change in the price of financial instruments from a change in spread over the benchmark interest rates. Unlike ''effective'' duration, spread duration is typically calculated by discounting of an instrument's cashflows, and not by the affecting a change of the underlying cashflows themselves due to optionality. This discounting impact creates a measure that is typically positive, where the instrument increases in value as spreads decline and decrease in value as spreads widen.

Under the proposed rule, the numerator of the ratio is the three-month moving average of the daily spread duration of all Enterprise unsecured debt. The denominator of the ratio is the three-month moving average of the daily spread duration of all Enterprise retained portfolio assets. The proposed rule would require that this ratio exceed 0.6 or 60 percent.

The numerator is the three-month moving average of the daily spread duration of all Enterprise unsecured debt. The daily spread duration of all Enterprise unsecured debt on a particular day equals the weighted average of the individual spread duration for each unsecured debt instrument weighted by the product of the UPB and the market price for the unsecured debt instrument for that day. Determining the spread duration for all unsecured debt requires that an appropriate estimate be made for each unsecured debt instrument. In addition, using a three-month moving average for the weighted balance sheet spread durations reduces potential impact of daily fluctuations on compliance management. The three-month moving average of the daily spread duration of all Enterprise unsecured debt is equal to the sum of the daily spread duration for all Enterprise unsecured debt for each business day over the three-month period preceding the calculation date divided by the total number of business days during the three-month period.

The denominator is the three-month moving average of the daily spread duration of all Enterprise retained portfolio assets. The daily spread duration of all Enterprise assets on a particular day equals the weighted average of the individual spread duration for each asset weighted by the product of the UPB and the market price for the retained portfolio asset for that day. The three-month moving average of the daily spread duration of all Enterprise retained portfolio assets is equal to the sum of the daily spread duration for all Enterprise assets for each business day over the three-month period preceding the calculation date divided by the total number of business days during the three-month period.

The proposed rule would provide additional assumptions that the Enterprises are to use in the calculation of this long-term liquidity and funding requirement. The proposed rule would allow the Enterprises to make the following adjustments to the spread duration of specific retained portfolio assets and unsecured debt:

- For callable unsecured debt, the proposed rule would allow the Enterprises to use the maturity of the callable debt rather than the actual spread duration of the callable debt because the Enterprise does not have the obligation to call the debt early and can, in a liquidity event, decide not to call the bond.
- For certain single-family and multifamily loans in the securitization pipeline, the proposed rule would allow the spread duration to be adjusted to better reflect the expected holding period of the loans before securitization and sale of these loans. For example, provided that the actual experience of the Enterprise can support these pipeline securitization assumptions, the proposed rule would allow a single-family loan in the securitization process to be assigned a two-month spread duration, and a multifamily loan in the securitization pipeline to be assigned a six-month spread duration. FHFA supervision teams will evaluate the underlying support for key assumptions, like this spread duration assumption, as part of ongoing supervisory activities.
- For certain trust structures, like those that are consolidated for GAAP purposes or credit risk transfer related trusts, the proposed rule would allow certain trust related assets to be excluded, as the trust structures are not funded by unsecured corporate debt but rather by debt issued by the trust and backed by the assets in the trust. In essence, the debt issued by MBS trusts and the loans in the MBS trusts that secure the debt are closely matched and the Enterprise does not have funding risk and thus these assets and liabilities are not included in this spread duration requirement. Similarly, certain credit risk transfer trusts, created by Fannie Mae (Connecticut Avenue Securities Credit-Linked Notes) and Freddie Mac (Structured Agency Credit Risk Credit-Linked Notes) are not included in this spread duration requirement. For the original credit risk transfers that did not include a credit-linked note structure, the Enterprises are required to include those as they represent unsecured debt issued by the corporation.
- The proposed rule would allow the Enterprises to exclude high quality liquid assets held in the liquidity portfolio from the denominator of the calculation because these assets are deemed to be liquid securities that do not require term funding and can be readily liquidated into cash. Similarly, the collateral used to post as initial margin is excluded from the spread duration asset calculation for this requirement.

Question 14. FHFA requests comment on whether the spread duration requirement appropriately addresses the concerns noted above, or whether there are alternative approaches to do so? Does the value of including the spread duration requirement exceed the costs and complexity of the calculation?

c. Funding From Stockholders Equity

Under the two longer-term proposed requirements, the Enterprises would be required to identify the maturity of unsecured debt instruments based on their contractual maturity. Other balance sheet sources of funds, like stockholder's equity, typically do not have a contractual maturity. In the case of stockholder's equity, the proposed rule treats these funding sources as short-term funding substitutes and does not attribute any maturity to these sources of funds beyond one year.

Question 15. FHFA requests comment on whether some portion of stockholder's equity should be considered as a longer-term funding source for the long-term liquidity and funding requirements? If so, why? If so, what analytics would support this assumption?

*C. Temporary Reduction of Liquidity Requirements*

FHFA recognizes that during periods of economic dislocation or market stress, it may be necessary for an

Enterprise, consistent with safety and soundness, to expend its liquidity position in order to support market liquidity to the secondary mortgage market. Such support may be necessary during periods of market stress to further an Enterprise's statutory public purposes, and may require, for example, that an Enterprise be provided flexibility to meet a reduced 30-day liquidity minimum in order to fund severe stress liquidity needs and to continue to provide liquidity to the secondary mortgage markets.

Therefore, the proposed rule would provide for temporary reductions in minimum liquidity requirements to address economic, market, or other circumstances. Specifically, it would provide for FHFA consideration and determination that, due to economic or market conditions, temporary adjustments to reduce the minimum liquidity requirements are needed to address those conditions. FHFA's exercise of this authority is intended to further Enterprise public purposes in supporting secondary mortgage market liquidity during periods of severe economic or market stress.

Question 16. FHFA seeks comment on all aspects of the proposed process for FHFA temporarily to reduce minimum regulatory liquidity requirements to respond appropriately during periods of economic or market stress.

## III. Liquidity Risk Management Reporting

The proposed rule would require each Enterprise to report daily to FHFA its compliance with the minimum liquidity requirements. The Enterprises shall submit such reports at the close of each business day, which is treated as Day 0, reflecting the liquidity positions and other required information as of 6 p.m. EST on Day 0. Such reports shall include, at a minimum, the key stress scenario assumptions discussed in the preamble, including a summary of the respective cash flows and other significant information and any other key assumptions used to calculate the four liquidity requirements. In some cases, this may require supplemental reports to explain individual key stress cash flows, like the purchases of delinquent loans and the purchases of cash window and whole loan conduit loans. These supplemental reports could also include, but are not limited to, the composition of both the FICC-eligible and non-FICC eligible collateral and the components of the spread duration calculations.

The proposed rule would provide enhanced information about the short-term, intermediate-term and long-term liquidity and funding profile of the Enterprises to managers, board directors, and supervisors. With this information, the Enterprise's management and supervisors would be better able to assess the Enterprise's ability to meet its projected liquidity needs during periods of liquidity stress, take appropriate actions to address liquidity needs, and, in situations of failure, to implement an orderly resolution of the Enterprise.

The proposed rule's 30-day and 365-day liquidity requirements would use Enterprise cash flow projections and certain assumptions based on stressed market conditions. While the short-term and intermediate-term liquidity requirements would use specific assumptions specified by FHFA (including by order) for liquidity requirement calculation purposes, FHFA expects the Enterprises would maintain robust stress testing frameworks that incorporate additional scenarios, like lower rate environments that might trigger calling debt. Enterprises should use these additional scenarios in conjunction with the proposed rule's liquidity requirements to appropriately determine their board and management liquidity buffers. FHFA notes that the four liquidity requirements are minimum requirements and organizations, like the Enterprises, that pose more systemic risk to the U.S. financial system or whose liquidity stress testing indicates a need for higher liquidity buffers may need to take additional steps beyond meeting the minimum ratio in order to meet supervisory expectations.

The proposed rule contemplates alignment between the Enterprises for the daily reporting of the liquidity and funding requirements and may, by order, require a common template that demonstrates the sources and uses of cash and the increased cash outflows or reduced cash inflows resulting from the seven stress scenarios. The objective is to ensure that management and supervisors have a transparent and readily comparable view into the key assumptions and resulting cash flows or metrics.

The proposed rule would require each Enterprise to report to the public its compliance with the four liquidity requirements monthly. Each Enterprise currently publishes a monthly volume summary that includes important information that the public consumes. The proposed rule would require the Enterprises to amend their respective monthly volume summaries and provide the average and month-end metrics for each of the four liquidity and funding requirements. In addition to the liquidity metrics, the Enterprises should include key assumptions used to estimate these liquidity metrics. FHFA may, by order, decide to include additional reporting requirements.

Question 17. FHFA invites public comment on all aspects of the proposed process and minimum elements for regulatory, management, and public reporting.

## IV. Supervisory Framework

### *A. Liquidity Requirement Shortfall*

Under the proposed rule, an Enterprise would be required to notify FHFA on any business day that any of the four liquidity requirements is not met. Specifically, if an Enterprise's liquidity position is calculated to be less than any of the minimum liquidity requirements, the Enterprise must promptly submit to FHFA for approval a plan for achieving compliance, unless FHFA instructs otherwise. In addition, if FHFA determines that the Enterprise is otherwise non-compliant with the requirements of this part, FHFA may require the Enterprise to submit to FHFA for approval a plan to remediate the shortfall. The Enterprise plan must include, as applicable: (1) An assessment of the Enterprise's liquidity profile and the reasons for the shortfall; and (2) The actions that the Enterprise has taken and will take to achieve full compliance with this part, including: (i) A plan for adjusting the Enterprise's risk profile, risk management, and funding sources in order to achieve full compliance with this part; (ii) A plan for remediating any operational or management issues that contributed to noncompliance with this part; (iii) Best estimate time frame for achieving full compliance with this part; and (iv) A commitment to report to FHFA daily on Enterprise progress to achieve compliance in accordance with the plan until full compliance with this part is achieved. Finally, the Enterprise plan must include other considerations or actions as may be required for FHFA approval.

FHFA engagement with the Enterprise on a remediation plan does not preclude exercise of other supervisory or enforcement authorities. FHFA may, at its sole discretion, take additional supervisory or enforcement actions to address non-compliance with the requirements of this part, including non-compliance with the minimum liquidity requirements or non-compliance with any requirement to submit a liquidity plan acceptable to FHFA. The liquidity remediation plan is intended to enable FHFA to monitor and respond appropriately to the unique

circumstances giving rise to an Enterprise's liquidity shortfall.

Question 18. FHFA invites public comment on all aspects of FHFA's proposed process to respond appropriately to Enterprise shortfalls in required liquidity.

*B. Process for Supervisory Determination of Temporarily Increased Liquidity Requirements*

The Board of Directors and senior management of the Enterprises have duties under applicable law to oversee, monitor, and manage Enterprise liquidity risk prudently. FHFA recognizes that under certain circumstances, it may be necessary for an Enterprise to enhance its liquidity position commensurate with its business activities. Under the proposed rule, when FHFA determines that, due to economic, market, or Enterprise-specific circumstances, temporary modified Enterprise liquidity requirements above those established under this part are necessary or appropriate for an Enterprise, FHFA will notify the Enterprise in writing of the proposed modified Enterprise liquidity requirements, the timeframe by which the Enterprise is required to achieve and comply with the proposed requirements, and an explanation of why the proposed modified Enterprise liquidity requirements are considered necessary or appropriate for the Enterprise.

The Enterprise may respond in writing within 30 days, or such time as FHFA may require, to any or all of the matters addressed in the notice, including any information which the Enterprise would like FHFA to consider in determining whether to establish the proposed modified liquidity requirements for the Enterprise. Failure to respond shall constitute a waiver of any objections to the proposed modified liquidity requirements or the timeframes for compliance.

After the close of the Enterprise response time period, FHFA will determine whether to establish the temporarily increased requirements for the Enterprise. FHFA will notify the Enterprise of its written determination and order effectuating the modified requirements. As part of its determination, FHFA may require the Enterprise to develop and submit a plan acceptable to FHFA to reach the modified liquidity requirements.

These procedures are intended to enable FHFA to monitor and respond appropriately to the particular economic, market, or Enterprise-specific circumstances by adjusting the minimum liquidity requirements through a temporary increase.

Question 19. FHFA invites public comment on all aspects of FHFA's proposed procedures to respond appropriately and in a timely manner to economic, market, Enterprise-specific, or other circumstances affecting Enterprise liquidity, safety and soundness, and ability to meet their public purposes.

## V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from the Office of Management and Budget (OMB). The proposed rule contains no such collection of information requiring OMB approval under the PRA. Therefore, no proposed collection of information has been submitted to OMB for review.

## VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, would not have a significant economic impact on a substantial number of small entities because the proposed rule is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

## The Proposed Rule

### List of Subjects in 12 CFR part 1241

Administrative practice and procedure, Government-sponsored enterprises, Reporting and recordkeeping requirements.

### Authority and Issuance

Accordingly, for the reasons stated in the preamble, under the authority of 12 U.S.C. 4526, FHFA proposes to amend Chapter XII of Title 12 of the Code of Federal Regulations as follows:

**CHAPTER XII—Federal Housing Finance Agency**

**Subchapter C—Enterprises**

■ 1. Add part 1241 to subchapter C to read as follows:

# PART 1241—MINIMUM ENTERPRISE LIQUIDITY REQUIREMENTS

**Subpart A—General Provisions**



**Subpart B—Required Minimum Enterprise Liquidity**



**Subpart C—Reporting Requirements**



**Subpart D—Supervisory Framework for Remediating Minimum Liquidity**



**Subpart E—[Reserved]**

**Authority:** 12 U.S.C. 4511(b); 12 U.S.C. 4513(a); 12 U.S.C. 4513b; 12 U.S.C. 4514; 12 U.S.C. 4526; 12 U.S.C. 4631–4636.

## Subpart A—General Provisions

### § 1241.1 Purpose and applicability.

(a) *Purpose.* FHFA is responsible for supervising and ensuring the safety and soundness of the regulated entities. In furtherance of those responsibilities, this part sets forth minimum liquidity and related requirements that apply to each Enterprise. (b) *Applicability.* The requirements established by this part apply to the Enterprises, and do not apply to the Federal Home Loan Banks or the Office of Finance.

### § 1241.2 Supervisory and enforcement authority.

(a) *Exercise of authority.* If FHFA determines that the Enterprise's liquidity requirements as calculated under this part are not commensurate with its liquidity risks, FHFA may, consistent with § 1241.31, require an Enterprise temporarily to hold an amount of High Quality Liquid Assets or other liquidity assets in an amount greater than otherwise required under this part, or to take any other measure to improve an Enterprise's liquidity risk profile.

(b) *No safe harbor.* The liquidity requirements established under this part are minimum requirements. Compliance with this part does not preclude agency action to enforce any other provision of law or regulation, including 12 CFR parts 1236 and 1239.

(c) *FHFA supervisory and enforcement authority not affected.* Nothing in this part shall be construed to limit the authority of FHFA under any other provision of law or regulation to take supervisory or enforcement action, including action to address unsafe or unsound practices or conditions, deficient liquidity coverage levels, or violations of law. (d) *Prudential standard.* This part is a prudential standard under 12 U.S.C. 4513b(a)(5) and 12 CFR part 1236.

**§ 1241.3 Definitions.**

For purposes of this part:

*Calculation date* means the business day as of which an Enterprise calculates its liquidity position and compliance with each of the minimum liquidity requirements established under this part.

*Cumulative Daily Net Cash Outflows (CDNCO)* means, with respect to any day within a calendar period (*i.e.,* 30-day or 365-day period) for which the CDNCO is calculated, the cumulative sum of an Enterprise's Daily Net Cash Flows starting from the first day following the Calculation Date up to and including the day in the calendar period for which the CDNCO is calculated.

*Daily Excess Requirement* means an amount equal to $10 billion.

*Daily Net Cash Flows (DNCF)* means, for any day within a calendar period (*i.e.,* 30-day or 365-day period) for which the DNCF is calculated, the Total Cash Outflows minus the Total Cash Inflows for that day. A positive DNCF represents a net cash outflow for the day, while a negative DNCF represents a net cash inflow for the day.

*Day or daily* means calendar day, and daily means pertaining to a calendar day, unless otherwise specified.

*Elected Calculation Time* means the time on the Calculation Date as of which an Enterprise must calculate its liquidity position for purposes of determining compliance with each of the minimum liquidity requirements established under this part. The Elected Calculation Time is 6 p.m. Eastern Standard Time (EST), unless the Enterprise elects a different Elected Calculation Time approved in writing by FHFA. The Enterprise may not change its Elected Calculation Time without prior written approval by FHFA.

*High Quality Liquid Assets* means, regardless of ''trading'', ''available for sale'', or ''held-to-maturity'' accounting designations, the following unencumbered assets that are owned and held by the Enterprise free of legal, regulatory, contractual, or other restrictions on the ability of the Enterprise to monetize the asset for cash, and that have not been pledged, explicitly or implicitly, to secure or provide credit enhancement for any transaction:

(1) Cash deposits held in a Federal Reserve Bank account;

(2) U.S. Treasury securities;

(3) Short-term secured loans to the Federal Reserve Bank of New York secured by U.S. Treasury securities; short-term secured loans held by the Enterprise secured by U.S. Treasury securities that clear through the Fixed Income Clearing Corporation (FICC). For short-term secured loans to the Federal Reserve Bank of New York or those cleared through the FICC, the remaining maturity term of the asset must not be longer than the greater of:

(i) 15 days; or

(ii) The number of days until the next agency mortgage-backed securities (MBS) payment date;

(4) Up to an amount not to exceed $10 billion, and subject to sufficient counterparty credit risk limits on deposits with any single institution and affiliated institutions, unsecured overnight bank deposits with a federally chartered bank where the bank and any holding company controlling the bank are headquartered in the United States, and where the bank is subject to quarterly reporting under the Federal Reserve System's FR Y–15 reporting requirements (or any amended or successor report) and has at least $250 billion in assets as of the most recent reporting date.

*Highest Cumulative Daily Net Cash Outflows (HCDNCO)* means, with respect to a calendar period (i.e., 30-day or 365-day period), the greater of zero or the maximum Cumulative Daily Net Cash Outflows amount occurring within the calendar period.

*Minimum Stress Assumptions* has the meaning set forth in § 1241.10(d).

*Spread Duration of Unsecured Debt* has the meaning set forth in § 1241.11(c)(2)(ii)(A).

*Spread Duration of Retained Portfolio Assets* has the meaning set forth in § 1241.11(c)(2)(ii)(B).

*Total Cash Inflows* means, for any day for which Total Cash Inflows is calculated, all cash inflows into the Enterprise. Total Cash Inflows includes cash inflows from To-be-Announced (TBA) contracts held by the Enterprise on or before the Calculation Date, which are assumed to be valid and represent cash inflows on the contract settlement date. With respect to any MBS trust-related cash flows, an Enterprise must include the total cash inflows to the Enterprise from its MBS trusts. Total Cash Inflows must be determined using the Minimum Stress Assumptions. For example, total Cash Inflows do not include any expected cash inflows from new debt issuance, unless the unsecured debt issuance has traded but not yet settled as of the Calculation Date. For cash inflows expected from mortgage sales or securitizations, calculations of Total Cash Inflows are limited consistent with the Minimum Stress Assumptions.

*Total Cash Outflows* means, for any day for which Total Cash Outflows is calculated, all cash outflows from the Enterprise. Total Cash Outflows includes, but is not limited to, cash outflows related to funding new mortgage purchases through the Enterprise facilities for purchasing mortgages in exchange for cash, *i.e.,* the Freddie Mac cash window or the Fannie Mae whole loan conduit. With respect to any MBS trust-related cash flows, an Enterprise must include the total cash outflows from the Enterprise to its MBS trusts. Total Cash Outflows must be determined using the Minimum Stress Assumptions. MBS trust-related cash outflows include advances paid by the Enterprise on principal and interest to MBS trusts and investors and delinquent loan buyouts.

*Total Less-liquid Retained Portfolio Assets* has the meaning set forth in § 1241.11(c)(1)(ii).

*Total Long-term Unsecured Debt* has the meaning set forth in § 1241.11(c)(1)(i).

## Subpart B—Required Minimum Enterprise Liquidity

**§ 1241.10 Enterprise liquidity calculation and operational requirements.**

(a) *Calculation date for minimum liquidity requirement.* An Enterprise must, on each business day, calculate its liquidity position and compliance with the minimum liquidity requirements established under § 1241.11(a) and (b) for a 30-day period and a 365-day period, and under § 1241.11(c) for the long-term liquidity requirements.

(b) *Elected Calculation Time.* The Enterprise must calculate its liquidity position and compliance with the minimum liquidity requirements established under § 1241.11(a) and (b) for a 30-day period and a 365-day period, and under § 1241.11(c) for the long-term liquidity requirements, as of

the Elected Calculation Time on each Calculation Date. Unless the Enterprise elects a different Elected Calculation Time by written notice approved by FHFA, the Elected Calculation Time will be 6 p.m. EST. The Enterprise may not change its Elected Calculation Time without prior written approval by FHFA.

(c) *Operational requirements for High Quality Liquid Assets.* An Enterprise must meet the following requirements for assets held as High Quality Liquid Assets for purposes of meeting the minimum liquidity requirements:

(1) Implement and maintain appropriate procedures and systems to monetize the High Quality Liquid Assets at any time in accordance with applicable standard settlement procedures;

(2) Conduct periodic testing of the effectiveness and ability of Enterprise procedures and systems to monetize a sample of High Quality Liquid Assets held;

(3) Implement and maintain policies requiring all High Quality Liquid Assets to be controlled by the Enterprise management function responsible for managing Enterprise liquidity risk, including a requirement that the High Quality Liquid Assets be segregated from other Enterprise assets for the sole purpose of providing liquidity to the Enterprise in times of market stress; and

(4) Implement and maintain policies and procedures that, on a daily basis:

(i) Identify where the High Quality Liquid Asset is held by legal entity, geographic location, currency, custodial or bank account, and other relevant identifying factors; and

(ii) Determine that the assets held as High Quality Liquid Assets continue to qualify as High Quality Liquid Assets.

(d) *Minimum Stress Assumptions.* An Enterprise must use the Minimum Stress Assumptions in determining its Total Cash Inflows and Total Cash Outflows to calculate its liquidity position and compliance with the minimum liquidity requirements established under § 1241.11(a) and (b) for a 30-day period and a 365-day period, and under § 1241.11(c) for the long-term liquidity requirements. *Minimum Stress Assumptions* means the following stress scenarios:

(1) *Complete loss of enterprise ability to issue unsecured debt.* In determining its cash inflows and outflows, the Enterprise must assume it is unable to issue any unsecured debt or receive cash from any unsecured debt issuance for the 365 days following the Calculation Date, except for unsecured debt traded but not yet settled as of the Calculation Date.

(2) *Continued mortgage purchases from enterprise cash window and whole loan conduit, with limited ability to sell or securitize mortgages*—(i) *Single-family.* In determining its cash inflows and outflows from its single-family mortgage operations, the Enterprise must:

(A) Assume it must continue to fund all forecasted single-family mortgage purchases based on Enterprise models for 30 days and 365 days, respectively, following the Calculation Date.

(B) Assume that, except for mortgages to be delivered under TBA contracts that are cleared through FICC and held by the Enterprise as of the Elected Calculation Time on the Calculation Date, it is unable to sell or securitize any mortgages until the later of 60 days following the Calculation Date or 30 days following acquisition of the mortgage.

(C) Not include in its cash inflow calculations mortgage sales on existing TBA contracts in excess, as of any Calculation Date, of existing Enterprise mortgage purchases and commitments to purchase mortgages.

(D) Not double-count its cash inflows for the sale or securitization of a mortgage and from cash inflows arising from an existing TBA contract on that mortgage. For example, an Enterprise may include a cash inflow from the sale of a mortgage, but if so, it may not also incorporate a cash inflow from a TBA contract associated with the same mortgage.

(ii) *Multifamily.* In determining its cash inflows and outflows from its multifamily mortgage operations, the Enterprise must:

(A) Assume it must continue to fund all forecasted multifamily mortgage purchases over 30 days and 365 days, respectively, following the Calculation Date.

(B) For any multifamily mortgage that an Enterprise acquires and receives delivery of on or before the Calculation Date, assume it sells or securitizes such mortgage, and receives corresponding cash inflow, starting on day 91 following the Calculation Date, provided that the Enterprise held such a loan for a total of 180 days.

(C) For any multifamily mortgage that an Enterprise acquires and receives delivery of after the Calculation Date, assume it is unable to sell or securitize such mortgage until at least 180 days following acquisition and delivery. An Enterprise may assume, to the extent it sufficiently documents the factual basis for the assumption, that it is able to sell or securitize a multifamily mortgage after a certain number of days following acquisition of the mortgage, provided that the assumed number of days is not less than 180 days.

(3) *Increase in borrower delinquencies under stress conditions.* In determining its cash inflows, the Enterprise must assume the number of borrowers failing to make scheduled principal, interest, tax, and insurance payments under their mortgages increases consistent with a stress scenario. The Enterprise must assume that the Enterprise is required to advance principal, interest, tax, and insurance payments as required under its MBS trust agreements, and consistent with its servicing agreements. To determine the stress increase in borrowers, the Enterprise must use either the following assumed stress scenarios, whichever results in the greater stress estimate of borrowers failing to make scheduled mortgage payments:

(i) The most recent Dodd-Frank Act Stress Test (DFAST) severe stress scenario assumptions provided to the Enterprise by FHFA; or

(ii) Other stress scenarios as FHFA may prescribe by order.

(4) *Increase in delinquent loan buyouts from enterprise-guaranteed MBS under stress conditions.* (i) In determining its cash outflows, the Enterprise must determine stress volumes of delinquent loan buyouts from its guaranteed MBS for 30 days following the Calculation Date, and for 365 days following the Calculation Date. To make such determination, the Enterprise must use either of the following assumed stress scenarios, whichever results in the greater stress estimate of delinquent mortgage buyouts:

(A) The most recent DFAST severe stress scenario assumptions provided to the Enterprise by FHFA, or

(B) Other stress scenarios as FHFA may prescribe by order.

(ii) An Enterprise may assume, to the extent that it sufficiently documents the evidentiary basis for the assumption, that it could sell delinquent mortgages forecasted to be repurchased from pools beginning a certain number of days from the forecasted repurchase date, provided that the assumed number of days is not less than 180 days.

(5) *Immediate need to meet collateral requirements to maintain access to short-term lending market.* In determining its cash outflows, the Enterprise must assume a cash outflow, on the first day following the Calculation Date (*i.e.,* Day 1), in the amount of initial collateral that the FICC requires the Enterprise to post in order to access the FICC facility for the calendar month following the Calculation Date. If the FICC has not yet

informed the Enterprise of the required amount of initial collateral for the following month, the Enterprise must use its best estimate of the required FICC initial collateral.

(6) *Immediate need to advance funds under variable-rate demand bond liquidity facilities.* In determining its cash outflows, the Enterprise must assume that all contingent liabilities and associated cash flows related to all variable-rate demand bonds whose liquidity is guaranteed by the Enterprise are immediately exercised and due, with the required cash outflows occurring the first day following the Calculation Date (*i.e.,* Day 1). (7)

*Increase in remittance shortfall by top non-bank seller-servicers under stress conditions.* In determining its cash inflows, the Enterprise must assume for the first month only that its top-five largest non-bank servicers by unpaid principal balance (UPB) fail, for all loans serviced for the Enterprise by these servicers, to remit by the applicable remittance due dates scheduled principal, interest, tax, and insurance payments. The Enterprise must assume cash outflows during the first month to cover principal and interest payments to holders of its MBS, and to pay taxes and insurance on the affected mortgages. For purposes of determining Total Cash Inflows, the Enterprise may assume a cash inflow on day 61 following the Calculation Date representing repayment to the Enterprises of the advances made in respect of the amounts assumed not to have been timely remitted.

**§ 1241.11 Minimum Enterprise liquidity requirements.**

(a) *Minimum required liquidity to cover 30-day period.* (1) An Enterprise must, for each Calculation Date at the Elected Calculation Time, calculate and determine its Cumulative Daily Net Cash Outflows for each day of the 30-day period beginning the day following the Calculation Date, the amount of the Highest Cumulative Daily Net Cash Outflows for the 30-day period, and the day on which the Highest Cumulative Daily Net Cash Outflows occurs for the 30-day period.

(2) As of each Calculation Date, an Enterprise must maintain High Quality Liquid Assets equal to or greater than the sum of:

(i) The Enterprise's Highest Cumulative Daily Net Cash Outflows calculated to occur over the 30-day period beginning the day following the Calculation Date, and;

(ii) The Daily Excess Requirement.

(b) *Minimum required liquidity to cover 365-day period.* (1) An Enterprise must, for each Calculation Date at the Elected Calculation Time, calculate and determine its Cumulative Daily Net Cash Outflows for each day of the 365-day period beginning the day following the Calculation Date, the amount of the Highest Cumulative Daily Net Cash Outflows for the 365-day period, and the day on which the Highest Cumulative Daily Net Cash Outflows occurs for the 365-day period.

(2) As of each Calculation Date, an Enterprise must maintain a liquidity portfolio with assets set forth in § 1241.11(b)(3) equal to or greater than the Enterprise's Highest Cumulative Daily Net Cash Outflows calculated to occur over the 365-day period beginning the day following the Calculation Date.

(3) For purposes of meeting the minimum required liquidity to cover the 365-day period following the Calculation Date, an Enterprise must hold assets consisting of:

(i) High Quality Liquid Assets;

(ii) Subject to a discount of 15 percent of the UPB forecasted to remain on the day on which the Highest Cumulative Daily Net Cash Outflows occur, Enterprise-guaranteed MBS that are eligible as collateral for FICC; or

(iii) Subject to a discount of 15 percent of the UPB forecasted to remain on the day on which the Highest Cumulative Daily Net Cash Outflows occur, mortgage loans that the Enterprise purchased through its cash window or whole loan conduit, or re-performing loans previously purchased from Enterprise MBS trusts, that are readily securitized into MBS that would be eligible as collateral for FICC.

(A) A single-family mortgage loan purchased through the cash window or whole loan conduit is deemed not readily securitized within the first 60 days following the Calculation Date, and is deemed readily securitized 30 days following the acquisition date of the loan if the loan was acquired after the first 30 days following the Calculation Date.

(B) For re-performing loans previously purchased out of Enterprise MBS trusts, such loans must be re-performing for at least 180 days in order to be deemed readily securitized into FICC-eligible collateral.

(c) *Minimum required long-term liquidity*—(1) *Ratio of Total Long-term Unsecured Debt to Total Less-liquid Retained Portfolio Assets must exceed 120 percent.* As of each Calculation Date, an Enterprise must maintain its Total Long-term Unsecured Debt in a proportion greater than 120 percent to its Total Less-liquid Retained Portfolio Assets, such that Total Long-term Unsecured Debt divided by Total Less-liquid Retained Portfolio Assets exceeds 1.2 (*i.e.,* 120 percent).

(i) Total Long-term Unsecured Debt means the three-month moving average of the total UPB outstanding of all unsecured debt issued by the Enterprise with one year or longer to maturity remaining from the Calculation Date.

(ii) Total Less-liquid Retained Portfolio Assets means the three-month moving average of the UPB of all retained portfolio assets that are not eligible collateral to be pledged to the FICC. Loans purchased through the cash window or whole loan conduit and reperforming loans that are readily securitized into FICC-eligible collateral as described in § 1241.11(b)(3)(iii) are not included in Total Less-liquid Retained Portfolio Assets.

(2) *Ratio of Spread Duration of Unsecured Debt to Spread Duration of Retained Portfolio Assets must exceed 60 percent*—(i) *Enterprise election of spread duration methodology.* An Enterprise must, by the effective date of this part, sufficiently document its methodology to determine the spread duration of its unsecured debt and its retained portfolio assets. An Enterprise may not change its spread duration methodology without prior written approval from FHFA.

(ii) *Ratio of Spread Duration of Unsecured Debt to Spread Duration of Retained Portfolio Assets must exceed 60 percent.* As of each Calculation Date, an Enterprise must maintain its Spread Duration of Unsecured Debt in a proportion greater than 60 percent to its Spread Duration of Retained Portfolio Assets, such that its Spread Duration of Unsecured Debt divided by its Spread Duration of Retained Portfolio Assets exceeds 0.6.

(A) The Spread Duration of Unsecured Debt equals the three-month moving average of the daily spread duration of all Enterprise-issued unsecured debt for each business day during the previous three-month period.

(*1*) The daily spread duration of all Enterprise-issued unsecured debt on a particular business day equals the weighted average of the individual spread duration for each issue of unsecured debt weighted by the product of the UPB and the price for the issue of unsecured debt for that day.

(*2*) The three-month moving average of the daily spread duration of all Enterprise-issued unsecured debt is equal to the sum of the daily spread duration for all Enterprise-issued unsecured debt for each business day over the three-month period preceding the Calculation Date divided by the total number of business days during the three-month period.

(B) The Spread Duration of Retained Portfolio Assets equals the three-month moving average of the daily spread duration of all Enterprise retained portfolio assets funded in whole or in part by unsecured debt for each business day during the previous three-month period.

(*1*) The daily spread duration of all Enterprise retained portfolio assets funded in whole or in part by unsecured debt on a particular business day equals the weighted average of the individual spread duration for each such retained portfolio asset weighted by the product of the UPB and the price for the retained portfolio asset for that day.

(*2*) The three-month moving average of the daily spread duration of all Enterprise retained portfolio assets funded in whole or in part by unsecured debt is equal to the sum of the daily spread duration for all such Enterprise retained portfolio assets for each business day over the three-month period preceding the Calculation Date divided by the total number of business days during the three-month period.

(C) An Enterprise may use the following assumptions or exclusions for the specified assets and unsecured debt to calculate its Spread Duration of Unsecured Debt and Spread Duration of Retained Portfolio Assets:

(*1*) For callable debt issued by the Enterprise, the Enterprise may assume that it will not call its callable debt and, instead, use the maturity rather than the actual spread duration of its callable debt.

(*2*) For single-family loans that the Enterprise has purchased and that are in process of securitization, the Enterprise may assume, to the extent that the Enterprise sufficiently documents the evidentiary basis supporting the assumption, a certain holding period for the loans in order to calculate their spread duration, provided that the assumed holding period is not less than two months.

(*3*) For multifamily loans that the Enterprise has purchased and that are in process of securitization, the Enterprise may assume, to the extent that the Enterprise sufficiently documents the evidentiary basis supporting the assumption, a certain holding period for the loans in order to calculate their spread duration, provided that the assumed holding period is not less than six months.

(*4*) For Enterprise-created trusts whose assets are funded, not by unsecured debt issued by the Enterprise, but by debt issued by the respective trusts and backed by assets of the trusts, the Enterprise may exclude such trusts from its calculation of the Spread Duration of Unsecured Debt and the Spread Duration of Retained Portfolio Assets. For example, the Enterprise may exclude from its calculation of the spread duration requirement certain trusts related to credit risk transfers, *e.g.,* Freddie Mac STACR CLN Trusts and Fannie Mae CAS CLN Trusts.

(*5*) For High Quality Liquid Assets, an Enterprise may exclude such assets from its calculation of Spread Duration of Retained Portfolio Assets. An Enterprise may also exclude from its calculation of Spread Duration of Retained Portfolio Assets, Treasury assets that are posted as collateral with the FICC for initial margin.

#### § 1241.12 Temporary reduction of liquidity requirements.

An Enterprise is not required to meet one or more of the minimum liquidity requirements if FHFA determines that, due to economic, market, or other circumstances, temporarily reduced liquidity levels are necessary or appropriate for the Enterprises to support liquidity in the secondary mortgage market. Such determination shall be evidenced by an FHFA order, which shall set forth the adjusted minimum liquidity requirements applicable to the Enterprise, and be temporary and time-limited to address the relevant circumstances.

### Subpart C—Reporting Requirements

#### § 1241.20 Required liquidity reporting.

(a) *Reporting to FHFA.* An Enterprise shall report to FHFA daily using the close of business position of the prior business day, the Enterprise calculations of its liquidity position and compliance under each of the minimum liquidity requirements, as of the Elected Calculation Time on the Calculation Date. Such reporting shall be in a form, manner, and content as directed by FHFA. At a minimum, the Enterprise liquidity reports shall include:

(1) The daily metric for each of the four liquidity requirements that demonstrates compliance with this part;

(2) Key stress scenario assumptions used to calculate Enterprise liquidity metrics, as well as any significant changes in those assumptions from prior reports;

(3) Summary of the respective cash flows for each of the stressed cash flow scenarios and other significant information related to the 30-day and 365-day metrics, *e.g.,* the delinquent loan purchases, and cash window and whole loan conduit purchases;

(4) Supplemental reports explaining the components of the numerator and denominator of the first long-term liquidity and funding requirement, *e.g.,* the composition of the unsecured debt and the composition of FICC-eligible and non-FICC-eligible collateral; and

(5) Supplemental reports explaining the components of the numerator and denominator of the second long-term liquidity and funding requirement, *e.g.,* the composition of the spread duration of the unsecured debt and the composition of the spread duration of the retained portfolio assets.

(b) *Minimum enterprise management reporting.* An Enterprise shall include in its internal management reports the Enterprise reports to FHFA required under paragraph (a) of this section. Enterprise management, in exercise of its prudential management obligations, may require additional reporting regarding Enterprise liquidity.

(c) *Public reporting.* An Enterprise shall make public monthly reports on its liquidity through its monthly volume summaries, reporting average and month-end liquidity positions for each of the minimum liquidity requirements including key assumptions used in the calculation of each of the four liquidity and funding requirements.

#### § 1241.21 Reporting orders.

FHFA may, by order, specify or add to the form, manner, or content of required reporting. FHFA may amend such reporting orders from time to time as appropriate.

### Subpart D—Supervisory Framework for Remediating Minimum Liquidity

#### § 1241.30 Remediation of minimum liquidity shortfall.

(a) *Notification requirements.* An Enterprise must notify FHFA in writing, beyond the regular daily FHFA reporting, on any business day that the Enterprise liquidity position is calculated to be less than any of the minimum requirements set forth in § 1241.11 or any applicable modified temporary minimum liquidity requirements ordered by FHFA. An Enterprise must also notify FHFA in writing on any business day that the Enterprise liquidity position is calculated to be less than any of the minimum liquidity limits established by the Board of the Directors of the Enterprise.

(b) *Liquidity plan.* (1) If, as of a Calculation Date, an Enterprise's liquidity position is calculated to be less than any applicable liquidity requirements, the Enterprise must submit to FHFA a plan for achieving compliance with the applicable requirements, unless FHFA instructs otherwise.

(2) If FHFA determines that the Enterprise is otherwise non-compliant with applicable requirements of this part, FHFA may require the Enterprise to submit a plan for achieving compliance with the requirements.

(3) If the Enterprise is required to submit a plan for achieving compliance with applicable requirements of this part, the Enterprise must promptly submit its plan to FHFA for approval, consistently with § 1236.4.

(4) The Enterprise plan must include, as applicable:

(i) An assessment of the Enterprise's liquidity and funding profile, and the reasons for the shortfall;

(ii) The actions that the Enterprise has taken and will take to achieve full compliance with this part, including:

(A) A plan for adjusting the Enterprise's liquidity and funding risk profile, liquidity portfolio, liquidity and funding risk management practices, and funding sources in order to achieve full compliance with this part;

(B) A plan for remediating any operational or management issues that contributed to noncompliance with this part;

(C) A best estimate time frame for achieving full compliance with this part; and

(D) A commitment to report to FHFA daily on Enterprise progress to achieve compliance in accordance with the plan until full compliance with this part is achieved.

(iii) Other considerations or actions as may be required for FHFA approval.

(c) *Supervisory and enforcement actions.* FHFA may, at its sole discretion, take additional supervisory or enforcement actions to address non-compliance with the requirements of this part, including non-compliance with the minimum liquidity requirements or non-compliance with any requirement to submit a liquidity plan acceptable to FHFA.

**§ 1241.31 Supervisory determination of temporarily increased liquidity requirements.**

(a) *Notice.* Whenever FHFA determines that, due to economic, market, or Enterprise-specific circumstances, temporary modified minimum liquidity requirements above those established under this part are necessary or appropriate for an Enterprise, FHFA will notify the Enterprise in writing of the proposed modified temporarily increased Enterprise liquidity requirements, the timeframe by which the Enterprise is required to achieve and comply with the proposed requirements, and an explanation of why the proposed modified Enterprise liquidity requirements are considered necessary or appropriate for the Enterprise.

(b) *Response.* (1) The Enterprise may respond in writing to any or all of the matters addressed in the notice. The response may include any information which the Enterprise would like FHFA to consider in determining whether the proposed temporarily increased liquidity requirements should be established for the Enterprise, and the timeframe for compliance with the proposed requirements. Any response from the Enterprise must be submitted in writing to FHFA within 30 days of the Enterprise receipt of the notice. FHFA may shorten the required Enterprise response time, when in the opinion of FHFA, the condition of the Enterprise so requires, provided that the Enterprise is informed promptly of the shortened response time, or with the consent of the Enterprise. In its discretion, FHFA may extend the Enterprise response time.

(2) Failure by the Enterprise to respond within 30 days or such other time period as may be specified by FHFA shall constitute a waiver of any objections to the proposed modified liquidity requirements or the timeframes for compliance.

(c) *Determination.* After the close of the Enterprise response time period, FHFA will determine, based on a review of the Enterprise response and other relevant information, whether the proposed requirements should be established for the Enterprise and, if so, the timeframe in which the requirements will be effective. FHFA will notify the Enterprise of its determination in writing. The determination will be accompanied by an order effectuating the modified liquidity requirements, which shall be temporary and time-limited to address the relevant circumstances. The determination will include a supporting explanation, except for a determination not to establish the proposed requirements.

(d) *Submission of plan.* FHFA's determination may require the Enterprise to develop and submit to FHFA, within a time period specified, an acceptable plan to reach and maintain the modified liquidity requirements.

## Subpart E—[Reserved]

**Mark A. Calabria,**

*Director, Federal Housing Finance Agency.*

[FR Doc. 2020–28204 Filed 1–7–21; 8:45 am]

**BILLING CODE 8070–01–P**

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1242

**RIN 2590–AB13**

### Resolution Planning

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is seeking comment on a proposed rule that would require Fannie Mae and Freddie Mac (the Enterprises) to develop plans to facilitate their rapid and orderly resolution in the event FHFA is appointed receiver. A resolution planning rule is an important part of FHFA's on-going effort to develop a robust prudential regulatory framework for the Enterprises, including capital, liquidity, and stress testing requirements, as well as enhanced oversight, which will be critical to FHFA supervision of the Enterprises after they exit the conservatorships. In addition, a resolution plan as proposed to be required would support FHFA if appointed as receiver to, among other things, minimize disruption in the national housing finance markets by providing for the continued operation of an Enterprise's core business lines by a limited-life regulated entity (LLRE); ensure that investors in mortgage-backed securities guaranteed by the Enterprises and in Enterprise unsecured debt bear losses in accordance with the priority of payments set out in the Safety and Soundness Act while minimizing unnecessary losses and costs to these investors; and, help foster market discipline in part through FHFA publication of ''public'' sections of Enterprise resolution plans.

**DATES:** Comments must be received on or before March 9, 2021.

**ADDRESSES:** You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590–AB13, by any one of the following methods:

- *Agency Website: https://www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AB13.

• *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB13, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB13, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Ellen S. Bailey, Managing Associate General Counsel, (202) 649–3056, *Ellen.Bailey@fhfa.gov;* Francisco Medina, Assistant General Counsel, (202) 649–3076, *Francisco.Medina@fhfa.gov;* Jason Cave, Deputy Director, Division of Resolutions, (202) 649–3027, *Jason.Cave@fhfa.gov;* or Sam Valverde, Principal Advisor, Division of Resolutions, (202) 649–3732, *Sam.Valverde@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

**SUPPLEMENTARY INFORMATION:**

## Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. Copies of all comments will be posted without change, and will include any personal information you provide such as your name, address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic rulemaking docket for this proposed rule also located on the FHFA website.

## Table of Contents



## I. Background; Purpose of and Need for the Rule

### *A. Business and Supervision of the Enterprises*

*Enterprise Purpose and Business.* Fannie Mae and Freddie Mac are federally chartered housing finance enterprises whose purposes include providing stability to the secondary market for residential mortgages; providing ongoing assistance to the secondary market for residential mortgages (including activities related to mortgages on housing for low- and moderate-income families) by increasing the liquidity of mortgage investments and improving distribution of investment capital available for residential mortgage financing; and, promoting access to mortgage credit throughout the United States, including central cities, rural areas, and underserved areas, by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.[1] To meet these purposes, the Enterprises are statutorily authorized to engage in limited activities—primarily, the purchase and securitization of eligible mortgage loans—and are directed to use their authority in some ways, such as meeting FHFA-established goals related to housing loans for low- and very low-income families and serving underserved housing markets.[2] Loans eligible for purchase or securitization by the Enterprises must meet statutory, regulatory, and business eligibility requirements.

Each Enterprise generally organizes its business activity into a single-family business and a multifamily business. The Enterprise business models for supporting single-family and multifamily housing consist primarily of a guarantee business. Mortgage lenders participate in the mortgage-backed securities (MBS) swap and cash window programs, originating loans in accordance with Enterprise standards and either providing those loans to an Enterprise in exchange for securities guaranteed by the Enterprise or selling loans directly to the Enterprise for cash. Among other things, the cash window enables smaller lenders to access the secondary market at competitive rates. In the portfolio business, the Enterprises issue debt and invest the proceeds in whole loans that they hold on their balance sheets rather than securitizing, and in MBS. In the past, the Enterprises have had substantial portfolio businesses. The Enterprises' ability to hold loans on their balance sheets continues to be important to support the cash window acquisition channel and to hold delinquent loans that have been bought out of pools of loans collateralizing MBS.

In both their portfolio and guarantee businesses, the Enterprises assume credit risk on purchased or securitized loans (in the MBS swap and cash programs, the Enterprise assumes the credit risk in exchange for a guarantee fee). Statutory requirements for loan purchase eligibility reduce credit risk somewhat. For example, the Enterprises may not acquire single-family loans with loan-to-value ratios (LTVs) at the time of purchase in excess of 80 percent without additional credit enhancement, the most common form of which is private mortgage insurance.[3] In both their multifamily and single-family businesses, the Enterprises may further reduce the credit risk they assume by engaging in risk management activities such as credit risk transfer (CRT) transactions, where the Enterprises pay a fee to transfer some credit risk to

[1] 12 U.S.C. 1451 (note) and 1716.

[2] *See, e.g., id.* 1454, 1723a, 4561, and 4565.

[3] 12 U.S.C. 1454(a)(2) and 1717(b)(2).

private investors.[4] Structures of CRT transactions vary.

The Enterprises' mortgage business lines require administration of cashflows derived from payments of principal and interest on underlying mortgage loans. The Enterprises contract with loan servicers (often, sellers of loans to an Enterprise who retain mortgage servicing rights) to administer payments from mortgagors. The Enterprises also jointly own and contract with Common Securitization Solutions, LLC (CSS), which operates a common securitization platform for single-family mortgages and performs certain back-office and administration operations previously conducted by the Enterprises directly (and separately). A common securitization platform also facilitates issuance of a common security, the uniform mortgage-backed security (UMBS), intended to promote liquidity in the secondary mortgage market and eliminate pricing differences between Fannie Mae and Freddie Mac single-family securities. By contrast, each Enterprise securitizes, issues, and administers multifamily MBS for its own account, using distinct collateralization structures.

While there are similarities between the Enterprises' business and that of the Government National Mortgage Association (Ginnie Mae), the Enterprises' guarantee of timely payment of principal and interest to investors is not backed by the full faith and credit of the United States.[5] The Enterprises are required to state in all of their obligations and securities that such obligations and securities, including the interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof other than the Enterprise itself.[6]

Nonetheless, because of the Enterprises' federal statutory charters and some federally conferred business privileges,[7] pricing of Enterprise obligations has reflected investor perception of a full faith and credit guarantee.[8] Investors may have been relying on this perception when deciding to invest in the Enterprises' debt and MBS at borrowing costs near that of debt issued by the federal government, despite the Enterprises' high leverage. That same perception may encourage typically conservative investors, including foreign sovereigns, to purchase Enterprise obligations and securities. The perception of an implicit guarantee thus undermines market discipline and incentivizes risk taking and growth at the Enterprises.

*Enterprise Supervision; Resolution.* As regulator and supervisor of the Enterprises, FHFA's duties include ensuring that the Enterprises operate in a safe and sound manner; foster liquid, efficient, competitive, and resilient national housing finance markets; and, operate in a manner that is consistent with the public interest.[9] In common with other federal financial safety and soundness supervisors, FHFA is authorized to examine the Enterprises and to require regular and special reports from them; to establish capital, liquidity, and other prudential management and operations standards; to require the Enterprises to submit corrective plans and take corrective actions if certain standards are not met; and, to bring enforcement actions against the Enterprises and certain ''entity-affiliated'' parties.[10]

FHFA is also authorized to appoint itself as conservator or receiver of an Enterprise if statutory grounds are met.[11] When appointed receiver of an Enterprise, FHFA must establish an LLRE which immediately succeeds to the Enterprise's federal charter and thereafter operates subject to the Enterprise's authorities and duties.[12]

FHFA's authorities as receiver or conservator were modeled on those provided to the Federal Deposit Insurance Corporation (FDIC) through the Federal Deposit Insurance Act, and the concept of an LLRE is derived from an FDIC-established bridge bank.[13] FDIC resolutions, however, involve insured depository institutions (IDIs) that pay into the FDIC's Deposit Insurance Fund (DIF) and receive, for the benefit of deposit customers, FDIC deposit insurance on deposit amounts up to a certain limit.[14] The FDIC may use the DIF when conducting a resolution and may replenish the DIF through assessments paid by thousands of IDIs.[15] To enable the FDIC ''to understand and anticipate the operational, managerial, financial and other aspects of the IDI that would complicate efforts by the FDIC as receiver to . . . determine and maximize franchise value, and conduct a least-cost [resolution],'' the FDIC has adopted a regulation requiring larger IDIs to engage in resolution planning.[16]

In contrast to FDIC resolutions, there is no fund similar to the DIF available to FHFA when conducting an Enterprise resolution.[17] Because Enterprise obligations and securities are not backed by the full faith and credit of the United States and because there is no DIF-like fund for Enterprise resolution, resolution of an Enterprise by FHFA necessarily would involve only the Enterprise's resources available to absorb losses and satisfy investor and creditor claims—Enterprise assets, capital and capital-like instruments, and contracts that transfer risk of loss to third parties.

### *B. FHFA Appointment as Conservator for the Enterprises; Actions Necessary to End the Conservatorships*

The 2007–2008 financial crisis began with stresses in the ''subprime'' and ''Alt-A'' mortgage market and grew to the traditional mortgage market and other financial sectors in the United States and globally.[18] As asset prices fell and other large financial firms failed, it became increasingly difficult for the Enterprises to issue debt to fund their retained portfolios, to raise new capital to cover mark-to-market losses from private label securities the Enterprises

[4] *See https://www.fhfa.gov/AboutUs/Reports/Pages/Overview-of-Fannie-Mae-and-Freddie-Mac-Credit-Risk-Transfer-Transactions-8212015.aspx,* and other reports at *https://www.fhfa.gov/PolicyProgramsResearch/Policy/Pages/Credit-Risk-Transfer.aspx.*

[5] *Compare* 12 U.S.C. 1717(a)(2)(A), 1455(h)(2), and 1719(d); *see also id.* 4501(4) and 4503.

[6] *Id.* 1455(h)(2) and 1719(d). Since September 2008, the Enterprises have been provided explicit, but limited, support by the U.S. Department of the Treasury through Senior Preferred Stock Purchase Agreements (PSPAs) to assure continuing operation of the Enterprises in conservatorships. *See https://www.fhfa.gov/Conservatorship/Pages/Senior-Preferred-Stock-Purchase-Agreements.aspx.* The PSPAs currently remain in place, although they are meant to be temporary, and the PSPA for each Enterprise establishes a limit or cap on the amount of support Treasury will provide, so they are not an exercise of the full faith and credit of the United States. More information on the Enterprise conservatorships and the PSPAs is set forth below in section B, FHFA Appointment as Conservator of the Enterprises; Actions Necessary to End the Conservatorships.

[7] The Enterprises may be depositories of public money; are exempt from almost all federal, state, and local taxation; and, are not required to be licensed to do business in any state. *Id.* 1452(d) and (e), 1456(a), 1723a(c)(2), and 1723a(a). Enterprise securities are exempt securities within the meaning of laws administered by the Securities and Exchange Commission, and the Secretary of the Treasury may purchase their obligations and may do so with public money. *Id.* 1455(c) and (g), 1719(c) and (e), and 1723c.

[8] *See https://www.fhfa.gov/PolicyProgramsResearch/Research/Pages/Working-Paper-07-4.aspx.*

[9] 12 U.S.C. 4513(a)(1)(B).

[10] *See generally, id.* 4513b, 4514, 4517, 4611, 4622, and 4631.

[11] *Id.* 4617(a).

[12] *Id.* 4617(i)(1)(A)(ii) and (2)(A).

[13] *Compare,* 12 U.S.C. 1821(c) and 4617(b); 1821(n) and 4617(i).

[14] *See generally,* 12 U.S.C. 1821.

[15] 12 U.S.C. 1817(b) and 1821(a)(4).

[16] 75 FR 27464, 27465 (May 17, 2010); *see also* 12 CFR 360.10 (2020).

[17] *See generally,* 12 U.S.C. 1817(b) and 1821(a)(4); *compare* 12 U.S.C. 1455(c)(2), 1719(c), and 4516(e).

[18] *See* 83 FR 33312, 33317 (July 17, 2018) (FHFA Notice of proposed rulemaking on Enterprise Capital Requirements, which discusses 2007–2008 financial crisis and the Enterprises).

held, and to build reserves for projected credit losses from their guarantees. In September 2008, when it was apparent that substantial deterioration in the housing market would leave the Enterprises unable to fulfill their statutory purposes and mission without government intervention, FHFA appointed itself conservator of each Enterprise.[19] At the same time, as conservator for each Enterprise, FHFA entered into the Senior Preferred Stock Purchase Agreements (PSPAs) with the U.S. Department of the Treasury (Treasury) to provide each Enterprise financial support up to a specified amount.[20] This limited support, which continues to the present, permits the Enterprises to meet their outstanding obligations and continue to provide liquidity to the mortgage markets while maintaining a positive net worth. The Enterprises required a combined $187 billion dollars in Treasury support from 2008 to 2012. However, Fannie Mae and Freddie Mac have not requested a major draw from the Treasury since 2012.[21]

FHFA appointed itself as conservator of each Enterprise in September 2008, instead of receiver, in part due to concerns about potential market instability that could have resulted from an unprecedented receivership proceeding for which FHFA and the Enterprises had not planned or prepared, which could have been compounded by market perception that all Enterprise debt was backed to some extent by the U.S. government.[22] Until July 2008, the Safety and Soundness Act did not provide for Enterprise receivership and there was no process for separating Enterprise operations between functions that were necessary to maintaining the stability of the housing market and those which were not, leaving the regulator and policymakers with limited options. The Enterprise conservatorships have now lasted for over twelve years, considerably longer than any conservatorship under the auspices of the FDIC or of the Resolution Trust Corporation, established to resolve failed thrifts following the 1989 thrift crisis.[23]

FHFA's current Strategic Plan includes the objective of responsibly ending the conservatorships.[24] In preparation, FHFA is developing a more robust prudential regulatory framework for the Enterprises, including capital, liquidity, and stress testing requirements, and enhanced supervision. The Treasury *Housing Reform Plan* noted the importance of developing a credible resolution framework for the Enterprises to protect taxpayers, enhance market discipline, and mitigate moral hazard and systemic risk.[25] FHFA believes this proposed rule is an important part of developing such a framework and is a key step toward the robust regulatory post-conservatorship framework FHFA is developing. Further, FHFA concurs with Treasury's enumeration of the benefits of a credible resolution framework. The importance of such a framework for the Enterprises is heightened by the historical precedent set by the decision to place each Enterprises in conservatorship instead of receivership. FHFA also notes that additional changes may be warranted, such as requiring each Enterprise to maintain a minimum amount of loss-absorbing capacity in the form of subordinated or convertible debt that could be ''bailed in'' should the Enterprise encounter significant financial distress, which could facilitate the establishment of a viable LLRE.[26] FHFA is considering a separate rulemaking that would require each Enterprise to maintain minimum amounts of long-term debt and other loss-absorbing capacity requirements.

In developing the proposed resolution planning framework, FHFA has considered the resolution planning framework of the FDIC for large IDIs and a framework jointly established by the FDIC and the Federal Reserve Board (FRB) pursuant to section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the DFA section 165 rule), which covers large, interconnected bank holding companies and nonbank financial companies designated by the Financial Stability Oversight Council (FSOC) for enhanced supervision by the FRB. While there would be significant differences among FDIC resolution of an IDI, resolution of a bank holding company in a bankruptcy proceeding, and FHFA resolution of an Enterprise, the FDIC's IDI rule and the DFA section 165 rule provided helpful context for FHFA's consideration of the goals and requirements of an appropriate Enterprise resolution planning framework in view of FHFA's statutory authorities and mandates.[27]

### *C. Purpose of and Need for Resolution Planning*

Considering the Enterprises' statutory purposes and mission and FHFA's statutory duties and authorities, the goals of Enterprise resolution planning are to facilitate the continuation of Enterprise functions that are essential to maintaining stability in the housing market in the establishment of an LLRE by FHFA as receiver and to allocate losses to creditors in the order of their priority. The Enterprises' combined single-family book of business is in excess of $5 trillion and the combined multifamily book is approximately $650 billion. Given the Enterprises' statutory obligation to provide liquidity to the secondary mortgage market, their market dominance in providing such liquidity, and the potentially significant impact financial stress in the secondary mortgage market could have on the national housing finance markets, financial stability, and the broader economy,[28] transferring Enterprise assets and liabilities to and continuing functions in an LLRE requires careful consideration and tailoring to the specific function of the Enterprises, despite the Enterprises' limited business lines (relative to other large and complex financial institutions) and simple corporate structures.

To facilitate FHFA's role as receiver, the proposed rule would establish a

[19] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B—Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx.*

[20] *See supra,* fn 6.

[21] Due to corporate tax law changes in 2017 that resulted in write-downs to the value of deferred tax assets, Fannie Mae received a $3.7 billion dollar draw from Treasury in 2018. This was a one-time accounting event.

[22] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B—Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx; https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-OFHEO-Director-James-B-Lockhart-in-Support-of-Secretary-Paulson,-Administration-and-the-Federal-Reserve-in-T.aspx;* and, *https://www.treasury.gov/press-center/press-releases/pages/hp1129.aspx.*

[23] By comparison, the RTC closed 706 failed thrift institution conservatorships from its establishment in 1989 through June 1995. *See* FDIC, *Managing the Crisis: The FDIC and RTC Experience,* 1980–1994 (1998), vol. 1, 27.

[24] *See https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_StrategicPlan_2021-2024_Final.pdf.*

[25] *See* U.S. Department of the Treasury, *Housing Reform Plan* (September, 2019), *available at https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf.*

[26] To facilitate a credible resolution planning framework, the *Housing Reform Plan* recommends requiring each Enterprise to maintain a minimum amount of total loss-absorbing capacity that could be bailed-in in the event of financial distress. *Id.* Such a requirement is beyond the scope of the current proposal.

[27] In this notice of proposed rulemaking, FHFA refers to the DFA section 165 rule as applying to bank holding companies, rather than that rule's ''Covered Companies,'' for ease of reading and because currently there are no FSOC-designated nonbank financial companies.

[28] *See https://home.treasury.gov/system/files/261/Financial-Stability-Oversight-Councils-Statement-on-Secondary-Mortgage-Market-Activities.pdf.*

multi-faceted, iterative Enterprise resolution planning process that provides FHFA an Enterprise resolution plan containing (i) key information about an Enterprise's structure, governance, operations, business practices, financial responsibilities, and risk exposures and (ii) advance strategic thinking and analysis, including the identification of impediments to ''rapid and orderly'' resolution as well as actions that could facilitate resolution if taken before receivership or in establishing the LLRE. The proposed resolution planning process also includes Enterprise development and maintenance of resolution-related capabilities to be assessed or verified periodically by FHFA that could generate, on a timely basis, critical information (*e.g.,* identification of key personnel) that FHFA would need as receiver to fulfill its statutory duties. Together, these components would help inform the immediate establishment of the LLRE to continue Enterprise business functions, including an informed division of assets and liabilities between the Enterprise receivership estate and a newly established LLRE.

Advance information, strategic analysis, and action, where appropriate, would also support other important goals of a rapid and orderly Enterprise resolution—to minimize disruption in the national housing finance markets, preserve Enterprise franchise and asset value, and ensure creditors bear losses in the order of their priority.[29] These goals work in concert, since a disruption of national housing finance markets also could increase costs to FHFA as receiver to the detriment of claimants on an Enterprise's receivership estate.

As well, the proposed rule would support transparency in the Enterprises' resolution planning process by requiring each Enterprise resolution plan to include a ''public section'' that FHFA would publish. FHFA may publish its own high-level assessment of Enterprise resolution plans as the planning process matures. FHFA believes that such transparency would further another important policy goal—fostering market discipline. Despite statutory provisions clarifying that neither the Enterprises themselves nor their securities or obligations are backed by the United States, investors, creditors and others doing business with the Enterprises may perceive that the Enterprises have implicit United States government support. Financial support from the Treasury Department provided through the PSPAs, which continues today, could encourage that perception. To clarify the status of the Enterprises as privately owned corporations, FHFA seeks to make explicit in this resolution planning rule that no extraordinary government support will be available to prevent an Enterprise receivership, indemnify investors against losses, or fund the resolution of an Enterprise. Each Enterprise must incorporate that assumption into its resolution plan, and this assumption must be apparent in the plan's public section.

## II. The Proposed Rule

### *A. Overview of the Resolution Planning Framework*

''*Rapid and orderly resolution*'' *of an Enterprise.* The proposed rule would establish the procedural and substantive requirements for Enterprise resolution plans developed to facilitate their rapid and orderly resolution by FHFA as receiver. The term ''rapid and orderly resolution'' is used in the DFA section 165 and its implementing rule.[30] FHFA has carefully considered whether an Enterprise resolution planning rule should include a similar standard.

A similar standard, reflecting FHFA's authorities as receiver and the Enterprises' statutory authorities and obligations, would help the Enterprises, market participants, and the public understand that the proposed rule seeks to achieve a similar, but appropriately tailored, goal—resolution, if necessary, of a large financial intermediary that performs functions other market participants rely on for their efficient operation, and which would be difficult to transfer or for which there are not available substitutes. FHFA views an Enterprise resolution planning rule as similar to the DFA section 165 rule, one purpose of which is to promote U.S. financial stability, and to efforts of other U.S. financial safety and soundness supervisors to align with common goals of the Financial Stability Board, such as improving ''the capacity of national authorities to implement orderly resolutions of large and interconnected financial firms.'' [31]

FHFA recognizes, however, that statutory provisions creating the Enterprises and authorizing their resolution by FHFA answer some questions that are not determined in advance for other receivers or administrators in bankruptcy—the Safety and Soundness Act directs that the Enterprises' functions as set forth in their charter acts will continue and establishes the framework for the continuation of these functions in a successor LLRE. FHFA's approach to ''rapid and orderly resolution'' is necessarily formed against that statutory backdrop.[32]

For the foregoing reasons, FHFA proposes to establish ''rapid and orderly resolution'' as a standard for Enterprise resolution, but to define it in a manner tailored to resolution of an Enterprise contemplated by the Safety and Soundness Act. Thus, FHFA proposes to define ''rapid and orderly resolution'' as a process for establishing an LLRE as successor to an Enterprise, including transferring Enterprise assets and liabilities to the LLRE, such that succession by LLRE ''can be accomplished within a reasonable amount of time and in a manner that substantially mitigates the risk that the failure of the Enterprise would have serious adverse effects on national housing finance markets.'' FHFA requests comment on the use of ''rapid and orderly resolution,'' as defined in the proposed rule, as the standard for an Enterprise resolution.

*Procedural overview of the proposed Enterprise resolution planning framework.* Procedurally, development of an Enterprise resolution plan would begin with the identification of Enterprise ''core business lines.'' Core business lines and the operations, services, functions, and supports associated with core business lines are important focal points of resolution planning, as FHFA expects ''core'' Enterprise business lines would be conducted in an LLRE established to continue the business operations of an Enterprise in receivership.

After core business lines and associated operations, services, functions, and supports are identified, each Enterprise would be required to develop and submit to FHFA a resolution plan that provides strategic analysis and information to facilitate

[29] Advance action could include, for example, ensuring that certain arrangements (master netting agreements related to qualified financial contracts, for example) are resilient to the creation of and transfer of assets to an LLRE.

[30] 12 CFR 243.2; *see also* 12 U.S.C. 5365(d)(1), requiring certain bank holding companies to report to the FRB on their plans ''for rapid and orderly resolution.'' The DFA section 165 rule defines ''rapid and orderly resolution'' as ''a reorganization or liquidation of the [bank holding] company . . . that can be accomplished within a reasonable period of time in a manner that substantially mitigates the risk that the failure of the [bank holding] company would have serious adverse effects on [the] financial stability of the United States.''

[31] 75 FR 27464, 27466 (May 17, 2010). In general, FDIC **Federal Register** notices on its IDI rule provide high level background on U.S. participation in international efforts toward resolution of large, interconnected financial firms.

[32] *See generally,* 12 U.S.C. 4617(i).

FHFA's rapid and orderly resolution of the Enterprise in a receivership, including setting forth actions that an Enterprise would take to improve its resolvability and identified impediments to resolvability that may be beyond the Enterprise's ability to address or control.

FHFA would review a received and complete resolution plan and provide notice to the Enterprise identifying deficiencies in its resolution plan, if any, as well as actions or changes set forth by the Enterprise in its resolution plan that FHFA agrees could facilitate a rapid and orderly resolution. FHFA may also provide other feedback, such as on the timing of actions or changes to be undertaken by the Enterprise. An Enterprise receiving a notice of deficiency would be required to submit a revised resolution plan that corrects the deficiency, or addresses what actions will be taken to correct it.

The resolution planning process proposed is an iterative one, involving episodic and periodic reviews (and updates as appropriate) of business lines, and periodic development of revised resolution plans. FHFA would employ its examination authority to assess Enterprise compliance with any final rule on resolution planning and, importantly, to assess or verify Enterprise capabilities that would be critical to facilitate resolution by FHFA, including timely production of accurate information from management information systems. The proposed rule is discussed in greater detail below.

*B. Identification of Core Business Lines and Associated Operations and Services*

*Proposed definition of ''core'' business line; FHFA considerations on scope.* The resolution planning process begins with identification of Enterprise core business lines and associated operations and services. Because the statutory outcome of Enterprise resolution is establishment of an LLRE that succeeds to the charter of the Enterprise and continues its operations on the same statutory basis as the Enterprise, FHFA proposes to define a ''core business line'' as each business line of the Enterprise that plausibly would continue to operate in an LLRE, considering the purposes, mission, and authorized activities of the Enterprise set forth in its authorizing statute and the Safety and Soundness Act.[33] ''Core business line'' would include operations, services, functions, and supports associated with the business line and necessary for the business line's continuation in the LLRE.

As an example of how the proposed ''core business line'' definition could operate, application of the concept may result in identification of two core business lines for each Enterprise, a single-family business line and a multifamily business line. Within the single-family business line, associated operations, services, functions, and supports may include purchasing single-family mortgage loans for cash as well as related operations such as loan servicing, credit enhancement, securitization support, information technology support and operations, and essential human resources and personnel support. When identifying associated operations, services, functions, and supports, an Enterprise should consider those functions that it performs directly and those that are performed by an affiliate or provided by a third party, including third parties whose direct relationship is with the borrower, but whose function may benefit an Enterprise (such as the provider of borrower loan-level mortgage insurance).

FHFA notes that the FDIC IDI and DFA section 165 resolution planning rules also require IDIs and bank holding companies, respectively, to identify ''core business lines'' but define such business lines as those whose failure, in the view of the institution or company, would result in material loss of revenue, profit, or franchise value. FHFA understands such concepts, in the context of those rules, to frame core business lines as those whose value the receiver should prioritize preserving in resolution or for which the receiver may obtain a higher price or find a ready market should such a business line be sold in a resolution. FHFA's proposed definition of ''core business line'' is different from the definition in the IDI and DFA section 165 resolution planning rules, considering that the Safety and Soundness Act requires FHFA to establish an LLRE for, and the LLRE to succeed to the charter of, an Enterprise in receivership. Consequently, FHFA believes it appropriate for an Enterprise resolution planning rule to focus on continuation of core business lines in an LLRE, and sees less need for the identification of Enterprise core business lines to consider the impact of failure on revenue, profit, or franchise value. FHFA requests comment on whether the proposed definition of ''core business line'' should be expanded to include consideration of the impact of failure (*e.g.,* whether the definition of ''core business line'' should be revised to state ''each business line of the Enterprise whose failure would result in a material loss of revenue, profit, or franchise value or would impair the Enterprise's ability to fulfill its purposes, mission, or obligations under in its authorizing statute and the Safety and Soundness Act.'').

FHFA believes that the scope of the proposed ''core business line'' definition, when considering the Enterprises' statutory purposes and missions and relatively simple corporate structures, makes it unnecessary for an Enterprise resolution planning rule to require identification of ''critical operations'' (which bank holding companies subject to the DFA section 165 rule must identify) or of ''critical services'' (which IDIs subject to the FDIC IDI rule must identify). Enterprise resolution planning is a process distinct from the identification of operations, services, functions, and supports associated with an Enterprise core business line. Likewise, FHFA does not believe it would be necessary to define the terms ''critical operations'' or ''critical services,'' in an Enterprise resolution planning rule, for reasons set forth below.

In the DFA section 165 rule, ''critical operations'' is defined as ''those operations of the [bank holding] company, including associated services, functions and support, the failure or discontinuance of which would pose a threat to the financial stability of the United States.'' [34] Unlike any bank holding company, each Enterprise was created by statute to perform limited functions in support of a particular market.

In that light, for purposes of resolution planning, it would be difficult for FHFA to conclude that a business line integral to an Enterprise's statutory purposes and mission could be discontinued without threatening the stability of the secondary mortgage market or another market an Enterprise is required to serve; each Enterprise's appropriate functions, as carried out through its core business lines, are in service to its purposes and mission.[35] In other words, if ''critical operations'' understood with regard to the

[33] As defined in the Safety and Soundness Act, an Enterprise's ''authorizing statute'' is its charter act (the Federal National Mortgage Association Charter Act for Fannie Mae, and the Federal Mortgage Loan Corporation Act for Freddie Mac). *See* 12 U.S.C. 4502(3). In this notice of proposed rulemaking, FHFA may use the terms ''authorizing statute'' and ''charter act'' interchangeably.

[34] 12 CFR 243.2.

[35] *Supra,* fn 1. FHFA also notes that discontinuation of mission-related functions could be disruptive to other markets, such as markets that are underserved.

Enterprises as operations that, if not performed, could cause disruption or instability in the secondary market for residential mortgages, FHFA expects there would be alignment between the Enterprises' core business lines with their statutory purposes and mission, such that all core business lines would be considered critical operations.

As for ''critical services,'' the FDIC IDI rule defines these as services and operations of the IDI that are necessary to continue its day-to-day operations, such as servicing, information technology support and operations, and human resources and personnel.[36] When proposing its IDI rule, FDIC explained that ''[k]ey decisions affecting the IDI, and key services or functions relating to the IDI, are often made . . . by parent holding companies or affiliates of the IDI,'' [37] that ''reliance upon affiliates to provide critical services can establish an impediment to transferring its assets, liabilities and operations to an acquiring institution or bridge bank,'' [38] and that one purpose of the resolution planning rule was for IDIs to ''demonstrat[e] how [they] could be separated from their affiliate structure and wound down in an orderly and timely manner in the event of receivership.'' [39] FHFA agrees that identification of critical services is important (particularly so if services are being provided by an affiliate within a holding company, possibly without an arms-length contract), but believes that such services already would be covered by the proposed definition of ''core business lines'' that includes operations, services, functions, and supports associated with the business line and necessary for its continuation.

FHFA invites comment on its view that there would be sufficient alignment between the definition of core business lines (those businesses line of the Enterprise that plausibly would continue to operate in an LLRE, considering the purposes, mission, and authorized activities of the Enterprise) and the concept of ''critical operations'' (operations that, if not performed, could cause disruption or instability in the secondary market for residential mortgages) such that an Enterprise resolution planning rule would not need a separate process for identification of ''critical operations.'' Also, FHFA requests comment on the conclusion that a definition of ''core business line'' that includes operations, services, functions, and supports associated with the business line and necessary for it to continue would capture the concept of ''critical services'' (services and operations of the Enterprise that would be necessary to continue its day-to-day operations), such that an Enterprise resolution planning rule would not need to separately identify those associated operations and services that are ''critical.''

*Process for identifying core business lines; methodology.* Procedurally, FHFA proposes to require each Enterprise to review its business lines and provide FHFA notice of those business lines preliminarily determined to be core, subject to FHFA review. On review, FHFA may approve or disapprove of any business line identified by an Enterprise as core (or of any operation, service, function, or support associated with any business line) and may independently identify any other business line as core. Following its review, and generally within three months of receiving an Enterprise's preliminary identification, FHFA will provide each Enterprise a notice of its core business lines for purposes of that Enterprise's resolution planning. Notice by FHFA may not include all associated operations, services, functions, and supports, as these aspects of a core business line could vary by Enterprise and would be better identified by the Enterprise, considering its experience operating that particular business line.

The proposed rule would permit FHFA to provide an Enterprise notice of identification of a core business line at any time at FHFA's initiative. To give an Enterprise time to incorporate any core business line newly identified by FHFA into its resolution planning, the Enterprise would not be required to incorporate a core business line identified by FHFA in its next required resolution plan, if that plan is required to be submitted within six months after the date the Enterprise receives notice of identification from FHFA.

The proposed approach to identification is intended to ensure that both the Enterprises and FHFA separately consider the Enterprises' statutory purposes, mission, and authorities when identifying core business lines, bringing both business and supervisory expertise and perspective to bear on identification. The proposed approach leverages each Enterprise's responsibility to meet the purposes of its statutory charter and its understanding of its own business operations, while recognizing FHFA's statutory duties as supervisor to ensure that each Enterprise complies with its charter act and operates in the public interest and FHFA's obligation as receiver to ensure that an LLRE is constituted in a manner to operate in accordance with the charter of the Enterprise for which it is successor.

To identify its core business lines, each Enterprise would be required to develop and implement an identification process, including a methodology to evaluate the Enterprise's participation in activities and markets that are critical to fostering liquidity, efficiency, resilience, stability, and competition in the national housing finance markets or carrying out the statutory mission and purpose of the Enterprise. That methodology should take into account the markets and activities in which the Enterprise participates; the significance of those markets and activities with respect to the national housing finance markets or the Enterprise's fulfillment of its statutory mission and purpose; and, the significance of the Enterprise as a provider or other participant in those markets and activities. An Enterprise's process for identifying its core business lines could incorporate, for example, review and assessment of business activities toward meeting its statutory duty to serve and its statutory affordable housing goals.[40]

FHFA would not be required to utilize any particular methodology for identifying any core business line but believes that it would be appropriate to consider the factors set forth above in the methodology for Enterprise identification. FHFA would be able to consider any other factor it deemed appropriate.

Because FHFA proposes to require the Enterprises periodically to review their business lines to ensure that identification of core business lines is up-to-date, the proposed rule would require each Enterprise periodically to review its identification process and to revise it as necessary to ensure its continued effectiveness. Additional information regarding periodic reviews is set forth below.

*Timing of initial and subsequent Enterprise identifications of core business lines.* FHFA proposes to require each Enterprise to provide its initial notice preliminarily identifying core business lines to FHFA within three months after the effective date of a final rule, and requests comment on whether three months is sufficient time for such identification, considering that identification necessarily involves establishing and implementing the methodology described above to assess business lines and their associated operations, services, functions, and

[36] 12 CFR 360.10(b)(5).

[37] 75 FR 27464, 27465 (May 17, 2010).

[38] *Id.,* at 27467.

[39] *Id.,* at 27464.

[40] *See generally,* 12 U.S.C. 4561 and 4565.

supports. Because identification of core business lines is only the first step in a resolution planning process, by proposing a relatively short period from the effective date of a final rule to the submission date of an initial identification notice, FHFA seeks to balance the Enterprises' need for sufficient time to develop and implement a meaningful identification process with FHFA's need for the Enterprises to develop and submit initial resolution plans that consider those core business lines, within a reasonable period of time after the effective date of a final rule. For the same reason—the desire for the Enterprises to complete initial resolution plans within a reasonable time after the effective date of a final rule—FHFA expects that it would view an Enterprise's initial identification process as sufficient if it reflects thoughtful consideration and application of a methodology consistent with a final rule, even if improvements to the Enterprise's identification process are warranted and would be undertaken as part of any subsequent identification activities.

Following its initial preliminary identification of core business lines, each Enterprise would be expected to review its business lines periodically, in accordance with the methodology set forth in the proposed rule, and to do so sufficiently in advance of its next resolution plan submission that the Enterprise could complete the notice-and-review process for FHFA identification of any new core business lines and also submit information required to be in the resolution plan for each core business line. Up-to-date identification of core business lines and associated operations, services, functions, and supports is critical for Enterprise resolution planning and to the development of a credible resolution plan.

In line with the proposed definition of ''core business line,'' in the period from submission of one resolution plan to the next, business lines identified as core may not change. To avoid unnecessary burden on the Enterprises and FHFA which may result if, out of an abundance of caution, an Enterprise conducts more frequent identification processes than necessary, FHFA also proposes to reserve authority to direct the Enterprises as to the timeframe for conducting any subsequent periodic identification process. Such direction would address only the timing of a periodic identification process and would not, for example, relieve an Enterprise of the need to review its business lines if it experienced a ''material change,'' as addressed below. By reserving authority to direct the timing of periodic identification processes, FHFA seeks to balance the need for up-to-date information about core business lines with the burden of conducting a periodic process, if it becomes apparent that identified core business lines are not changing over the course of several resolution plan submissions.

*Change to identification as a core business line, including FHFA reconsideration.* FHFA recognizes that there may be different views on whether a business line is core, for purposes of resolution planning, and that business lines may evolve over time, such that a business line once identified as core may cease to be a core business line. Three elements of the proposed rule address possible changes in identification of a core business line.

First, an Enterprise may identify new core business lines when conducting its periodic identification process. Such identification would be a ''material change,'' which FHFA proposes to define as a change, event, or occurrence that could reasonably be foreseen to have a material effect on the resolvability of the Enterprise, the Enterprise's resolution strategy, or how the Enterprise's resolution plan may be implemented. That ''material change'' would be an ''extraordinary event,'' described in the proposed rule as ''any material change, merger, reorganization, sale or divestiture of a business unit or material assets, or similar transaction, or any fundamental change to the Enterprise's resolution strategy.'' Such a ''material change'' would thus trigger an Enterprise notice to FHFA within 45 days after the occurrence of the change (the new identification). Relatedly, an ''extraordinary event'' could occur that gives rise to identification of a new core business line outside of an Enterprise's periodic identification process. In that instance as well, notice to FHFA would be required within 45 days of the identification of the new core business line. Finally, because the definition of ''core business line'' includes associated operations, services, functions, or supports, a notice of material change would also be required when there is a material change to such operations, services, functions, or supports that could affect the Enterprise's resolution plan.

The proposed rule would also provide a process for FHFA reconsideration of identification of a core business line. Only FHFA may remove the identification of a core business line (including removing the identification of any associated operation, service, function, or support), and it may do so on its own initiative, at any time, upon notice to an Enterprise. An Enterprise would be permitted to initiate a reconsideration, by submitting a written request to FHFA that includes arguments and other material information that the Enterprise believes would be relevant to that reconsideration. The proposed rule would provide FHFA three months to respond to a reconsideration request, unless FHFA extended that review period. If the Enterprise requests FHFA to reconsider a core business line that FHFA has previously reconsidered, pursuant to an earlier Enterprise request, the written request should describe the material differences between the current request and the most recent prior request. The proposed rule does not set forth a process for discussion or negotiation with an Enterprise about reconsideration, but FHFA anticipates that it would engage with an Enterprise as part of an established supervisory process to understand any different views on the nature of a particular business line.

Finally, FHFA recognizes that a resolution plan is necessarily developed at a point in time, while business activities are fluid through time. For that reason, a notice removing identification as a core business line may include an effective date or other delaying conditions or triggers (such as, for example, sufficient decrease in volume of a core business line, after which it would not be necessary to consider that business line in the Enterprise's resolution planning process).

FHFA invites comment on all aspects of the proposed processes for identifying core business lines and changing a core business line identification. FHFA invites comment on a process element that it has not proposed but is considering—whether, due to similarities between the activities each Enterprise is authorized or directed to take in its charter, there would be benefit to FHFA's providing notice to each Enterprise of all core business lines identified or any removal of a core business line identification, across both Enterprises. In contrast to bank holding companies subject to the DFA section 165 rule, where there presumably would not be common core business lines and critical operations across companies, there exist greater possibilities of common core business lines across the Enterprises. This is apparent if core business lines are identified primarily based on the Enterprise charter acts. FHFA believes that there could be alignment of core business lines across

the Enterprises when considering their current businesses and the proposed Enterprise methodology for determining core business lines. One possible benefit of core business line identification across the Enterprises is that there would be a process to assure that each Enterprise's resolution planning and plan addresses the same core business lines. At the same time, in the unlikely event the Enterprises' core business lines did not align based on their individual application of the proposed rule's identification methodology, each Enterprise could be required to address business lines that are not, in fact, core as to that Enterprise in its resolution planning.

*C. Content and Form of an Enterprise Resolution Plan*

After identifying its core business lines, the proposed rule would require an Enterprise to develop a resolution plan. Each resolution plan would contain strategic analysis and information important to understanding an Enterprise's core business lines and facilitating their continuation, possibly with appropriate changes, in an LLRE established by FHFA as receiver.

Under the proposed rule, a resolution plan would be required to include both strategic analysis and information components, including a description of the Enterprise's corporate governance structure for resolution planning; how the LLRE will be funded throughout its existence and be well capitalized within the timeline provided by statute; information regarding the Enterprise's overall organizational structure; information regarding the Enterprise's management information systems; a description of interconnections and interdependencies among the Enterprise's core business lines, including with CSS and other third-party providers; and, a clear identification of any potential impediments to the strategies developed and Enterprise plans for addressing such obstacles where practicable. An executive summary would also be required. In proposing these components, FHFA reviewed both the FDIC IDI resolution planning rule and the DFA section 165 rule and has incorporated concepts from each framework, and tailored those concepts to reflect Enterprise and FHFA authorities and duties.

*Required and prohibited assumptions.* Similar to the DFA section 165 rule, FHFA is proposing to establish required and prohibited assumptions which must underpin an Enterprise's resolution plan. An Enterprise would be required to consider that resolution may occur under the severely adverse economic conditions provided to the Enterprise by FHFA in conjunction with any stress testing required pursuant to FHFA's rule on stress testing of the regulated entities, 12 CFR part 1238. On occasion FHFA may identify or provide other stress scenarios, possibly more idiosyncratic to an Enterprise, which the Enterprises would be required to consider in preparing the next periodic resolution plan.

Importantly, each Enterprise would be prohibited from assuming that any extraordinary support from the United States government would be continued or provided to the Enterprise to prevent either its becoming in danger of default or in default, including support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as regulator, conservator, or receiver of the Enterprise through the PSPAs with the Treasury Department. Likewise, each Enterprise's resolution plan would be required to reflect statutory provisions that the Enterprise's ''obligations and securities, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof other than [the Enterprise].'' [41] The proposed rule seeks to ensure that resolution plans accurately reflect the statutory construct of the Enterprises—they are not supported by the full faith and credit of the United States and their securities (including securities that an Enterprise guarantees) and debt are not guaranteed by the United States.

*Strategic analysis.* Similar to the DFA section 165 rule, FHFA proposes to require a strategic analysis describing the Enterprise's plan to facilitate its rapid and orderly resolution. As a practical matter, there may be two components to this analysis—those strategies and actions that are feasible for an Enterprise to implement or take prior to receivership, and those strategies and actions that the Enterprise believes FHFA could take in conjunction with receivership and resolution. By statute, moving to receivership is solely FHFA's authority, and the proposed rule makes clear that FHFA is not bound by any resolution plan of an Enterprise. Nonetheless, each Enterprise understands its business operations in greater detail than does FHFA. An Enterprise's assessment of how the value of its assets and franchise could be preserved, how assets and liabilities could be divided between the LLRE and a receivership estate, and how losses and costs could be minimized, would be important considerations for FHFA. These actions are the basis for a resolution and receivership that minimize disruption in the national housing finance markets. They will be particularly important given that the Enterprises are not supported by the United States government, and FHFA does not have access to funding for resolution, such as the DIF.

Each Enterprise's strategic analysis should therefore detail how, in practice, the Enterprise could be resolved through FHFA's receivership authority by liquidating assets or by transferring them to an LLRE, which would continue to operate the Enterprise's core business lines. The strategic analysis should include the analytical support for the resolution plan and its key assumptions, including any assumptions made concerning the economic or financial conditions that would be present at the time a plan is implemented.

An important element proposed in the strategic analysis is the Enterprise's description of actions or a range actions that the Enterprise could take to facilitate its rapid and orderly resolution, including with respect to its core business lines, in the event of its becoming in danger of default or in default. For example, an Enterprise could review service level agreements to assess likelihood of service continuation after transfer to an LLRE, including whether contracts have ''resolution-favorable'' terms. The Enterprise should specify those actions that it plans to take and set forth the time period the Enterprise expects would be needed to successfully execute each such action. The Enterprise should also describe any impediments to actions that could be taken, including impediments to actions that it plans to take.

The strategic analysis should identify and address funding, liquidity, support functions, and other resources, mapped to the Enterprise's core business lines. This element would require the Enterprise to identify the amount of capital and capital-like instruments (such as subordinated debt, convertible debt, other contingent capital, mortgage insurance, and CRT transactions) available to absorb losses before imposing losses on creditors or investors and, where applicable, map this loss absorbing capacity to associated assets. The Enterprise's strategy for maintaining and funding its core business lines in an environment when it faces becoming in danger of default or in default should be provided and mapped to its core business lines, and its strategic analysis should demonstrate how such resources would be utilized to facilitate an orderly

[41] 12 U.S.C. 1455(h)(2) and 1719(d).

resolution. The Enterprise's strategic analysis also should consider the capital support that will be needed by an LLRE (during its life and when its status as a ''limited-life'' regulated entity ends) to maintain market confidence.

The strategic analysis should set forth the Enterprise's strategy in the event of a failure or discontinuation of a core business line, including an associated operation, service, function, or support that is critical to a core business line and the actions that could be taken to prevent or mitigate any adverse effects of such failure or discontinuation on the national housing finance markets. This would include, if appropriate, the Enterprise's strategy for continuing an associated operation, service, function or support provided by an affiliate or the third-party provider that has failed. The ability of each affiliate or third party providing operations, services, functions or supports to function during the Enterprise's resolution should be assessed.

The strategic analysis should describe how and the extent to which claims against the Enterprise by the Enterprise's creditors and counterparties would be satisfied in accordance with FHFA's rule setting forth the priority of expenses and unsecured claims set forth at 12 CFR 1237.9, consistent with continuation of the Enterprise's core business lines by an LLRE. Another element to be included in a strategic analysis is the Enterprise's strategy for transferring or unwinding qualified financial contracts, consistent with applicable statutory requirements.[42]

It is likely that each Enterprise will identify potential material weaknesses or impediments to rapid and orderly resolution as conceived in its plan. The Enterprise's strategic analysis must identify and describe those weaknesses or impediments, and any actions or steps the Enterprise has taken or proposes to take to address them. There may be overlap between these planned actions and other planned actions included in the strategic analysis. The Enterprise should identify actions or steps that other market participants could take to address the identified weaknesses or impediments. The Enterprise would be required to include a timeline for such remedial or other mitigating actions that are under its control.

Finally, FHFA proposes that each Enterprise describe in its strategic analysis the processes the Enterprise employs to determine the current market values and marketability of its core business lines and material asset holdings, as well as to assess the feasibility of the Enterprise's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the Enterprise's resolution plan. The strategic analysis would include impact of such actions on the value, funding, and operations of the Enterprise and its core business lines.

*Description of corporate governance related to resolution planning.* The proposed rule would require each Enterprise's resolution plan to include information on its corporate governance structure related to resolution planning. Each Enterprise would be required to describe how resolution planning is integrated into its corporate governance structure and processes; the Enterprise's methodology and process for identifying core business lines; Enterprise policies, procedures, and internal controls governing preparation and approval of its resolution plan; and, the nature, extent, and frequency of reporting to Enterprise senior executive officers and the board of directors regarding the development, maintenance, and implementation of the Enterprise's resolution plan. Each Enterprise resolution plan would include the name and position of the senior management official primarily responsible for overseeing those functions and for compliance with a final resolution planning rule. The Enterprise's strategic analysis should address the corporate governance framework that supports determination of the specific actions to be taken to facilitate a rapid and orderly resolution as the Enterprise is becoming in danger of default and the senior management officials responsible for making those determinations and undertaking those actions.

Each resolution plan would be required to describe any contingency planning or other similar exercise that the Enterprise has conducted since submitting its prior resolution plan to assess the viability of or improve its resolution plan. The proposed rule would require each Enterprise to identify and describe the relevant risk measures it uses to report credit risk exposures both internally to its senior management and board of directors as well as any relevant risk measures reported externally to investors or to FHFA.

*Organizational structure, interconnections, and related information.* Under the proposed rule, each Enterprise's resolution plan would include information regarding the Enterprise's organizational structure, including a list of all affiliates and trusts, the percentage of voting and nonvoting equity of each listed legal entity, and the location, jurisdiction of incorporation, licensing, and key management associate with each material legal entity identified. Where information required to be provided about a legal entity is identical across multiple legal entities, that information may be presented as applicable to a group of identified legal entities.

In its resolution plan, each Enterprise would be required to provide information about interconnections, mapping the operations, services, functions, and supports associated with each of its core business lines. Mapping should identify the entity, including any third-party providers, responsible for conducting each associated operation or service that supports the functioning of each core business line as well as the Enterprise's material asset holdings. Mapping should identify liabilities related to such operations, services, and core business lines. Such mapping should show the interconnections between core business lines to be transferred to the LLRE and any operations anticipated to be left in the receivership estate.

Enterprise resolution plans would be required to include an unconsolidated balance sheet for the Enterprise and a consolidating schedule for all material entities that are subject to consolidation by the Enterprise. Each Enterprise would be required to describe the material components of its liabilities, mapped to core business lines, identifying types and amounts of short-term and long-term liabilities, secured and unsecured liabilities, and subordinated liabilities, as well as processes used by the Enterprise to determine to whom collateral has been pledged collateral, the identity of the entity (or person) that holds such collateral, and the jurisdiction where collateral is located and the jurisdiction in which the security interest in collateral is enforceable against the Enterprise, if different from the location. Information on material off-balance sheet exposures, practices related to the booking of trading and derivatives activities, and hedges would be required and a description of the process undertaken by the Enterprise to establish exposure limits.

Each Enterprise would be required to include information about third-party providers with which the Enterprise has significant business connections, including descriptions of the business connection (such as the operation, service, function, or support associated

[42] ''Qualified financial contracts'' are defined and the requirements for their transfer or unwinding are set forth at 12 U.S.C. 4617(d)(8) through (11).

with a core business line that the third-party provider performs or provides), the criticality of the connection, the resilience of the connection, and provisions or actions needed to ensure the continued availability of the operation, service, function, or support through the receivership process. For example, the securitization platform provided by CSS is a critical operation for the securitization of single-family mortgages for which there is no substitute. An Enterprise's resolution plan should therefore include provisions for ensuring the continued viability of the common securitization platform, such as prepositioning of working capital. Alternatively, where substitution among providers is feasible, provisions and procedures for affecting such substitutions in the wake of FHFA's appointment as receiver should be noted or developed.

The Enterprises would be required to report on their credit risk exposures to counterparties identified in the proposed rule, including significant sellers of mortgage loans to an Enterprise, significant servicers, and providers of loan-level mortgage insurance. Enterprise resolution plans would be required to analyze whether the failure of a third-party provider would likely have an adverse impact on the Enterprise or likely result in the Enterprise becoming in danger of default or in default. Finally, each Enterprise would be required to identify trading, payment, clearing, and settlement systems of which the Enterprise, directly or indirectly, is a member and on which the Enterprise conducts a material number or material value amount of trades and transactions.

Certain proposed provisions on organizational structure, interconnections, and related information to be included in an Enterprise resolution plan use the term ''third-party provider.'' FHFA has not proposed a definition of that term. When considering the concept of a ''third-party provider'' in the context of the proposed rule's provisions that use it, FHFA concluded that third-party providers would be identified through application of those rule provisions, such as provisions that would require each Enterprise to identify the entity performing or providing operations, services, functions, or supports associated with core business lines. In that context, where an appropriate rule definition of ''third-party providers'' would likely refer to aspects of the rule which, when applied, would result in their identification, FHFA considered that a rule definition of ''third-party provider'' would not add to the understanding of the rule. FHFA was concerned that a rule definition of ''third-party provider'' could inadvertently limit application of rule provisions that are intended to be broadly applied. Finally, FHFA notes that the DFA section 165 rule uses the term ''major counterparty,'' which that rule does not define, to somewhat similar effect as ''third-party provider'' in FHFA's proposed rule. FHFA chose the term ''third-party provider'' in this instance to avoid implying that a contractual relationship, financial or otherwise, was required. Notwithstanding these considerations, FHFA requests comment on whether a definition of ''third-party provider'' should be included in any final rule.

*Management information systems.* FHFA proposes to require each Enterprise to provide information in its resolution plan about the key management information systems and applications supporting its core business lines, including systems and applications for risk management, automated underwriting, valuation, accounting, and financial and regulatory reporting, and systems and applications containing records used to manage all qualified financial contracts. Each resolution plan would be required to include information on the legal ownership of such systems and associated software, licenses, or other intellectual property. Each Enterprise would be required to map key management information systems and applications to core business lines that use or rely on them and to include information on the key internal reports used to monitor the financial health, risks, and operation of the Enterprise and core business lines.

The proposed rule would require each resolution plan to include a description of the capabilities of the Enterprise's management information systems to collect, maintain, and report the information and other data underlying the resolution plan, in a timely manner to Enterprise management to FHFA. Each Enterprise would be required to identity in its resolution plan deficiencies, gaps, or weaknesses in the capabilities of its management information systems and describe actions the Enterprise plans to undertake, including the associated timelines for implementation, to address such deficiencies, gaps, or weaknesses. The goal of the analysis, and any practical steps identified by the Enterprise, is to confirm the continued availability of the key management information systems that support core business lines through resolution, including their availability to the LLRE. Finally, each Enterprise resolution plan would be required to describe the process for FHFA to access the management information systems and applications required to be identified.

*Executive summary.* The proposed rule would require each resolution plan to include an executive summary, addressing the key elements of the Enterprise's strategic analysis; identifying material changes that occurred since the Enterprise's prior resolution plan, if any; and, describing changes to the previously submitted resolution plan because of any change in law or regulation, guidance or supervisory feedback from FHFA, or any identified material change. The executive summary should also describe actions taken by the Enterprise to improve the feasibility or effectiveness of the resolution plan or remediate, or otherwise mitigate, any material weaknesses or impediments to a rapid and orderly resolution.

*Enterprise point-of-contact.* The proposed rule would require each Enterprise to identify a senior management official responsible for serving as a point-of-contact regarding the resolution plan, in the resolution plan.

*Public section of the resolution plan; confidentiality of other parts.* The proposed rule would require each resolution plan to include an identified public section—in essence, a second executive summary that describes the business of the Enterprise and its identified core business lines and associated operations and services. The public section would address as well financial information regarding assets, liabilities, capital and major funding sources; derivative activities, hedging activities, and CRT instruments; listing memberships in material payment, clearing or settlement systems; identifying the Enterprise's principal officers; the Enterprise's corporate governance structure and processes related to resolution planning, including the identification of core business lines; and, material management information systems. The public section would include a high-level description of the Enterprise's strategies to facilitate its resolution by FHFA as receiver, such as the types of potential purchasers of the Enterprise's core business lines and other significant assets, and steps that, if taken by the Enterprise, could minimize the risk that its resolution would have serious adverse effects on the national housing finance markets and the amount of potential loss to the Enterprises' investors and creditors. The proposed rule would require that the public section clearly reflect the

required and prohibited assumptions governing development of the resolution plan.

FHFA notes that the DFA section 165 rule requires bank holding companies to identify ''material entities'' in the public sections of their resolution plans.[43] FHFA has not proposed a similar requirement, considering the corporate structures of the Enterprises. Specifically, as defined in the DFA section 165 rule, a ''material entity'' is a ''subsidiary or foreign office of the [bank holding] company that is significant to the activities of an identified critical operation or core business line, or is financially or operationally significant to the resolution of the [bank holding] company.'' [44] Were FHFA to adopt a similar requirement and definition, each Enterprise would identify one ''material entity''—CSS.

Based on the DFA section 165 rule definition of ''material entity,'' FHFA does not view that rule's requirement to identify such entities in the public section of a bank holding company's resolution plan as intending to require the company to identify its major counterparties or third-party providers. Only entities that are ''significant to the activities of an identified critical operation or core business line'' or ''financially or operationally significant'' to the bank holding company's resolution *and* that are within the company's organizational structure would be required to be identified in the public section of the bank holding company's resolution plan.

Because FHFA sees little, if any value, in requiring each Enterprise to identify CSS as its single ''material entity,'' FHFA has not proposed a similar requirement for the public section of an Enterprise resolution plan.[45] FHFA requests comment, however, on whether an Enterprise should be required to identify significant third-party providers and major counterparties in the public section of its resolution plan.

FHFA expects to publish the public section of each Enterprise's resolution plan on its website. If published as proposed, the public section would make clear the assumptions pursuant to which the Enterprise drafted its resolution plan, including the assumption that no government support will be available to prevent the failure of an Enterprise or to fund its resolution. It would indicate the extent to which potential claims by creditors and counterparties against the Enterprise might be satisfied in a resolution, and priority of those claims. By providing the public with greater transparency about the satisfaction of potential claims and the manner in which those claims might be satisfied, FHFA believes publishing the public section of each Enterprise's resolution plan would foster market discipline by making clear to investors in Enterprise-guaranteed MBS and Enterprise debt that they should no longer rely on an implicit government guarantee and that they should price the risk of these investments accordingly. FHFA may also publish other information about Enterprise resolution planning, which may include its high-level assessments of the Enterprises' resolution plans.

With regard to the first resolution plans the Enterprises submit, however, it is plausible FHFA would not publish the public section, but may publish information based on it or drawn from it on FHFA's website or in its Annual Report to Congress. This approach recognizes that the Enterprises and FHFA will learn from the process of developing and reviewing resolution plans, and balances the desire for transparency and market awareness of Enterprise resolution plans with the desire to permit improvement in resolution plans before the public sections are published.

All material that is not in the public section would be presumed to be confidential, and the proposed rule provides that information contained in the confidential section of a resolution plan would be treated as confidential in line with applicable law. The proposed rule would provide a process for an Enterprise to request confidential treatment of information in a resolution plan or any related materials under 5 U.S.C. 552(b)(4), 12 CFR part 1202 (Freedom of Information Act), and 12 CFR part 1214 (availability of non-public information), and states that FHFA will determine confidentiality in accordance with applicable exemptions under the Freedom of Information Act, FHFA's rule implementing that Act, and FHFA's rule on the availability of non-public information and its statutory requirements and authorities.

*Preparation of the initial resolution plan.* FHFA recognizes the burden associated with developing an initial resolution plan, including establishing necessary processes, procedures, and systems. Although FHFA proposes to require an Enterprise's initial resolution plan to include all informational elements set forth in the proposal, FHFA expects the process of submission and review of the initial resolution plan to involve dialogue with each Enterprise. In developing its initial resolution plan, each Enterprise should focus on the key elements of the resolution plan, including identifying core business lines and associated operations, services, functions, and supports, developing a robust strategic analysis, and identifying and describing the interconnections and interdependencies among the Enterprise, its affiliates, and its third-party providers.

*Incorporation by reference of material from prior resolution plans.* FHFA proposes to permit an Enterprise to incorporate by reference information from a prior resolution plan submitted to FHFA, provided that the information remains accurate in all material respects. The ''incorporating'' resolution plan would be required to clearly identify the information that is being incorporated as well as the resolution plan in which it was originally contained and its specific location in that plan.

### *D. FHFA Review and Feedback, Plan Deficiencies, and the ''Credible'' Standard*

*FHFA review and feedback.* After a resolution plan is submitted, FHFA would review it and provide feedback to the Enterprise. Feedback could range from informal discussion with an Enterprise to an FHFA determination of, and notice to the Enterprise identifying, deficiencies in the resolution plan as submitted. FHFA feedback could address any planned actions or changes set forth by the Enterprise that FHFA agrees could facilitate a rapid and orderly resolution, or priority or timing of actions or changes to be undertaken by the Enterprise. After FHFA and Enterprise experience over the first few resolution plan submission and review cycles, it may also be appropriate for FHFA to share more general ''lessons-learned'' feedback on meeting rule requirements and developing a resolution plan, or for FHFA to develop and publish responses to frequently-asked-questions.

FHFA expects that it would first assess submitted resolution plans for substantive completeness. If additional information is necessary in order for FHFA to review a plan, the Enterprise would receive notice and be provided

[43] 12 CFR 243.11(c)(2)(i). ''Material entity'' is differently defined but appears to be similarly applied in the FDIC IDI rule, *id.,* 12 CFR 360.10(b)(8).

[44] *Id.,* 12 CFR 243.2.

[45] FHFA also notes that resolution of CSS is not addressed by the proposed resolution planning rule, and the proposed rule would not require CSS to develop a resolution plan. On the other hand, as an affiliate of an Enterprise, CSS could be within FHFA resolution authority. FHFA expects to address these aspects of its supervision of CSS at a different time.

an opportunity to submit the missing information, generally within 30 days. An Enterprise that does not receive a notice that additional information is needed may assume that FHFA has accepted the plan as substantially complete; however this does not prevent FHFA from making reasonable requests for additional information it believes would be helpful to understand the Enterprise's resolution plan in the course of its review.

FHFA believes a completeness review would improve the efficiency and effectiveness of the review process, in particular because it establishes a process for obtaining missing information outside of the deficiency identification process (discussed below). FHFA also observes, however, that a resolution plan that is missing substantial information, or as to which an Enterprise does not timely provide missing information, may warrant a deficiency notice.

*FHFA notice following review; determination of deficiencies.* The proposed rule would establish a process for FHFA to identify deficiencies in an Enterprise's resolution plan and provide notice to the Enterprise identifying deficiencies or affirming that there were no deficiencies. For this purpose, the proposed rule would define ''deficiency'' as an aspect of the Enterprise's resolution plan that FHFA determines presents a weakness that, individually or in conjunction with other aspects, could undermine the feasibility of the Enterprise's resolution plan. For example, a deficiency may be that the nature, extent, or frequency an Enterprise's reporting on resolution planning to the board of directors is insufficient or that an Enterprise's contracts with third-party providers do not clearly address continuity of services or operations after an LLRE is established as successor to the Enterprise. An Enterprise receiving a notice of deficiency would be required to submit a revised resolution plan that corrects the deficiency, which may include planned actions or next steps.

Because a notice of deficiency would trigger the need for an Enterprise to submit a revised resolution plan that addresses the deficiency, the proposed rule would establish the principle that a deficiency would be something an Enterprise could plausibly address by taking or adding a planned action, considering of additional factors, or undertaking additional strategic analysis. Although there could be an overlap between deficiencies and material weaknesses or impediments identified by the Enterprise in its resolution plan as conceived and described in its strategic analysis, FHFA does not anticipate identifying as deficiencies those material weaknesses or impediments to a well-conceived plan that an Enterprise is reasonably unable to address, or which would be impracticable to change.

FHFA notes that the DFA section 165 rule includes reference to ''shortcomings,'' defined as ''a weakness or gap that raises questions about the feasibility of a [bank holding] company's resolution plan, but does not rise to the level of a deficiency.'' [46] Determination of a shortcoming in a resolution plan would not trigger the requirement to submit a revised plan, but unaddressed shortcomings could become deficiencies in subsequent plans. FHFA does not propose a similar concept because, as the proposed rule indicates, FHFA could inform an Enterprise through routine communications of any concerns with its resolution plan that do not yet rise to the level of a ''deficiency,'' but which could rise to such a level if unaddressed in future plans. FHFA requests comment on whether a final resolution planning rule should include a process for FHFA identification of a ''shortcoming,'' in addition to a ''deficiency'' and, if so, whether FHFA should adopt a definition of ''shortcoming'' similar to that contained in the DFA section 165 rule.

''*Credible*'' *standard.* Concepts of deficiency in a resolution plan, and a plan's identification of material weaknesses in or impediments to resolution, must be considered in the context of a ''credible'' resolution plan. While ''credible'' is commonly used as a standard for resolution plans, it is not always defined when used.[47] As did the FDIC, FHFA has determined to propose a rule standard for a resolution plan to be ''credible.''

Specifically, FHFA is proposing to consider a resolution plan to be ''credible'' if, demonstrating consideration of the proposed rule's required and prohibited assumptions, the plan's strategic analysis and detailed information required are well-founded and based on information and data that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets. A resolution plan that meets this standard will reflect depth and thoroughness of thought and analysis, clarity and appropriateness of assumptions and projections, and accuracy and detail in supporting data and other information. Under this standard, a resolution plan may be ''credible'' even if it identifies material weaknesses or impediments to rapid and orderly resolution or if it sets forth steps that an Enterprise indicates it will take to improve the likelihood of its rapid and orderly resolution. FHFA is not proposing to correlate identification of deficiencies with application of the ''credible'' standard, although it is inevitable that sufficiently significant deficiencies would result in a resolution plan that is not credible.

Through its proposed standard for a ''credible'' resolution plan, FHFA seeks to clarify that such a plan would not require an Enterprise to produce a roadmap that FHFA would follow to discharge its responsibilities as receiver. This clarification is important for two reasons: (1) To reassure the Enterprises, and inform other stakeholders that Enterprise resolution plans may stop short of an FHFA-executable ''playbook'' and still be credible; and, (2) To emphasize that resolution of an Enterprise remains FHFA's responsibility, to be carried out pursuant to its statutorily conferred authorities and discretion.

On the other hand, the ''credible'' standard would make the Enterprises accountable to FHFA on critical aspects of resolution planning as the standard includes concepts of ''well-founded'' and ''verifiable.'' FHFA expects to use its examination authority to assess such aspects of an Enterprise's resolution plan as the capabilities of the Enterprise's management information systems to collect and maintain information and data underlying the resolution plan and report it in a timely manner to management of the Enterprise and to FHFA. Such capabilities and the importance of assessing them were both emphasized in consultations with FDIC and FRB staff on their experience implementing the FDIC IDI and DFA section 165 rules.[48]

[46] 12 CFR 243.8(e).

[47] *Compare* FDIC IDI rule, 12 CFR 360.10(c)(4)(i) (used and defined); DFA section 165 rule, 12 CFR 243.8(b) (used but not defined) *and* Treasury Department *Housing Reform Plan* supra, p. 13 (used but not defined).

[48] *See also,* 77 FR 3075, 3083 (Jan. 23, 2012) (FDIC IDI final rule) (''The [IDI's] ability to produce the information and data underlying its resolution rapidly and on demand is a vital element in a credible [r]esolution [p]lan.'') and 76 FR 58379, 58380 (Sept. 21, 2011) (FDIC IDI interim final rule) (''The [Financial Stability Board] Crisis Management Working Group has recommended that supervisors ensure that firms are capable of supplying in a timely fashion the information that may be required by the authorities in managing a financial crisis.'').

Verifying capabilities set forth in an Enterprise's resolution plan is not the only area of resolution planning that would be subject to FHFA's examination authority. FHFA may use its examination authority at any time to review Enterprise compliance with a resolution planning

*Timing of feedback.* FHFA intends to provide substantive feedback to an Enterprise on an informationally complete resolution plan within 12 months of receipt. The proposed rule would permit FHFA to extend that timeframe if extenuating circumstances so require. FHFA wishes to provide timely feedback but must take the time necessary to review each plan appropriately. Given that FHFA has proposed to require each Enterprise to submit resolution plans every two years, receipt of feedback one year after submission of a plan would provide the Enterprise another year to incorporate that feedback into its next resolution plan.

If FHFA provides an Enterprise a notice of deficiency, the Enterprise must submit appropriate revisions to its prior plan within a timeframe established by the Agency. Procedures for submitting revised resolution plans and taking other corrective actions are addressed below.

*E. Corrective Processes; Significance as a Prudential Standard*

The proposed rule would require an Enterprise that receives notification from FHFA of any deficiency in its resolution plan to submit a revised resolution plan to FHFA that addresses the deficiency. The proposed rule would also identify the resolution planning rule, in its entirety, as a prudential standard within the meaning of 12 U.S.C. 4513b (section 4513b) and for purposes of 12 CFR part 1236. The interplay of these two elements of the proposed rule is described below.

Section 4513b(b) authorizes FHFA to establish prudential management and operations standards for its regulated entities and provides that if a regulated entity fails to meet a standard, FHFA may require submission of a corrective plan specifying actions that the regulated entity will take to correct the deficiency.[49] To implement section 4513b, FHFA has adopted a prudential management and operations standards (PMOS) regulation, at 12 CFR part 1236. That regulation addresses FHFA determinations that a regulated entity has failed to meet a standard and provides that FHFA may base that determination on an examination, inspection, or any other information.[50] The PMOS regulation codifies FHFA's authority to permit a regulated entity to submit a PMOS corrective plan in conjunction with other required submissions, such as a capital restoration plan or a response to an examination report.[51] If a regulated entity fails to submit a corrective plan or fails to implement an approved corrective plan, the PMOS regulation provides for an FHFA order to correct the deficiency or to undertake additional corrective or remedial measures as FHFA may require.

FHFA has determined that it is legally appropriate and would be sound policy to identify its resolution planning rule as a prudential standard. Identifying the rule as a prudential standard provides FHFA access to section 4513b corrective measures, if necessary, to address deficiencies in a resolution plan, an Enterprise's failure to take actions set forth in its resolution plan that FHFA agrees could facilitate the Enterprise's rapid and orderly resolution, or concerns with an Enterprise's resolution planning process.[52] Section 4513b corrective measures are in line with FHFA's approach to resolution planning, which will be iterative and involve dialogue between an Enterprise and FHFA. A corrective approach to encourage or direct Enterprise management's attention to concerns of high priority to FHFA could in some cases be more constructive and more conducive to improvements in a resolution plan or the Enterprise planning process than an enforcement approach.

Because the resolution planning standard would be established as a regulation, FHFA could also bring an enforcement action if appropriate grounds existed and FHFA determined such action to be necessary.[53] Under its general enforcement authority, FHFA may order an Enterprise to cease and desist from a violation of law, which would include the final resolution planning rule, and may require an Enterprise to take other appropriate corrective action, including by implementing a plan to correct a violation of the final resolution planning rule. FHFA also may impose a civil money penalty for a violation of a final resolution planning rule.

Procedurally, the proposed rule permits FHFA to deem a determination of a deficiency in a resolution plan or an Enterprise's failure to undertake actions or changes that FHFA identified in any notice to an Enterprise following review of a resolution plan to be the failure of a prudential standard and to deem the Enterprise's submission of a revised resolution plan in accordance with any final resolution planning rule to be a corrective plan for purposes of the PMOS regulation. The proposed rule states that FHFA may find an Enterprise to have failed the resolution planning standard if the Enterprise does not undertake any planned action or change set forth by the Enterprise, and which FHFA identified as necessary in its notice to the Enterprise following review of the resolution plan.

In such cases, FHFA could provide the Enterprise a notice of failure in accordance with the PMOS regulation, and would inform the Enterprise of the need to submit a PMOS corrective plan or, a revised resolution plan that is deemed to be a PMOS corrective plan. Within 90 days, absent FHFA establishing a longer or shorter period, the Enterprise would be required to submit a revised resolution plan that addresses: (1) The deficiencies identified and discusses revisions to the plan to address the deficiencies; (2) Any changes to the Enterprise's business operations and corporate structure the Enterprise proposes to undertake to address the deficiencies, and a timeline for completing them; and, (3) Why the Enterprise believes the revised resolution plan is feasible and would facilitate its rapid and orderly resolution by FHFA, as receiver.

If a regulated entity fails to submit a corrective plan (which may be a revised

rule, including the Enterprise's methodology and process for identification of core business lines, resolution planning strategic analysis, and corporate governance related to resolution planning.

[49] 12 U.S.C. 4513b(b)(2)(B).

[50] 12 CFR 1236.4(a).

[51] *Id.,* 1236.4(c)(2)(ii).

[52] This determination reflects, among other things: (1) Safety and Soundness Act provisions that require FHFA to act as receiver for an Enterprise, should receivership be necessary; (2) Requirements for FHFA, as receiver, to establish an LLRE to continue the business of an Enterprise in resolution; (3) Requirements for the receiver to pay all valid obligations of the Enterprise, pursuant to the receiver's determination of claims; and, (4) clarifies the absence of any U.S. government support for the Enterprises or FHFA when acting as receiver. Prudential management and operation of an Enterprise and its successor LLRE during the resolution process will require advance planning. Also of note, FHFA is directed by statute to establish prudential management and operations standards on topics that would have a direct and critical bearing on an Enterprise's rapid and orderly resolution, such as: (1) The adequacy of management information systems; (2) Adequacy and maintenance of liquidity and reserves; (3) Overall risk management processes, including processes to identify, measure, monitor, and control material risks and for business resumption (or continuation) for all major systems to protect against disruptive events; (4) Management of counterparty risk; and, (5) Maintenance of adequate records to enable FHFA to determine the financial condition of an Enterprise. *See* 12 U.S.C. 4513b(a)(1), (4), (8), (9), and (10). It would be possible to address resolution planning in the context of these and other required standards, but it would be more coherent to address it in a single, more focused, standard.

[53] *See* 12 U.S.C. 4513b(a) (authorizing FHFA to establish standards as regulations) and 12 U.S.C. 4631(a)(1) (authorizing FHFA to issue a cease-and-desist order for, among other things, violating a regulation).

resolution plan) or fails to implement an approved corrective plan, then, in accordance with 12 U.S.C. 4513b and the PMOS regulation, FHFA may order the Enterprise to correct the deficiency or to implement the corrective plan and take other corrective or remedial measures.

*F. Corporate Governance Related to Resolution Planning*

The proposed rule would require the Enterprise's board of directors to approve each preliminary notice of core business lines prior to submission to FHFA, with approval noted in the minutes. A similar process would be required for any Enterprise request for FHFA reconsideration of a business line.

The proposed rule would require the Enterprise's board to approve each resolution plan prior to its submission to FHFA, with approval noted in the minutes. A revised resolution plan is considered a resolution plan, also requiring board approval. In contrast, an ''interim update'' (discussed below) would not be considered a resolution plan and would not require board approval. The content of an interim update, however, may warrant board approval, as a matter of appropriate corporate governance related to the nature of such update.

*G. Timing of Plan Submission; Interim Updates*

*Submission of initial resolution plan; successive plans.* FHFA proposes to require each Enterprise to submit its initial resolution plan 18 months after the regulatory due date for the initial notice of core business lines, which FHFA proposes to be three months after the effective date of a final rule. FHFA anticipates that any final rule would be effective 30 days after publication in the **Federal Register**. As a result, an Enterprise's first resolution plan would be required to be submitted to FHFA slightly less than two years after the final rule is published in the **Federal Register**. The due date for the initial plan will establish the due dates for successive plans with FHFA proposing to require each Enterprise to submit a resolution plan every two years thereafter.

While the effective date for a final rule is uncertain, FHFA is aware that other end-of-year reporting requirements may make it more challenging if the recurring due date for resolution plans were to fall in the fourth quarter of the calendar year. For that reason, among others, the proposed rule includes a provision permitting FHFA to alter the submission date of resolution plans. FHFA would provide notice to an Enterprise of any altered submission due date established by a final rule with the intention of providing the Enterprises two full years to develop their initial resolution plans. FHFA could alter a submission date on any other basis, such as on request by an Enterprise or if financial or economic conditions merit a delay.

*Interim update to a prior plan.* The proposed rule would permit FHFA to request an interim update to the Enterprise's most recently submitted resolution plan, on written notice to the Enterprise. FHFA may require an interim update after receiving a notice of an extraordinary event, for example. FHFA's notice requiring an interim update would set forth a deadline for submission and identify the portions or aspects of the resolution plan to be updated. FHFA expects to provide the Enterprise a reasonable amount of time to complete the update, and may alter any date set forth in the notice, in its discretion and as appropriate.

An interim update is not considered a resolution plan. Consequently, submission of an interim update would not itself affect the date for submission of the next resolution plan. If FHFA determines that it is appropriate, the Agency could alter that submission date on notice to an Enterprise.

*H. Effect of a Resolution Plan on Rights of Other Parties*

The proposed rule also includes three provisions addressing the effect of an Enterprise resolution plan on such considerations as preservation of privileges, execution of a receivership, and rights of private parties. The proposed rule would clarify and assert that the submission of any nonpublic data or information under FHFA's resolution planning rule would not constitute a waiver of or otherwise affect any privilege arising under Federal or state law, including the rules of any Federal or state court, to which the data or information is otherwise subject. The proposed rule also indicates that FHFA may assert examination privilege for any nonpublic data or information submitted under the rule.

The proposed rule would also clarify that an Enterprise's resolution plan would not have any binding effect on FHFA when appointed as receiver under 12 U.S.C. 4617. The resolution plan would not be binding on FHFA as conservator, either currently or if FHFA is appointed conservator in the future. FHFA proposes to clarify that any final rule would not create any private right of action based on a resolution plan prepared by an Enterprise or submitted to FHFA or based on any action taken by FHFA with respect to any such resolution plan. These provisions support the resolution planning process as a strategic, informational, and assessment regime which is critical to facilitate rapid and orderly resolution, but which does not commit FHFA to any action in exercising its authorities as receiver. FHFA or an Enterprise may take actions that are different from those considered or contained in any resolution plan.

**III. Section-by-Section Summary**

*A. Section 1242.1 Purpose; Identification as a Prudential Standard*

This section of the proposed rule sets forth its purposes and goals related to Enterprise resolution, identifies the rule as a prudential standard for purposes of 12 U.S.C. 4513b and FHFA's implementing regulation at 12 CFR part 1236, and addresses the effect of such identification relative to corrective plans required to be submitted pursuant to section 4513b. FHFA may also enforce this part pursuant to sections 1371, 1372, and 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, and 4636).

*B. Section 1242.2 Definitions*

This section of the proposed rule refers users to statutory definitions and FHFA's regulation setting forth definitions that are generally applicable (12 CFR part 1201) and sets forth definitions of other words and terms that are not defined by statute or in the Safety and Soundness Act. Words or terms used in the proposed rule that are defined by the Safety and Soundness Act or part 1201 include ''affiliate,'' ''authorizing statutes,'' ''default,'' ''in danger of default,'' ''enterprise,'' and ''limited-life regulated entity.'' The proposed rule sets forth definitions of ''credible,'' ''core business line,'' ''material change,'' and ''rapid and orderly resolution.'' The proposed meaning of each of those terms is described above, in material relevant to the use of such term.

*C. Section 1242.3 Identification of Core Business Lines*

This section of the proposed rule sets forth requirements related to identification of ''core business lines,'' including associated operations, services, functions, and supports. The proposed rule would establish a process for identification, including preliminary identification by each Enterprise and FHFA review and determination of core business lines, address the Enterprises' periodic review of business lines,

establish a process for changes to identifications, address the timing of each Enterprise's initial preliminary identification of core business lines, and address the timing for inclusion of a newly-identified core business line to be included in the following required resolution plan.

*D. Section 1242.4 Credible Resolution Plan Required; Other Notices to FHFA*

This section of the proposed rule establishes the requirement for Enterprise resolution plans to facilitate ''rapid and orderly resolution'' in the event FHFA is appointed receiver, sets forth requirements related to timing and frequency of submission of resolution plans to FHFA, and establishes processes for determining the timing for submission of each Enterprise's initial resolution plan and subsequent plans. This section also addresses interim updates to a resolution plan that may be required by FHFA.

This section establishes the requirement that an Enterprise submit a notice to FHFA on an extraordinary event, which may include a ''material change,'' as well as the timing and content of such a notice. This section also sets forth other matter related to the development and submission of a resolution plan, including the requirement for Enterprise board approval of a resolution plan prior to submission of the plan for FHFA. Finally, this section addresses the incorporation of material from a prior resolution plan into a subsequent plan by reference and addresses identification of an Enterprise point-of-contact for matters regarding the resolution plan.

*E. Section 1242.5 Informational Content of a Resolution Plan; Required and Prohibited Assumptions*

This section of the proposed rule sets forth substantive requirements for an Enterprise resolution plan, including important required and prohibited assumptions that must underpin and be reflected throughout each resolution, including in each plan's public section. This section describes the informational content of each resolution plan, including an executive summary, strategic analysis, and information on corporate governance related to resolution planning, organizational structures, management information systems, and interconnections and interdependencies.

*F. Section 1242.6 Form of Resolution Plan; Confidentiality*

This section of the proposed rule sets forth requirements for the form of a resolution plan, which must include a public section and a confidential section. FHFA expects to publish the public section of each resolution plan on its website. This section establishes both the presumption that material not included in the public section is confidential and a process for an Enterprise to request confidential treatment of information for purposes of the Freedom of Information Act and FHFA's implementing regulation, and for purposes of FHFA's regulation on disclosure of nonpublic information. This section of the proposed rule also asserts the non-waiver of otherwise applicable Federal and state privileges, as a result of submitting a resolution plan and asserts the bank examination privilege for any nonpublic information or data in the resolution plan and related materials submitted to FHFA.

*G. Section 1242.7 Review of Resolution Plans; Resubmission of Deficient Resolution Plans*

This section of the proposed rule addresses FHFA review of a resolution plan, after submission by an Enterprise, including an initial review for completeness, any request by FHFA for missing or additional information, an Enterprise's opportunity to provide such information, and a timeframe for providing missing or additional information. In this section, the proposed rule addresses FHFA's substantive review of a complete resolution plan, which may result in FHFA's determination of a deficiency in the plan. In this section, and for this purpose, the proposed rule defines ''deficiency.'' The proposed rule establishes a process for FHFA to provide an Enterprise notice of a deficiency (which, in accordance with § 1242.1(b), may be deemed a determination of failure of a prudential standard) and for Enterprise submission of a revised resolution plan to address such a deficiency (which, in accordance with § 1242.1(b) of the proposed rule, may be deemed a corrective plan for purposes of FHFA's PMOS regulation).

This section of the proposed rule also sets forth the timeframe for submission of any revised resolution plan, and includes a provision permitting FHFA to extend timeframes in any resolution planning rule adopted as final, on its own initiative or on request by an Enterprise.

*H. Section 1242.8 No Limiting Effect or Private Right of Action*

This section of the proposed rule establishes that a resolution plan does not limit or bind FHFA when acting as conservator or receiver, such that FHFA may, or may not, take any action set forth in an Enterprise's resolution plan; and, also that neither a resolution plan nor an FHFA rule requiring such a plan would give rise to any private right of action. An Enterprise resolution plan is intended, among other things, to provide strategic analysis and information to FHFA that it may use for its benefit, including for purposes of any capabilities or other assessment, in FHFA's sole discretion.

**IV. Comments Specifically Requested**

As stated above, FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. In addition to comments specifically requested within the description of the proposed rule, above, FHFA also requests comment on the questions set forth below. The most helpful comments reference the specific questions listed, explain the reason for any changes, and include supporting data.

*Scope*

1. Are the stated goals of Enterprise resolution planning clear? Are there goals that should be added, removed, or modified?

2. Would Enterprise resolution planning benefit from the availability of funding mechanisms such as convertible long-term debt or other similar loss-absorbing instruments (as recommended in the *Treasury Housing Reform Plan*)?

3. What advantages or disadvantages does the corporate organization of the Enterprises as single operating companies present for FHFA receivership?

*Definitions*

4. Are the defined terms in the proposed rule clear? Do they require further clarification and if so, how should they be defined?

5. Are there terms used in the proposed rule that should be defined in a final rule?

6. Are there terms or operative concepts used in other resolution planning regimes, such as the DFA section 165 rule or the FDIC IDI rule, that should be incorporated into an FHFA resolution planning rule (*e.g.,* ''material entity,'' ''critical operation'')?

*Governance and Process*

7. Are there resolution planning governance and oversight requirements in the proposed rule that could be clarified? Are there additional governance and oversight requirements that should be included?

8. Is the required frequency of resolution plan submission in the proposed rule appropriate? If not, what frequency would be appropriate?

9. Are the proposed timelines for Enterprise resolution planning (*i.e.,* core business lines identification, resolution plan submissions, revised plans, and interim updates) adequate for the Enterprises to develop and submit the information required by the proposed rule? If not, what timelines would be appropriate?

10. Should the proposed rule provide greater specificity (*e.g.,* in terms of a dollar amount or percentage of assets acquired or disposed of in a significant transaction) with regard to the definition of an Enterprise extraordinary event that would require notice to FHFA?

*Core Business Lines*

11. Should the proposed rule provide greater specificity on the required methodology, assessment, and process for Enterprise identification of core business lines?

12. Is the concept of ''core business lines'' clear, and is ''core business line'' defined appropriately? If not, how can FHFA provide additional clarity?

*Resolution Plan Informational Content and Assumptions*

13. Are the informational content elements described in the proposed rule appropriate and adequate for resolution planning? Are there any informational content elements in the proposed rule that create an unnecessary burden or should not be included in an Enterprise resolution plan?

14. Are there informational content elements described in the proposed rule that could be clarified? How can FHFA provide additional clarity?

15. What additional informational content elements should the final rule require? Describe any impediments to collection and production of existing or additional informational elements identified. What changes could FHFA make to reduce the identified burdens and impediments?

16. Should the final rule require any informational content elements to be delivered to FHFA on a more frequent basis (*e.g.,* quarterly) or available to FHFA on an ''on demand'' basis? What impediments apply to making such information available more frequently or on demand?

17. Are the required and prohibited assumptions for Enterprise resolution planning in the proposed rule appropriate? Are there any required or prohibited assumptions for Enterprise resolution planning that require clarification? Are there required or prohibited assumptions that should be added?

*FHFA Review of Plans*

18. Are there explicit factors FHFA should consider in determining whether a resolution plan is deficient?

*Confidentiality*

19. Are there portions of the Enterprise resolution plans that should be made available to the public? Are there portions that should remain confidential and privileged? What should FHFA consider in making such determinations?

20. Would greater transparency around Enterprise resolution plans impact market expectations and improve market discipline? If so, identify specific elements where transparency would have the greatest effect and describe how transparency into those elements would improve market discipline. For example, would a public description of Enterprise sources of funding in receivership or a related discussion of how losses may be allocated enhance market discipline? Are there other ways the proposed rule should be modified to improve market discipline, and if so, how should the proposed rule be modified?

## V. Paperwork Reduction Act

The proposed rule would not contain any information collection requirement that would require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to OMB for review.

## VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of this proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that this proposed rule, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities because the regulation would apply only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

## List of Subjects in 12 CFR Part 1242

Administrative practice and procedure, Government-sponsored enterprises, Reporting and record keeping requirements, Securitizations.

## Authority and Issuance

■ For the reasons stated in the preamble, and under the authority of 12 U.S.C. 4511, 4513, and 4526, FHFA proposes to amend chapter XII of title 12 of the Code of Federal Regulations by adding new part 1242 to subchapter C to read as follows:

**CHAPTER XII—Federal Housing Finance Agency**

**SUBCHAPTER C—Enterprise Regulations**

# PART 1242—RESOLUTION PLANNING

Sec.



**Authority:** 12 U.S.C. 4511; 12 U.S.C. 4513; 12 U.S.C. 4513b; 12 U.S.C. 4514; 12 U.S.C. 4517; 12 U.S.C. 4526; and 12 U.S.C. 4617.

### § 1242.1 Purpose; identification as a prudential standard.

(a) *Purpose.* The purpose of this part is to require each Enterprise to develop a plan for submission to FHFA that would assist FHFA in planning for the rapid and orderly resolution of an Enterprise using FHFA's receivership authority at 12 U.S.C. 4617, in a manner that:

(1) Minimizes disruption in the national housing finance markets by providing for the continued operation of the core business lines of an Enterprise in receivership by a newly constituted limited-life regulated entity;

(2) Preserves the value of an Enterprise's franchise and assets;

(3) Facilitates the division of assets and liabilities between the limited-life regulated entity and the receivership estate;

(4) Ensures that investors in mortgage-backed securities guaranteed by the Enterprises and in Enterprise unsecured debt bear losses in accordance with the

priority of payments established in the Safety and Soundness Act while minimizing unnecessary losses and costs to these investors; and

(5) Fosters market discipline by making clear that no extraordinary government support will be available to indemnify investors against losses or fund the resolution of an Enterprise.

(b) *Identification as a prudential standard; effect of identification.* This part is a prudential standard pursuant to section 1313B of the Safety and Soundness Act, 12 U.S.C. 4513b, and is subject to 12 CFR part 1236. In its discretion, FHFA may deem:

(1) The determination of a deficiency in a resolution plan; or

(2) The failure to undertake actions or changes identified by FHFA in the notice provided pursuant to § 1242.7(b)(1), to be a failure to meet a standard for purposes of § 1236.4. In its discretion, FHFA may also deem a revised, resubmitted resolution plan to be a corrective plan for purposes of § 1236.4.

**§ 1242.2 Definitions.**

Unless otherwise indicated, terms used in this part have the meanings that they have in 12 CFR part 1201 and in the Federal Housing Enterprises Financial Safety and Soundness Act (12 U.S.C. 4501 *et seq.*).

*Core business line* means a business line of the Enterprise that plausibly would continue to operate in a limited-life regulated entity, considering the purposes, mission, and authorized activities of the Enterprise as set forth in its authorizing statute and the Safety and Soundness Act. *Core business line* includes associated operations, services, functions, and supports necessary for any identified core business line to be continued, such as servicing, credit enhancement, securitization support, information technology support and operations, and human resources and personnel.

*Credible,* with regard to a resolution plan, means a resolution plan that:

(1) Demonstrates consideration of required and prohibited assumptions set forth at § 1242.5(b);

(2) Provides strategic analysis and detailed information as required by § 1242.5(c) through (g) that is well-founded and based on information and data related to the Enterprise that are observable or otherwise verifiable and employ reasonable projections from current and historical conditions within the broader financial markets; and

(3) Plausibly achieves the purposes of § 1242.1(a).

*Material change* means an event, occurrence, change in conditions or circumstances, or other change that results in, or could reasonably be foreseen to have, a material effect on:

(1) The resolvability of the Enterprise;

(2) The Enterprise's resolution strategy; or

(3) How the Enterprise's resolution plan is implemented. Material changes may include the identification of a new core business line or significant increases or decreases in business, operations, funding, or interconnections.

*Rapid and orderly resolution* means a process for establishing a limited-life regulated entity as successor to the Enterprise under section 1367 of the Safety and Soundness Act (12 U.S.C 4617), including transferring Enterprise assets and liabilities to the limited-life regulated entity, such that succession by the limited-life regulated entity can be accomplished promptly and in a manner that substantially mitigates the risk that the failure of the Enterprise would have serious adverse effects on national housing finance markets.

**§ 1242.3 Identification of core business lines.**

(a) *Enterprise preliminary identification; notice to FHFA; timing.* (1) Each Enterprise shall conduct periodic reviews of its business lines to identify core business lines, consistent with the requirements of paragraph (a)(2) of this section.

(2) Each Enterprise shall establish and implement a process to identify each of its core business lines. The process shall include a methodology for evaluating the Enterprise's participation in activities and markets that may be critical to the stability of the national housing finance markets or carrying out the statutory mission and purpose of the Enterprise. The methodology shall be designed, taking into account the nature, size, complexity, and scope of the Enterprise's operations, to identify and assess:

(i) The markets and activities in which the Enterprise participates or has operations;

(ii) The significance of those markets and activities with respect to the national housing finance markets or the Enterprise's obligation to carry out its statutory mission and purpose; and

(iii) The significance of the Enterprise as a provider or other participant in those markets and activities.

(3) Enterprise identification of any business line as a core business line is preliminary and is subject to review by FHFA. Each Enterprise must provide a notice of its preliminary identification of core business lines to FHFA, including a description of its methodology and the basis for identification of each core business line.

(4) The board of directors of the Enterprise shall approve each notice of preliminary identification of core business lines before submission to FHFA, with such approval noted in board minutes.

(5) Each Enterprise must conduct its initial identification process and submit its initial identification of core business lines to FHFA by the date that is three months after the effective date of the final rule. Thereafter, each Enterprise shall conduct periodic identification processes, determining the timing of each periodic process to ensure that the process for identification, including FHFA review and determination required by paragraph (b) of this section, can be complete in sufficient time for each succeeding required resolution plan to include the information required under § 1242.5 for each core business line. FHFA may also direct an Enterprise as to the timeframe for conducting any subsequent identification process.

(6) Each Enterprise must periodically review its identification process and update it as necessary to ensure its continued effectiveness.

(b) *FHFA identification of core business lines; notice to an Enterprise; timing of inclusion in resolution plan.* (1) Within three months of receiving an Enterprise notice of the preliminary identification of a business line as a core business line, FHFA will provide notice to the Enterprise of its determination of each core business line. FHFA may also identify operations, services, functions, or supports associated with any core business line.

(2) FHFA may identify any business line of the Enterprise as a core business line, considering factors set forth in paragraph (a)(2) of this section or any other factor FHFA deems appropriate, following review of an Enterprise notice of preliminary identification or at any other time, on written notice to an Enterprise.

(3) If FHFA identifies a core business line under paragraph (b)(2) of this section, an Enterprise is not required to include that core business line in a resolution plan if that plan is due within six months after the Enterprise receives notice of identification from FHFA.

(c) *Reconsideration of business line identification*—(1) *Reconsideration initiated by an Enterprise.* (i) An Enterprise may request that FHFA reconsider the identification under paragraph (a) or (b) of this section, by submitting a written request to FHFA that includes a clear and complete

statement of all arguments and all material information that the Enterprise believes is relevant to reconsideration as a core business line.

(ii) The board of directors of the Enterprise shall approve each request for reconsideration of identification before submission to FHFA, with such approval noted in board minutes.

(iii) FHFA will respond to an Enterprise request for reconsideration within three months after the date on which a complete request is received.

(2) *Reconsideration initiated by FHFA.* FHFA may reconsider the identification of any business line, including reconsideration of any operation, service, function, or support, at any time and in its discretion, on written notice to an Enterprise.

(3) *FHFA notice of reconsideration.* FHFA will provide a notice of reconsideration to the affected Enterprise, stating the results of the reconsideration. If FHFA determines to change an identification, such notice may also provide an effective date or other delaying or triggering condition for the change to become effective.

(4) *Effect of reconsideration.* For purposes of Enterprise resolution plans, identification as a core business line continues in effect until any notice of reconsideration removing such identification becomes effective.

**§ 1242.4 Credible resolution plan required; other notices to FHFA.**

(a) *Credible resolution plan required; frequency and timing of plan submission*—(1) *Credible resolution plan required; resolution plan submission dates.* Each Enterprise is required to submit a credible resolution plan to FHFA in accordance with frequency and timing requirements established by FHFA. Each Enterprise is required to submit its initial resolution plan 18 months after the date on which it is required to submit its initial notice preliminarily identifying core business lines to FHFA in accordance with § 1242.3(a)(2). Thereafter, each Enterprise shall submit a resolution plan to FHFA not later than two years following the submission date for the prior resolution plan, unless otherwise notified by FHFA in accordance with paragraph (a)(2) of this section.

(2) *Altering submission dates.* Notwithstanding anything to the contrary in this part, FHFA may determine that an Enterprise shall submit its resolution plan on a date different from any date provided in paragraph (a)(1) of this section, which may be before or after any date so established.

(3) *Interim updates.* FHFA may require that an Enterprise submit an update to a resolution plan submitted under this part, within a reasonable time, as determined by FHFA. FHFA shall notify the Enterprise of its requirement to submit an update under this paragraph (a)(3) in writing and shall specify the portions or aspects of the resolution plan the Enterprise shall update. Submission of an interim update does not affect the date for submission of a resolution plan, unless otherwise notified by FHFA in accordance with paragraph (a)(2) of this section.

(b) *Notice of extraordinary events; inclusion in next resolution plan.* Each Enterprise shall provide FHFA with a notice no later than 45 days after any material change, merger, reorganization, sale or divestiture of a business unit or material assets, or similar transaction, or any fundamental change to the Enterprise's resolution strategy. Such notice must describe such extraordinary event and explain how it may plausibly affect the resolution of the Enterprise. The Enterprise shall address any such extraordinary event with respect to which it has provided notice pursuant to this paragraph (b) in the next resolution plan submitted by the Enterprise, provided that plan is required to be submitted more than 90 days after submission of the notice of an extraordinary event to FHFA.

(c) *Board of directors' approval of resolution plan.* The board of directors of the Enterprise shall approve each resolution plan (including any revised resolution plan) before submission to FHFA, with such approval noted in board minutes.

(d) *Point of contact.* Each Enterprise shall identify an Enterprise senior management official and position responsible for serving as a point of contact regarding the resolution plan.

(e) *Incorporation of previously submitted resolution plan information by reference.* Any resolution plan submitted by an Enterprise may incorporate by reference information from a prior resolution plan submitted to FHFA, provided that:

(1) The resolution plan seeking to incorporate information by reference clearly indicates:

(i) The information the Enterprise is incorporating by reference; and

(ii) Which of the Enterprise's previously submitted resolution plan(s) originally contained the information the Enterprise is incorporating by reference, including the specific location of that information in the previously submitted resolution plan; and

(2) The information the Enterprise is incorporating by reference remains accurate in all respects that are material to the Enterprise's resolution plan.

(f) *Extensions of time.* Upon its own initiative or a written request by an Enterprise, FHFA may extend any time period under this part. Each extension request by an Enterprise shall be supported by a written statement describing the basis and justification for the request.

**§ 1242.5 Informational content of a resolution plan; required and prohibited assumptions.**

(a) *In general.* An Enterprise resolution plan shall reflect required and prohibited assumptions specified in paragraph (b) of this section and include information specified in paragraphs (c) through (h) of this section, as well as analysis, in detail, to facilitate a rapid and orderly resolution of the Enterprise by FHFA as receiver in a manner that minimizes the risk that resolution of an Enterprise would have serious adverse effects on the national housing finance markets, and to the extent possible, the amount of any losses to be realized by the Enterprise's creditors.

(b) *Required and prohibited assumptions when developing a resolution plan.* In developing a resolution plan, each Enterprise shall:

(1) Take into account that receivership of the Enterprise may occur under the severely adverse economic conditions provided to the Enterprise by FHFA in conjunction with any stress testing required or in another scenario provided by FHFA;

(2) Not assume the provision or continuation of extraordinary support by the United States to the Enterprise to prevent either its becoming in danger of default or in default (including, in particular, support obtained or negotiated on behalf of the Enterprise by FHFA in its capacity as supervisor, conservator, or receiver of the Enterprise, including the Senior Preferred Stock Purchase Agreements entered into by FHFA and the U.S. Department of the Treasury on September 7, 2008 and any amendments thereto); and

(3) Reflect statutory provisions that obligations and securities of the Enterprise issued pursuant to its authorizing statute, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof other than the Enterprise.

(c) *Executive summary.* Each resolution plan of an Enterprise shall

include an executive summary describing:

(1) Summary of the key elements of the Enterprise's strategic analysis;

(2) A description of each material change experienced by the Enterprise since submission of the Enterprise's prior resolution plan (or affirmation that no such change has occurred);

(3) Changes to the Enterprise's previously submitted resolution plan resulting from any:

(i) Change in law or regulation;

(ii) Guidance or feedback from FHFA; or

(iii) Material change described pursuant to paragraph (c)(2) of this section; and

(4) Any actions taken by the Enterprise since submitting its prior resolution plan to improve the effectiveness of the resolution plan or remediate or otherwise mitigate any material weaknesses or impediments to a rapid and orderly resolution.

(d) *Strategic analysis.* Each resolution plan shall include a strategic analysis describing the Enterprise's plan for facilitating its rapid and orderly resolution by FHFA. Such analysis shall:

(1) Include detailed descriptions of—

(i) Key assumptions and supporting analysis underlying the resolution plan, including any assumptions made concerning the economic or financial conditions that would be present at the time resolution would occur;

(ii) Actions, or ranges of actions, which if taken by the Enterprise could facilitate a rapid and orderly resolution and those actions that the Enterprise intends to take;

(iii) The corporate governance framework that supports determination of the specific actions to be taken to facilitate a rapid and orderly resolution as the Enterprise is becoming in danger of default (including identifying the senior management officials responsible for making those determinations and taking those actions);

(iv) Funding, liquidity, and capital needs of, and resources and loss absorbing capacity available to, the Enterprise, which shall be mapped to its core business lines, in the ordinary course of business and in the event the Enterprise becomes in danger of default or in default;

(v) Considering the Enterprise's core business lines, a strategy for identifying assets and liabilities of the Enterprise to be transferred to a limited-life regulated entity; and for transferring operations of, and funding for, the Enterprise to a limited-life regulated entity, which shall be mapped to core business lines;

(vi) A strategy for preventing the failure or discontinuation of each core business line and its associated operations, services, functions, or supports as the core business line is transferred to a limited-life regulated entity, and actions that, in the Enterprise's view, FHFA could take to prevent or mitigate any adverse effects of such failure or discontinuation on the national housing finance markets;

(vii) A strategy for mitigating the effect on the Enterprise of another Enterprise becoming in danger of default or in default, on the continuation of each of the Enterprise's core business lines and its associated operations, services, functions, or supports as any assets or operations of the other Enterprise are transferred to the Enterprise;

(viii) The extent to which claims against the Enterprise by creditors and counterparties would be satisfied in accordance with § 1237.9 and the manner and source of satisfaction of those claims consistent with the continuation of the Enterprise's core business lines by the limited-life regulated entity; and

(ix) A strategy for transferring or unwinding qualified financial contracts, as defined at 12 U.S.C. 4617(d)(8)(D)(i), in a manner consistent with 12 U.S.C. 4617(d)(8) through (11);

(2) Identify the time period(s) the Enterprise expects would be needed to successfully execute each action identified in paragraph (d)(1)(ii) of this section to facilitate rapid and orderly resolution, and any impediments to such actions;

(3) Identify and describe—

(i) Any potential material weaknesses or impediments to rapid and orderly resolution as conceived in the Enterprise's plan;

(ii) Any actions or steps the Enterprise has taken or proposes to take, or which other market participants could take, to remediate or otherwise mitigate the weaknesses or impediments identified by the Enterprise; and

(iii) A timeline for the remedial or other mitigating action that the Enterprise proposes to take; and

(4) Provide a detailed description of the processes the Enterprise employs for—

(i) Determining the current market values and marketability of the core business lines and material asset holdings of the Enterprise;

(ii) Assessing the feasibility of the Enterprise's plans (including timeframes) for executing any sales, divestitures, restructurings, recapitalizations, or other similar actions contemplated in the Enterprise's resolution plan; and

(iii) Assessing the impact of any sales, divestitures, restructurings, recapitalizations, or other similar actions on the value, funding, and operations of the Enterprise and its core business lines.

(e) *Corporate governance relating to resolution planning.* Each resolution plan shall:

(1) Include a detailed description of—

(i) How resolution planning is integrated into the corporate governance structure and processes of the Enterprise;

(ii) The process for identifying core business lines, including a description of the Enterprise's methodology considering the requirements of § 1242.3(a);

(iii) Enterprise policies, procedures, and internal controls governing preparation and approval of the resolution plan; and

(iv) The nature, extent, and frequency of reporting to Enterprise senior executive officers and the board of directors regarding the development, maintenance, and implementation of the Enterprise's resolution plan;

(2) Provide the identity and position of the Enterprise senior management official primarily responsible for overseeing the development, maintenance, implementation, and submission of the Enterprise's resolution plan and for the Enterprise's compliance with this part;

(3) Describe the nature, extent, and results of any contingency planning or similar exercise conducted by the Enterprise since the date of the Enterprise's most recently submitted resolution plan to assess the viability of or improve the resolution plan of the Enterprise; and

(4) Identify and describe the relevant risk measures used by the Enterprise to report credit risk exposures both internally to its senior management and board of directors, as well as any relevant risk measures reported externally to investors or to FHFA.

(f) *Organizational structure, interconnections, and related information.* Each resolution plan shall:

(1) Provide a detailed description of the Enterprise's organizational structure, including—

(i) A list of all affiliates and trusts within the Enterprise's organization that identifies for each affiliate and trust (legal entity), the following information (provided that, where such information would be identical across multiple legal entities, it may be presented in relation to a group of identified legal entities):

(A) The percentage of voting and nonvoting equity of each legal entity listed; and

(B) The location, jurisdiction of incorporation, licensing, and key management associated with each material legal entity identified;

(ii) A mapping of the Enterprise's operations, services, functions, and supports associated with each of its core business lines, identifying—

(A) The entity, including any third-party providers, responsible for conducting each associated operation or service that supports the functioning of each core business line as well as the Enterprise's material asset holdings; and

(B) Liabilities related to such operations, services, and core business lines;

(2) Provide an unconsolidated balance sheet for the Enterprise and a consolidating schedule for all securitization trusts consolidated by the Enterprise;

(3) Provide a schedule showing all assets and liabilities of unconsolidated Enterprise securitization trusts;

(4) Include a description of the material components of the liabilities of the Enterprise and each identified core business line that, at a minimum, separately identifies types and amounts of the short-term and long-term liabilities, secured and unsecured liabilities, and subordinated liabilities;

(5) Identify and describe the processes used by the Enterprise to—

(i) Determine to whom the Enterprise has pledged collateral;

(ii) Identify the person or entity that holds such collateral; and

(iii) Identify the jurisdiction in which the collateral is located, and, if different, the jurisdiction in which the security interest in the collateral is enforceable against the Enterprise;

(6) Describe any material off-balance sheet exposures (including guarantees and contractual obligations) of the Enterprise, including a mapping to each of its core business lines;

(7) Describe the practices of the Enterprise and its core business lines related to the booking of trading and derivatives activities;

(8) Identify material hedges of the Enterprise and its core business lines related to trading and derivative activities, including a mapping to legal entity;

(9) Describe the hedging strategies of the Enterprise;

(10) Describe the process undertaken by the Enterprise to establish exposure limits;

(11) Identify the third-party providers with which the Enterprise has significant business connections (including third parties performing or providing operations, services, functions, or supports associated with each core business line) and describe the business connections, dependencies and relationships with such third party;

(12) Report on the counterparty credit risk exposure to—

(i) The 20 largest single-family mortgage sellers and the 20 largest single-family mortgage servicers to the Enterprise (where ''largest'' is determined as of the end of the quarter preceding submission of a resolution plan, and the Enterprise includes an entity that is among the largest in both categories in each separate report category); and

(ii) All multifamily sellers and servicers to the Enterprise, based on purchasing volume during the preceding year.

(13) Report on insurance in force, risk in force, and exposure and potential future exposure related to all providers of loan-level mortgage insurance;

(14) Analyze whether the failure of a third-party provider to an Enterprise would likely have an adverse impact on an Enterprise or result in the Enterprise becoming in danger of default or in default, the availability of alternative providers, and the ability of the Enterprise to change providers when necessary; and

(15) Identify each trading, payment, clearing, or settlement system of which the Enterprise, directly or indirectly, is a member and on which the Enterprise conducts a material number or value amount of trades or transactions, and map membership in each such system to the Enterprise and its core business lines.

(g) *Management information systems.* (1) Each resolution plan shall include:

(i) A detailed inventory and description of the key management information systems and applications, including systems and applications for risk management, automated underwriting, valuation, accounting, and financial and regulatory reporting, used by the Enterprise, and systems and applications containing records used to manage all qualified financial contracts. The description of each system or application provided shall identify the legal owner or licensor, the use or function of the system or application, service level agreements related thereto, any software and system licenses, and any intellectual property associated therewith;

(ii) A mapping of the key management information systems and applications to core business lines of the Enterprise that use or rely on such systems and applications;

(iii) An identification of the scope, content, and frequency of the key internal reports that senior management of the Enterprise and core business lines use to monitor the financial health, risks, and operation of the Enterprise and core business lines;

(iv) A description of the process for FHFA to access the management information systems and applications identified in this paragraph (g); and

(v) A description and analysis of—

(A) The capabilities of the Enterprise's management information systems to collect, maintain, and report, in a timely manner to management of the Enterprise and to FHFA, the information and data underlying the resolution plan; and

(B) Any gaps or weaknesses in such capabilities, and a description of the actions the Enterprise intends to take to promptly address such gaps, or weaknesses, and the timeframe for implementing such actions.

(h) *Identification of point of contact.* The Enterprise senior management official responsible for serving as a point of contact regarding the resolution plan shall be identified in the resolution plan.

**§ 1242.6 Form of resolution plan; confidentiality.**

(a) *Form of resolution plan*—(1) *Generally.* Each resolution plan of an Enterprise shall be divided into a public section and a confidential section. Each Enterprise shall segregate and separately identify the public section from the confidential section.

(2) *Content of public section.* The public section of a resolution plan shall clearly reflect required and prohibited assumptions set forth at § 1242.5(b) and consist of an executive summary of the resolution plan that describes the business of the Enterprise and includes, to the extent material to an understanding of the Enterprise:

(i) A description of each core business line, including associated operations and services;

(ii) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(iii) A description of derivative activities, hedging activities, and credit risk transfer instruments;

(iv) A list of memberships in material payment, clearing and settlement systems;

(v) The identities of the principal officers;

(vi) A description of the corporate governance structure and processes related to resolution planning;

(vii) A description of material management information systems; and

(viii) A description, at a high level, of strategies to facilitate resolution,

covering such items as the range of potential purchasers of the Enterprise's core business lines and other significant assets, as well as measures that, if taken by the Enterprise, could minimize the risk that its resolution would have serious adverse effects on the national housing finance markets and minimize the amount of potential loss to the Enterprise's investors and creditors.

(b) *Confidential treatment of resolution plan.* (1) The confidentiality of each resolution plan and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)), 12 CFR part 1202 (FHFA's regulation implementing the Freedom of Information Act), and 12 CFR part 1214 (FHFA's regulation on the availability of non-public information).

(2) An Enterprise submitting a resolution plan or related materials pursuant to this part that desires confidential treatment of the information under 5 U.S.C. 552(b)(4), 12 CFR part 1202 (Freedom of Information Act), and 12 CFR part 1214 (availability of non-public information) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the confidential section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. The submission of any nonpublic data or information under this part shall be subject to the examination privilege.

**§ 1242.7 Review of resolution plans; resubmission of deficient resolution plans.**

(a) *FHFA acceptance of resolution plan; review for completeness.* (1) After receipt of a resolution plan, FHFA will either acknowledge acceptance of the plan for review or return the resolution plan if FHFA determines that it is incomplete or that substantial additional information is required to facilitate review of the resolution plan.

(2) If FHFA determines that a resolution plan is incomplete or that substantial additional information is necessary to facilitate review of the resolution plan:

(i) FHFA shall provide notice to the Enterprise in writing of the area(s) in which the resolution plan is incomplete or with respect to which additional information is required; and

(ii) Within 30 days after receiving such notice (or such other time period as FHFA may establish in the notice), the Enterprise shall resubmit a complete resolution plan or such additional information as requested to facilitate review of the resolution plan.

(b) *FHFA review of complete plan; determination regarding deficient resolution plan.* (1) Following review of a complete resolution plan, FHFA will send a notification to each Enterprise that:

(i) Identifies any deficiencies in the Enterprise's resolution plan (or confirms that no deficiencies were identified);

(ii) Identifies any planned actions or changes set forth by the Enterprise that FHFA agrees could facilitate a rapid and orderly resolution of the Enterprise; and

(iii) Provides any other feedback on the resolution plan (including feedback on timing of actions or changes to be undertaken by the Enterprise). FHFA will send the notification no later than 12 months after accepting a complete plan, unless FHFA determines in its discretion that extenuating circumstances exist that require delay.

(2) A deficiency is an aspect of an Enterprise's resolution plan that FHFA determines presents a weakness that, individually or in conjunction with other aspects, could undermine the feasibility of the Enterprise's resolution plan.

(c) *Resubmission of a resolution plan.* Within 90 days of receiving a notice of deficiency, or such shorter or longer period as FHFA may establish by written notice to the Enterprise, an Enterprise shall submit a revised resolution plan to FHFA that addresses all deficiencies identified by FHFA, and that discusses in detail:

(1) Revisions to the plan made by the Enterprise to address the identified deficiencies;

(2) Any changes to the Enterprise's business operations and corporate structure that the Enterprise proposes to undertake to address a deficiency (including a timeline for completing such changes); and

(3) Why the Enterprise believes that the revised resolution plan is feasible and would facilitate a rapid and orderly resolution by FHFA as receiver.

**§ 1242.8 No limiting effect or private right of action.**

(a) *No limiting effect on resolution proceedings.* A resolution plan submitted pursuant to this part shall not have any binding effect on FHFA when appointed as conservator or receiver under 12 U.S.C. 4617.

(b) *No private right of action.* Nothing in this part creates or is intended to create a private right of action based on a resolution plan prepared or submitted under this part or based on any action taken by FHFA with respect to any resolution plan submitted under this part.

**Mark A. Calabria,**

*Director, Federal Housing Finance Agency.*

[FR Doc. 2020–28812 Filed 1–7–21; 8:45 am]

**BILLING CODE 8070–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R09–OAR–2020–0618; FRL–10018–46–Region 9]**

## Partial Approval and Partial Disapproval of Air Quality Implementation Plans; Arizona; West Pinal County; 1987 $PM_{10}$ Nonattainment Area Requirements

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve in part and to disapprove in part the state implementation plan (SIP) revision submitted by the State of Arizona to meet Clean Air Act (CAA or ''Act'') requirements for the 1987 $PM_{10}$ national ambient air quality standards (NAAQS or ''standard'') in the West Pinal County $PM_{10}$ nonattainment area. The State of Arizona's ''2015 West Pinal Moderate $PM_{10}$ Nonattainment Area SIP'' (''West Pinal County $PM_{10}$ Plan'') addresses the CAA nonattainment area requirements for the 1987 $PM_{10}$ NAAQS, including requirements for an emissions inventory, an attainment demonstration, reasonable further progress, reasonably available control measures, contingency measures, and motor vehicle emissions budgets. The EPA is proposing to approve the base year 2008 emissions inventory for direct $PM_{10}$ and to disapprove the remaining elements of the West Pinal County $PM_{10}$ Plan.

**DATES:** Written comments must arrive on or before February 8, 2021.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R09–OAR–2020–0618 at *https://www.regulations.gov*. For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public

docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, or if you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Jerry Wamsley, Air Planning Office (ARD–2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 947–4111, or by email at *wamsley.jerry@epa.gov*.

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

## Table of Contents



## I. Regulatory Context

### *A. $PM_{10}$ Standard, Area Designations, and SIPs*

The EPA sets the National Ambient Air Quality Standard (NAAQS) for certain ambient air pollutants at levels required to protect human health and the environment. Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers, or $PM_{10}$, is one of these ambient air pollutants for which the EPA has established health-based standards. On July 1, 1987, the EPA promulgated two primary standards for $PM_{10}$: A 24-hour standard of 150 micrograms per cubic meter (μg/m$^3$); and an annual $PM_{10}$ standard of 50 μg/m$^3$. The EPA also promulgated secondary $PM_{10}$ standards that were identical to the primary standards.[1] Because they are identical, we refer to the primary and secondary standards using the singular term, NAAQS. Effective December 18, 2006, EPA revoked the annual $PM_{10}$ NAAQS but retained the 24-hour $PM_{10}$ NAAQS.[2]

An area attains the 24-hour $PM_{10}$ NAAQS when the expected number of days per calendar year with a 24-hour concentration in excess of 150 micrograms per cubic meter (μg/m$^3$) (referred to herein as an ''exceedance''), is equal to or less than one as determined in accordance with 40 CFR part 50, appendix K.[3] Conversely, a violation of the $PM_{10}$ NAAQS occurs when the number of expected annual exceedances of the 24-hour NAAQS is greater than one.

Most of Pinal County, Arizona, including what is now the West Pinal County $PM_{10}$ nonattainment area, was included in the ''rest of state'' area, which was designated ''unclassifiable'' for the 24-hour $PM_{10}$ NAAQS by operation of law upon enactment of the CAA, consistent with section 107(d)(4)(B)(iii). Until recently, this area in Arizona remained designated ''unclassifiable'' for the 1987 24-hour $PM_{10}$ NAAQS. The CAA, under section 107(d)(3), authorizes the EPA to revise the designation of, or ''redesignate,'' areas (or portions thereof) based on air quality data, planning and control considerations, or any other air-quality-related considerations that the EPA deems appropriate.

On October 14, 2009, under CAA section 107(d)(3)(A), the EPA notified the Governor of Arizona and four tribal leaders (whose areas of Indian country are located entirely, or in part, within Pinal County) that the designation for Pinal County, and any nearby areas that may be contributing to the monitored violations in Pinal County, should be revised.[4] Our decision to initiate the redesignation process was due to ambient data for 2006–2008 from $PM_{10}$ monitoring sites within the County showing widespread, frequent, and in some instances, severe, violations of the $PM_{10}$ standard.

Effective July 2, 2012, the EPA designated a portion of state lands in Pinal County, Arizona (''West Pinal County'') as nonattainment for the 1987 $PM_{10}$ NAAQS based on monitoring data from 2006–2008.[5] West Pinal County is located in central Arizona, southeast of the Phoenix metropolitan area and northwest of the city of Tucson. Pinal County covers 5,365 square miles and has two distinct western and eastern regions with different characteristics relevant to pollution formation. The West Pinal County $PM_{10}$ nonattainment area is located within the western region, characterized by low desert valleys and an arid climate. The eastern region is mountainous, with elevations up to 6,441 feet.

As a result of the nonattainment designation, EPA classified West Pinal County as a ''Moderate'' $PM_{10}$ nonattainment area. Consequently, by January 2, 2014, Arizona was required to submit a nonattainment plan SIP revision for the 24-hour $PM_{10}$ NAAQS meeting relevant CAA requirements. The State submitted a SIP revision intended to meet these requirements on December 21, 2015, and this ''2015 West Pinal Moderate $PM_{10}$ Nonattainment Area SIP'' is the subject of this proposed action. For a $PM_{10}$ nonattainment area classified as Moderate, section 188(c) of the CAA provides that the Moderate area attainment date is ''as expeditiously as practicable, but no later than the end of the sixth calendar year after the area's designation as nonattainment.'' Consequently, the applicable attainment date for the West Pinal County area, designated nonattainment in 2012, was as expeditiously as practicable, but no later than December 31, 2018.

CAA section 188(b)(2) requires the EPA to determine whether a state has

[1] 52 FR 24634 (July 1, 1987).

[2] 71 FR 61144 (October 17, 2006).

[3] See 40 CFR 50.6 and 40 CFR part 50, appendix K.

[4] Letter from Laura Yoshii, Acting Regional Administrator to Governor Jan Brewer dated October 14, 2009. The EPA notified the tribal leaders of the Ak-Chin Indian Community, Gila River Indian Community, San Carlos Apache Tribe by letters dated December 30, 2009, and Tohono O'odham Nation by letter dated September 21, 2010.

[5] 77 FR 32024 (May 31, 2012). The precise boundaries for the West Pinal County nonattainment area are described in 40 CFR 81.303.

attained the 24-hour $PM_{10}$ NAAQS in a Moderate $PM_{10}$ nonattainment area by the applicable attainment date and requires the EPA to make such a determination within six months after that date. If the EPA determines that a Moderate area has not attained the NAAQS by the relevant attainment date, then the area is reclassified as a Serious area by operation of law. On June 24, 2020, the EPA determined that the West Pinal County nonattainment area had not attained the 1987 24-hour $PM_{10}$ NAAQS by December 31, 2018, the outermost permissible statutory attainment date for the area.[6] This determination was based on our calculation of the $PM_{10}$ design value for the West Pinal County nonattainment area over the 2016–2018 period, using complete, quality-assured, and certified $PM_{10}$ monitoring data.

The basis for the EPA's June 24, 2020 finding of failure to attain the $PM_{10}$ NAAQS and the margin by which the area failed to attain indicate that the Moderate plan's modeled attainment demonstration, which incorrectly predicted attainment of the $PM_{10}$ NAAQS by December 31, 2018, is not approvable. Because the modeled attainment demonstration is not approvable, as described in section III.D, other elements of the West Pinal County $PM_{10}$ Plan that are dependent upon the modeled attainment demonstration are likewise not approvable, *e.g.,* the emission controls imposed by the State to meet reasonably available control measure/reasonably available control technology (RACM/RACT) requirements based on the predicted sufficiency of those controls to result in attainment by the intended attainment date. If finalized as we propose, our disapproval of most elements of the Moderate plan will start sanctions and Federal implementation plan (FIP) clocks, which can be turned off by the EPA's approval of new plan elements for the $PM_{10}$ NAAQS that correct the deficiencies within the Moderate plan. With the EPA's reclassification of the West Pinal County area to Serious, Arizona now has an obligation to submit, by January 24, 2022, a nonattainment plan SIP revision that complies with the statutory and regulatory requirements for Serious $PM_{10}$ nonattainment plans and that demonstrates attainment of the $PM_{10}$ NAAQS as expeditiously as practicable, but no later than December 31, 2022. Although reclassification of an area from Moderate to Serious does not eliminate a state's obligation to meet Moderate area nonattainment plan requirements, the EPA anticipates that Arizona's submission of an approvable Serious area nonattainment plan would also satisfy the State's Moderate area nonattainment plan obligations. For example, an approvable Serious area nonattainment plan would satisfy the Act's requirements for imposing best available control measures, including best available control technology (BACM/BACT), which would presumably satisfy the less stringent requirements for RACM/RACT.

### *B. CAA and Regulatory Requirements for Moderate $PM_{10}$ Nonattainment Area SIPs*

Along with the new designations, classifications, and attainment dates, the Clean Air Act Amendments of 1990 established new nonattainment area planning requirements. The air quality planning requirements for Moderate $PM_{10}$ nonattainment areas are set out in subparts 1 and 4 of the CAA, including sections 110, 172, and 189 of the statute. We discuss these sections of the Act in more detail later during our review of each plan element. Also, the EPA has issued guidance, in a document we refer to as the General Preamble, describing how we will review state nonattainment plan SIP submissions under Title I of the CAA, including such SIP submissions for Moderate $PM_{10}$ nonattainment areas.[7] In general, states must include the following elements in nonattainment plans for Moderate areas for purposes of the 1987 24-hour $PM_{10}$ NAAQS: A comprehensive, accurate, and current emissions inventory of emissions sources in the nonattainment area; provisions to implement RACM/RACT for the appropriate sources and pollutants in the nonattainment area; provisions demonstrating reasonable further progress (RFP), including quantitative milestones towards attainment of the $PM_{10}$ NAAQS as expeditiously as practicable, along with quantitative milestones for evaluation of RFP at set times; contingency measures that will provide for additional emissions reductions automatically in the event that the state fails to meet RFP or to attain the NAAQS by the applicable attainment date in the area; and, a motor vehicle emissions budget for the purpose of determining the conformity of transportation programs and plans developed by state transportation agencies.

## II. Submissions From the State of Arizona To Address the 1987 $PM_{10}$ Standard Requirements in the West Pinal County Nonattainment Area

### *A. Summary of State Submissions*

As a result of the May 31, 2012 nonattainment designation, West Pinal County was classified as a Moderate $PM_{10}$ nonattainment area. Within 18 months from the July 2, 2012 effective date of the designation, or January 2, 2014, the State was required to submit a nonattainment plan meeting Moderate area plan requirements, including emission control measures for West Pinal County designed to attain the 1987 24-hour $PM_{10}$ NAAQS as expeditiously as practicable, but no later than December 31, 2018.

On December 21, 2015, Arizona submitted the West Pinal County $PM_{10}$ Plan, intended to address the Moderate area nonattainment requirements, to the EPA as a revision to the Arizona SIP.[8] The West Pinal County $PM_{10}$ Plan is organized into seven chapters and nine appendices. The nine appendices provide support for the plan and are divided into the following categories: Technical support and documentation (appendices A–D, F), SIP adoption authority and public notice and hearing documentation (appendix E) and control measure submittals (appendices G–I).

Appendices G, H, and I contain control measures submitted with the West Pinal County $PM_{10}$ Plan in the form of rules, statutes, and other supporting documents. We are not proposing to act on the submitted control measures in this proposed action on the West Pinal County $PM_{10}$ Plan. Previously, the EPA approved into the Arizona SIP the submitted control measures that regulate fugitive dust, construction dust, and crop operations.[9] In a separate **Federal Register** notice, we intend to take action on the remainder of the State's submitted rules, namely, an update to its agricultural best management practices (AgBMP) statute, and the AgBMP rules for animal operations in Pinal County.

### *B. CAA Procedural Requirements for Adoption and Submission of SIP Revisions*

CAA sections 110(a) and 110(l) require a state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submission of a SIP revision to the EPA

[6] 85 FR 37756 (June 24, 2020).

[7] 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992).

[8] Letter dated December 21, 2015, from Eric C. Massey, Director, Air Quality Division, Arizona Department of Environmental Quality, to Jared Blumenfeld, Regional Administrator, EPA Region IX.

[9] 82 FR 20267 (May 1, 2017).

for evaluation under section 110(k) and other applicable substantive requirements. To meet this procedural requirement, a state must include evidence that it provided adequate public notice and an opportunity for a public hearing, consistent with the EPA's implementing regulations in 40 CFR 51.102.

The Arizona Department of Environmental Quality (ADEQ) provided public notice and opportunity for public comment on the West Pinal County $PM_{10}$ Plan. On October 19, 2015, ADEQ released the West Pinal County $PM_{10}$ Plan for public review and published a notice of public meeting to be held on November 19, 2015, to consider adoption of the West Pinal County $PM_{10}$ Plan.[10] On November 19, 2015, ADEQ held the public hearing and subsequently adopted the West Pinal County $PM_{10}$ Plan as a revision to the Arizona SIP.[11] Under authority provided by Arizona state law, on December 21, 2015, Eric Massey, Director of the Air Quality Division, ADEQ, submitted the West Pinal County $PM_{10}$ Plan to the EPA.[12] On June 21, 2016, the West Pinal County $PM_{10}$ Plan became complete by operation of law.[13]

Based on information provided in the SIP submissions summarized above, the EPA has determined that the public hearing was properly noticed. Therefore, we find that the submittal of the West Pinal County $PM_{10}$ Plan meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102.

## III. Evaluation of the West Pinal County $PM_{10}$ Plan

### *A. Emissions Inventories*

#### 1. Statutory and Regulatory Requirements

CAA section 172(c)(3) requires a state to submit for each $PM_{10}$ nonattainment area a ''base year inventory'' that is a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in the area. Also, the state should submit a second projected ''attainment year inventory'' for the year in which the state projects that the area will attain the $PM_{10}$ standards. The state should include documentation explaining how it calculated the emissions data. When estimating mobile source emissions, states should use the latest emissions models and planning assumptions available at the time the SIP is developed.[14]

The state must meet several general requirements for base year emissions inventories, consistent with CAA section 172(c)(3). First, the emissions inventory year must be one of the 3 years used for the EPA $PM_{10}$ nonattainment designation for the area, or an alternative year agreed upon by the EPA and the state as more reflective of the causes and sources of violations of the $PM_{10}$ standard that meet the criteria in CAA section 172(c)(3). Second, the state must reflect actual emissions from all sources of $PM_{10}$ in the inventory. Third, the state should report the emissions inventory in the form of the $PM_{10}$ standard it is intended to address, *e.g.,* in tons or pounds per day to be consistent with the averaging period of the 24-hour $PM_{10}$ NAAQS.[15]

A state must meet similar CAA section 172(c)(3) requirements in the projected attainment year inventory for the most expeditious year in which the state can show attainment of the $PM_{10}$ standard in the modeled attainment demonstration portion of the nonattainment plan. At a minimum, the state must choose an attainment year consistent with the outermost applicable deadline required by CAA section 188(c). As with the baseline year inventory, the state must reflect emissions from all sources of $PM_{10}$ in this inventory and report them in the form of the $PM_{10}$ standard. In addition, the attainment year inventory must be consistent with the source categories and level of detail reported by the state in the base year inventory.

Future attainment year and related baseline emissions inventories must reflect the most recent population, employment, travel and congestion estimates for the area. In this context, ''baseline'' emissions inventories refer to emissions estimates for a given year and area that reflect rules and regulations and other measures that are already adopted in a state's EPA approved SIP and assumed within the attainment demonstration. Future baseline emissions inventories are necessary to show the projected effectiveness of SIP control measures designed to result in attainment by the applicable attainment year. Both the base year and future year, baseline and attainment inventories are necessary inputs to any modeling or other analyses required to demonstrate attainment of the $PM_{10}$ standard, as required by section 189(a)(1)(B).

#### 2. Summary of State's Submission

The West Pinal County $PM_{10}$ Plan includes a base year (2008) inventory, and future year (2018) baseline and attainment emissions inventories for direct $PM_{10}$ in the West Pinal County area. The State provided documentation for the emissions inventories in Chapter 5 (''Annual Emissions Inventory'') of the West Pinal County $PM_{10}$ Plan and its two-part Appendix B (''Pinal County $PM_{10}$ Nonattainment Area Emissions Inventories for 2008 and 2018 Base Years and Design Days'', and its supporting ''Exhibits'').[16] The emissions inventories are provided in two parts, one representing windblown $PM_{10}$ emissions on high-wind days (including both entrained dust and windblown dust from human activities), and the second representing $PM_{10}$ emissions on low-wind days (including dust due to human activity that stagnates near its point of origin). The State presents the annual emissions inventories on a tons per year basis that it later converts to a tons or pounds per day basis for use within the attainment demonstration modeling for the 24-hour NAAQS at issue.

The 2018 attainment year emissions inventories reflect State of Arizona and Pinal County rules adopted concurrently with the West Pinal County $PM_{10}$ Plan in late 2015.[17] The Plan's emissions reductions are based on continuing implementation of existing Federal controls along with new state and local control measures submitted with the Plan. The 2008 base year and projected 2018 baseline and attainment year inventories use the most recent EPA-approved mobile source emissions model at the time the plan was developed, MOVES2014, for estimating on-road motor vehicle emissions.[18] Future emissions forecasts in the West Pinal County $PM_{10}$ Plan, particularly on-road mobile source emissions, are based primarily on

[10] ''Arizona Department of Environmental Quality and Public Comment Period and Hearing on the Proposed Arizona State Implementation Plan Revision, Attainment Plan for the West Pinal County $PM_{10}$ Planning Area (1987 NAAQS)'' published in the Arizona Republic October 19 and 20, 2015; Exhibit E–III, Appendix E, West Pinal County $PM_{10}$ Plan.

[11] ''Public Hearing Presiding Officer Certification'' signed by Naveen Savarirvayan, Presiding Officer, November 19, 2015 and notarized; Exhibit E–VI, Appendix E, West Pinal County $PM_{10}$ Plan. The hearing transcript and the public comments and State responses are found at Exhibit E–VIII and Exhibit E–VII, respectively, within Appendix E, West Pinal County $PM_{10}$ Plan.

[12] Letter dated December 21, 2015 from Eric C. Massey, Director, Air Quality Division, ADEQ to Jared Blumenfeld, Regional Administrator, EPA Region IX.

[13] 42 U.S.C. 7410(k)(1)(B).

[14] See 81 FR 58032 (August 24, 2016).

[15] See 81 FR 58027–58032.

[16] As needed, we will refer to the primary document as ''Appendix B'' and the secondary document as ''Appendix B-Exhibits.''

[17] Please refer to Appendices G, H, and I, West Pinal County $PM_{10}$ Plan for rule adoption information.

[18] Appendix B, 62.

demographic and economic growth projections provided by Arizona Department of Administration and the Maricopa Association of Governments (MAG).[19]

In general, the term ''point sources'' typically refers to permitted facilities that have one or more identified and fixed pieces of equipment and emissions points. ''Area sources'' typically consist of widespread and numerous smaller emissions sources, such as small permitted facilities and households. The ''mobile sources'' category refers to vehicles and is typically divided into two major subcategories, ''on-road'' and ''non-road'' mobile sources. On-road mobile sources include light-duty automobiles, light-, medium-, and heavy-duty trucks, and motorcycles. In addition to tailpipe, brake, and tire wear, on-road mobile emissions estimates for $PM_{10}$ also include re-entrained dust from vehicles driven on paved and unpaved roads. Non-road mobile sources include aircraft and related support vehicles, locomotives, construction equipment, agricultural equipment, mobile equipment, and recreational vehicles.

In the West Pinal County $PM_{10}$ Plan, the State based the point source emissions for the 2008 base year emissions inventory on reported data from facilities using the permit file reporting programs of the Pinal County Air Quality Control District (PCAQCD). Area sources, as noted above, include smaller emissions sources distributed across the nonattainment area. ADEQ estimated emissions for area sources using established inventory methods, including publicly available emissions factors and activity information. The State derived activity data from national survey data, such as the Energy Information Administration or from local sources and PCAQCD databases. Emissions factors used for the estimates come from many sources, such as facility and equipment source tests, compliance reports, and the EPA's compilation of emissions factors document known as ''AP–42.''

ADEQ calculated the 2008 base year on-road emissions inventories in the West Pinal $PM_{10}$ Plan using the MOVES2014 model and a back-casting of 2015 modeling of vehicle travel activity data provided by MAG.[20] ADEQ estimated emissions inventories for non-road equipment using the EPA's NONROAD Model, including construction and mining equipment, industrial and commercial equipment, lawn and garden equipment, agricultural equipment, and recreational vehicles.[21] Locomotive emissions were estimated from EPA published emission factors and local track-mileage, train speed, and throughput data.[22] The State developed aircraft and related ground support vehicle emissions estimates in conjunction with activity data from local airports in the region.

As described previously, the State grouped direct $PM_{10}$ emissions estimates in the West Pinal County $PM_{10}$ Plan into two general categories and emissions inventories, windblown dust and human activity-based emissions;[23] we present these inventories in Tables 1 and 2, respectively. In general, emission inventories can be broken into four basic categories: Stationary sources, area sources, non-road sources and mobile sources. Instead of a summary emissions inventory consisting of these four general categories, ADEQ provided a more detailed 2008 base year emissions inventory. In some cases, a source category will appear in both emissions inventories and tables. For example, an unpaved road and an agricultural field will emit $PM_{10}$ when wind speeds become high enough to pick up and carry disturbed earth, as well as due to vehicle and equipment traffic on the unpaved road or agricultural activity in a field, such as harvesting or tilling.

TABLE 1—WEST PINAL COUNTY $PM_{10}$ PLAN, WINDBLOWN DUST/FUGITIVE EMISSIONS INVENTORY

[Tons per year]

| Source category | 2008 base year |
|---|---|
| Developed Urban Lands | 200.7 |
| Developed Rural Lands | 1,959.7 |
| Unpaved Roads | 4,688.6 |
| Cleared Areas | 398.1 |
| Residential Construction | 1,302.4 |
| Dairies | 449.6 |
| CAFOs | 273.7 |
| Desert Shrubland | 38,276.7 |
| Agriculture | 19,510.1 |
| Commercial Construction | 686.4 |
| Other | 4,243.9 |
| Site Development | 858.7 |
| Total | 72,848.6 |

Source: West Pinal County $PM_{10}$ Plan, Table 5–3; Appendix B, Tables 5–31, 5–33.

Table 2 presents ADEQ's direct $PM_{10}$ emissions inventory related to human activity. Stationary sources are broken out into permitted sources and fuel combustion. Area sources are disaggregated into several source categories: Fires, open burning, unpaved parking, and construction sites and activities. Agricultural sources are also disaggregated into several source categories: on field harvesting, on field tilling, confined animal feed operations (CAFOs), and dairies. In contrast, mobile sources are included within the ''unpaved roads'' and ''paved roads'' source categories. Each of these two source categories aggregate direct (vehicle exhaust, tire and brake wear) and fugitive $PM_{10}$ emissions from motor vehicles on unpaved and paved roads. Finally, nonroad equipment and railroad emissions are assigned to their own respective source categories.

TABLE 2—WEST PINAL COUNTY $PM_{10}$ PLAN, HUMAN ACTIVITY-BASED EMISSIONS INVENTORY

[Tons per year]

| Source category | 2008 base year |
|---|---|
| Ag Fields—Harvesting | 312.9 |
| Ag Fields—Tilling | 2,540.3 |
| CAFOs | 2,614.3 |
| Paved Road* | 1,180.7 |
| Unpaved Road—All Road Types* | 45,127.8 |
| Fuel Combustion | 28.3 |
| Fires | 19.9 |
| Open Burning | 13.6 |
| Nonroad | 121.3 |
| Railroad | 85.9 |
| Construction | 12,955.3 |
| Dairy | 186.6 |
| Permitted Sources | 781.3 |
| Unpaved Parking | 251.5 |
| Total | 66,219.7 |

Source: West Pinal County $PM_{10}$ Plan, Table 5–3; Appendix B, Tables 5–31, 5–33.

* Paved and Unpaved Road emissions estimates include direct vehicle emissions and fugitive dust emissions from vehicle re-entrainment.

Tables 1 and 2 provide a summary of the West Pinal County 2008 base year direct $PM_{10}$ emissions in tons per year. Appendix B, Chapters 3 and 5 also provide source category estimates in a pounds per day format consistent with the 24-hour $PM_{10}$ NAAQS. Where appropriate, within the attainment demonstration, ADEQ used these daily estimates or developed more focused daily emissions estimates to provide the basis for the control measure analysis and the modeled attainment demonstrations in the West Pinal County $PM_{10}$ Plan.[24] Within the windblown $PM_{10}$ emissions inventory, the largest source after desert shrubland

[19] West Pinal County $PM_{10}$ Plan, 27–28, Table 3–3; Appendix B, 120, 132, and 132 at footnote 97.

[20] Appendix B, 62–75.

[21] Appendix B, 87–90. EPA NONROAD Model, Version 2008a, released July 2009.

[22] Appendix B, 96.

[23] Tables 5–1, 5–2, and 5–3, West Pinal County $PM_{10}$ Plan.

[24] Appendix B, chapters 3 and 5.

is agricultural emissions. Within the human activity-based emissions inventory, the largest source is unpaved roads, followed by construction fugitive emissions.

3. The EPA's Review of the State's Submission

We have reviewed the 2008 base year emissions inventory for direct $PM_{10}$ in the West Pinal County $PM_{10}$ Plan and emissions inventory estimation methodologies used by ADEQ for consistency with CAA requirements and EPA guidance. We address the State's analysis for $PM_{10}$ precursors in Section III.B.

First, we find that although the 2008 base year inventory reports annual $PM_{10}$ emissions estimates, the Plan also provides and uses daily emissions estimates within the attainment demonstration modeling and the related modeling domain micro-emissions inventories; therefore, the Plan is consistent with the requirement that ADEQ must use an emissions inventory in a form consistent with the 24-hour $PM_{10}$ standard.[25] ADEQ has provided adequate documentation explaining how it calculated the 2008 base year emissions estimates, both as annual and daily inventories.[26]

Second, we find that the 2008 base year emissions inventory in the West Pinal County $PM_{10}$ Plan used emissions models, emission factors, and methodologies for estimating $PM_{10}$ emissions that were accurate and appropriate to the time that the Plan was written. Also, the 2008 base year inventory for direct $PM_{10}$ is comprehensive in scope and coverage. Therefore, the submitted emissions inventory represents a comprehensive, accurate, and current inventory of actual emissions of direct $PM_{10}$ during that year in the West Pinal County Area.

Third, we find that ADEQ's selection of 2008 for the base year emissions inventory is appropriate because it is chosen from one of the three years, 2006–2008, in which the area was designated nonattainment. The 2008 emissions inventory is representative of the sources of direct $PM_{10}$ pollution contributing to exceedances of the $PM_{10}$ NAAQS that caused the area to be designated nonattainment. Consequently, the EPA is proposing to approve the 2008 base year emissions inventory for direct $PM_{10}$ in the West Pinal County $PM_{10}$ Plan as meeting the requirements for a base year inventory set forth in CAA section 172(c)(3).

*B. $PM_{10}$ Precursors*

1. Statutory and Regulatory Requirements

Section 189(e) of the Act requires that the control requirements for major stationary sources of direct $PM_{10}$ also apply to major stationary sources of $PM_{10}$ precursors, except where the Administrator determines that such sources do not contribute significantly to $PM_{10}$ levels that exceed the standard in the area. While CAA section 189(e) expressly requires control of precursors from major stationary sources, subpart 4 and other CAA provisions collectively require the control of direct $PM_{10}$ and $PM_{10}$ precursors from all types of sources (*i.e.,* stationary sources, area sources and mobile sources) as may be needed for the purposes of demonstrating attainment as expeditiously as practicable in a given nonattainment area.[27]

The provisions of subpart 4 of part D, title I of the CAA do not define the term ''precursor'' for purposes of $PM_{10}$, nor do they explicitly require the control of any specific PM precursor. The statutory definition of ''air pollutant'' in CAA section 302(g), however, provides that the term ''includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.'' EPA has identified sulfur dioxide ($SO_2$), oxides of nitrogen ($NO_X$), volatile organic compounds (VOC), and ammonia ($NH_3$) as precursors to the formation of PM.[28] Accordingly, a state must include emissions of direct PM emissions and these four precursors in emissions inventories and must control emissions from sources of all of these pollutants, unless the state demonstrates to EPA's satisfaction that control of one or more of these pollutants is not needed for expeditions attainment of the NAAQS in the nonattainment area at issue.

2. Summary of the State's Submission

Appendix B, Exhibit BXVI contains ADEQ's demonstration that emissions of $SO_2$, $NO_X$, and $NH_3$ from existing sources in the West Pinal County nonattainment area do not contribute significantly to $PM_{10}$ levels that exceed the NAAQS. For this analysis, ADEQ estimated the impact of these three $PM_{10}$ precursors on $PM_{10}$ concentrations at two sites, Cowtown (CWT) and Pinal County Housing (PCH), using ''worst impact day monitored data'' from a year-long chemical mass balance characterization (CMBC) study (Desert Southwest Coarse Particulate Matter Study) and emissions data from the 2008 National Emission Inventory (NEI).[29] ADEQ evaluated these data to determine which, if any, source categories had precursor emissions that contribute more than 5 micrograms per cubic meter ($\mu g/m^3$) on specific design days. [30]

Appendix B, Exhibit BXVI, Table BXVI–1 provides the maximum particle mass concentration and chemical composition (*i.e.,* crustal, organic material, nitrate, sulfate, ammonium, other species, and unidentified particle fractions) measured during the CMBC study for CWT and PCH. ADEQ then calculated the percentage of each chemical constituent to the summed total of the chemical constituent parts. ADEQ assumed the design days for each monitor had the same relative chemical composition as the ''worst impact day'' identified in the CMBC study. The State calculated design day concentrations for each chemical constituent by multiplying the study-derived percentages by a design day concentration for CWT (244.5 $\mu g/m^3$) and PCH (178.0 $\mu g/m^3$). The CMBC study estimated that summed nitrate, sulfate, and ammonium impacts on the CWT and PCH monitors were 3.4 percent and 4.0 percent, respectively. These percentages suggest that 8.4 $\mu g/m^3$ and 7.2 $\mu g/m^3$ of the design day ambient $PM_{10}$ concentrations at the CWT and PCH monitors resulted from emissions of the three $PM_{10}$ precursors examined.

Next, ADEQ processed Pinal County 2008 EPA NEI reported emissions for $NO_X$, $SO_2$, and $NH_3$ to determine the percent contribution of each source sector to the total emissions of these pollutants for the county. [31] ADEQ apportioned the precursor concentrations derived above to individual source sectors based on the relative contribution of each sector to the annual emission inventory. Based

[25] As discussed in Section III.G Motor Vehicle Emissions Budgets and Transportation Conformity, an annual emissions inventory introduces difficulties with determining and presenting a motor vehicle emissions budget.

[26] Chapter 5 and Appendix B of the West Pinal County $PM_{10}$ Plan.

[27] See CAA requirements for states to demonstrate attainment ''as expeditiously as practicable,'' CAA section 188(c)(1) and section 172(a)(1).

[28] See 81 FR 58010, 58018.

[29] Clements, A.L., Fraser, M.P., Upadhyay, N., Herckes, P., Sundblom, M., Lantz, J., and Solomon, P.A., ''Chemical characterization of coarse particulate matter in the Desert Southwest—Pinal County Arizona, USA'', Atmospheric Pollution Research, 5 (2014) 52–61.

[30] ADEQ focused their attainment demonstration on a set of ''design days'' and monitors that have experienced, or are conducive to, the highest concentrations. See EPA TSD, p. 11. Two design days were examined in ADEQ's $PM_{10}$ precursor demonstration.

[31] Appendix B, Exhibit BXVI, Table BXVI–2.

on this analysis, no precursor emissions from any source category exceeded the 5 μg/m$^3$ threshold.[32] The largest contributing source category was ''On-road Mobile,'' contributing less than 3.5 μg/m$^3$ of $PM_{10}$ from precursor emissions to either monitor on the design days.

3. The EPA's Review of the State's Submission

We identified several issues with the analysis that ADEQ presented. First, $SO_2$, $NO_X$, VOC, and ammonia are precursors to the formation of $PM_{10}$. ADEQ does not address VOC emissions in its analysis; therefore, we cannot evaluate whether sources of VOC emissions contribute significantly to $PM_{10}$ levels that exceed the NAAQS in the West Pinal County $PM_{10}$ nonattainment area.

Second, it is unclear whether the chemical composition values presented in Appendix B, Exhibit BXVI, Table BXVI–1 reflect one maximum day sample, or the maximum chemical composition measured for each individual component during the entire CMBC study. If the latter approach was used, then the resulting percentages would not reflect percentages measured on any actual exceedance day and could overrepresent or underrepresent the various chemicals when compared to actual exceedance days. If the chemical composition values represent one maximum day sample, then: (a) The individual components listed in Table BXVI–1 when totaled together should equal that day's total mass, which they do not; and (b) this would only represent a single day—therefore, a single type of exceedance day. ADEQ modeled two meteorological scenarios causing exceedances, high wind conditions and stagnant or low wind conditions. The emission sources affecting the $PM_{10}$ composition would vary between these two scenarios, making use of a single maximum value at each site for each chemical component likely insufficient. Therefore, ADEQ's approach of assuming the chemical composition of the two design days match those reported in the study likely does not address all conditions affecting nonattainment for the area.

Third, ADEQ applied the 5 μg/m$^3$ threshold from the Serious $PM_{10}$ nonattainment area addendum to the General Preamble.[33] The Serious area addendum states that, for purposes of evaluating best available control measures (BACM), a source category will be presumed to contribute significantly to a violation of the NAAQS if its $PM_{10}$ impact at the location of the expected violation would exceed 5 μg/m$^3$. This guidance is not precursor guidance and was intended to apply to the total impact of a source category (including direct PM and precursor emissions). It is not clear from the State's submission why the application of this threshold to the impact of precursor emissions from individual source categories is an appropriate method of evaluating the significance of $PM_{10}$ precursor emissions for the West Pinal County $PM_{10}$ nonattainment area.[34]

Finally, ADEQ used an annual inventory to partition the source category contribution to $PM_{10}$. High wind affected days would likely have a different composition of sources than what would be reflected in an annual inventory, potentially by a substantial margin. ADEQ did not address this issue, and used the annual inventory composition to represent all exceedance days.

The State has not adequately shown that $PM_{10}$ precursors do not contribute significantly to concentrations above the NAAQS in the West Pinal County $PM_{10}$ nonattainment area. As described elsewhere in this notice, due to the deficiencies with the State's precursor analysis, the State has not shown that it was unnecessary to regulate emissions of precursors in its RACM and modeled attainment demonstration. As explained in Section III.C., the State has only evaluated sources of direct PM emissions within the West Pinal County $PM_{10}$ Plan. The EPA anticipates that ADEQ could develop an improved precursor analysis for the area, and this analysis may ultimately confirm that it is not necessary to regulate one or all of the $PM_{10}$ precursors; however, we find that the precursor analysis submitted with the Plan does not provide a sufficient basis for that conclusion.

In conclusion, because of the omissions and uncertainties in ADEQ's $PM_{10}$ precursor analysis, we are unable to determine whether precursor emissions contribute significantly to $PM_{10}$ levels that exceed the NAAQS in the West Pinal County nonattainment area. Consequently, we are proposing to disapprove the precursor demonstration in the West Pinal County $PM_{10}$ Plan because the demonstration is inadequate to show that emissions reductions from all $PM_{10}$ precursors do not contribute significantly to $PM_{10}$ levels exceeding the NAAQS, as required by CAA Section 189(e). As explained in section III.C, the deficiencies in the State's precursor analysis mean that the State failed to establish in its RACM/RACT analysis that it was unnecessary to regulate $PM_{10}$ precursor emissions.

*C. Reasonably Available Control Measures Demonstration*

1. Statutory and Regulatory Requirements

CAA section 172(c)(1) requires that each attainment plan provide for the implementation of all RACM/RACT as expeditiously as practicable (including such reductions in emissions from sources in the area through implementation of reasonably available control technology) and for attainment of the NAAQS. Consistent with section 189(a)(1)(C), each state with a Moderate $PM_{10}$ nonattainment area is required to submit provisions to assure implementation of reasonably available control measures no later than 4 years after the date of designation of the area. Taken together, these CAA provisions require that Moderate area attainment plans must provide for the implementation of RACM and RACT in the nonattainment area as expeditiously as practicable but no later than 4 years after designation.

Section 189(a)(1)(B) of the CAA requires states to demonstrate attainment of the $PM_{10}$ standard by the applicable attainment date (or demonstrate that attainment by such date is impracticable) and Section 188(c)(1) requires that the attainment date for a Moderate area shall be as expeditiously as practicable, but no later than the end of the sixth calendar year after the year of the nonattainment area's designation.

To address this requirement to adopt all RACM/RACT and meet the $PM_{10}$ NAAQS as expeditiously as practicable, states should consider all potentially reasonable control measures for source categories in the nonattainment area to determine whether they are reasonably available for implementation in that area and whether they would, if implemented individually or collectively, advance the area's applicable attainment date by one year or more.[35] Any measures that are necessary to meet these requirements that are not either federally promulgated, or part of the state's SIP, must be submitted in enforceable form

[32] Appendix B, Exhibit BXVI, Table BXVI–3.

[33] Appendix B, Exhibit BXVI, BXVI–2. See 59 FR at 42011.

[34] For more recent guidance on precursor significance, see Memorandum from Scott Mathias, Acting Director, Air Quality Policy Division and Richard Wayland, Director, Air Quality Assessment Division, ''Fine Particulate Matter ($PM_{2.5}$) Precursor Demonstration Guidance'' (May 30, 2019).

[35] 44 FR 20372 (April 4, 1979) and 57 FR 13498 (April 16, 1992).

as part of the state's nonattainment plan SIP submission for the area.

The EPA has provided guidance interpreting the RACM requirement in the General Preamble for the Implementation of the Clean Air Act Amendments of 1990 (''General Preamble''). This guidance includes the following elements and concepts: A recommended list of potential $PM_{10}$ measures for states to consider;[36] an emphasis on a state's evaluation of the technological and economic feasibility of potential control measures to determine if such measures are reasonably available for implementation in a given nonattainment area; an expectation that the state will provide a reasoned explanation for a decision not to adopt a given control measure, including a review of any control measures recommended to the state during public comment or public hearing; and, a discussion that in some cases partial implementation of an emissions reduction program may be considered RACM when full implementation would be infeasible within the given Moderate area timeframe.[37]

2. Summary of the State's Submission

For the West Pinal County $PM_{10}$ Plan, ADEQ worked through a process to identify and evaluate potential RACM/RACT that could contribute to expeditious attainment of the $PM_{10}$ NAAQS in the West Pinal County nonattainment area. Chapter 6 of the West Pinal County $PM_{10}$ Plan provides an overview and description of the Plan's constituent control measures. ADEQ's RACM/RACT analysis for the $PM_{10}$ standard is described in Appendix F—RACM Analysis for the West Pinal County $PM_{10}$ Nonattainment Area (''Appendix F''). Appendix F contains summary analyses of potential control measures for emissions reduction opportunities, as well as the economic and technological feasibility and comparability with control requirements in other states and localities.

As a first step in the RACM/RACT analysis, ADEQ prepared a detailed inventory of direct $PM_{10}$ emissions sources to identify source categories from which emissions reductions would contribute to attaining the $PM_{10}$ standard.[38] In this analysis, ADEQ identified point sources, unpaved roads and agriculture on tribal land, dairy operations, nonroad vehicles, residential fuel combustion, and open burning as insignificant sources of emissions in the area.[39] Then, ADEQ identified agricultural operations, confined animal feeding operations, fugitive dust from cleared area and unpaved parking lots, construction fugitive dust, and re-entrained dust from paved and unpaved roads as significant sources in the nonattainment area and determined a list of available control measures. ADEQ determined that a source category was significant if those sources contributed more than 5 $\mu g/m^3$ on a 24-hour basis on a given design day. Conversely, ADEQ determined that source categories contributing less than the 5 $\mu g/m^3$ threshold were insignificant; furthermore, ADEQ determined these insignificant sources would not advance attainment of the NAAQS, given their small collective contribution to nonattainment.[40] Finally, ADEQ evaluated the efficacy, cost, and technical feasibility of these identified control measures within the nonattainment area.[41] As part of this review, ADEQ also compared the control requirements of its proposed rules with those requirements in other $PM_{10}$ nonattainment areas or similar state and local provisions.[42] ADEQ did not identify sources or analyze potential RACM/RACT for $PM_{10}$ precursors because it concluded that such precursors did not contribute significantly to a violation of the NAAQS.

With this process, ADEQ attempted to evaluate and analyze the universe of potential RACM/RACT level controls for sources of direct $PM_{10}$ emissions and identify the subset of control measures that were available to include within the West Pinal County $PM_{10}$ Plan. ADEQ identified a set of control measures that it determined would be sufficient to enable the area to attain by December 31, 2018, and additional controls that it determined were not necessary for attainment or RFP to serve as contingency measures.[43] ADEQ based this conclusion on: (1) The practical feasibility of adopting control measures over the latter half of 2015 with the State's desired implementation date of no later than January 1, 2016; and (2) the ability of these control measures to produce immediate emissions reductions and contribute to attainment of the $PM_{10}$ NAAQS by 2018.[44] As discussed earlier, the State submitted the following control measures with the West Pinal County $PM_{10}$ Plan: The AgBMP Rules for Pinal County, the Pinal County Fugitive Dust Rule, and the Pinal County Construction Dust Rule. ADEQ relied only on the following portions of the AgBMP Rules for Pinal County to meet the RACM/RACT requirements and demonstrate attainment of the $PM_{10}$ standard: AgBMP rule R18–2–610 and –610.03, commercial farms; AgBMP rule R18–2–611 and –611.03, commercial animal operations (except for dairy operations); and R18–2–612 and –612.01, irrigation districts.[45]

ADEQ did not provide a complete or systematic analysis of whether the control measures it did not adopt based on concerns about a lack of immediate emission reduction effect, if taken together, would advance the area's attainment date. Nonetheless, ADEQ did adopt those control measures, implemented them over the 2016–2018 timeframe, and allocated them to serve as contingency measures in the Plan. ADEQ designated the portion of the AgBMP Rules for Pinal County applicable to dairy operations (R18–2–611 and –611.03), along with the Pinal County Fugitive Dust Rule and the Pinal County Construction Dust Rule, as contingency measures because these rules provided additional emissions reductions not relied upon within the Plan's attainment demonstration.[46]

3. The EPA's Review of the State's Submission

As described above, ADEQ evaluated a wide range of potentially available measures for the West Pinal County $PM_{10}$ Plan. ADEQ identified portions of the AgBMP Rules for Pinal County as RACM/RACT and the State adopted them to provide for attainment of the $PM_{10}$ standard.[47] The remaining adopted control measures, some of which were identified as significant sources and potential RACM/RACT, were assigned to provide for contingency measures within the Plan.[48] In sum, all source categories identified as significant were covered by controls either as a control measure for attainment, or as contingency measures, and implemented over the 2016–2018 timeframe. As has been confirmed by subsequent monitoring data, however,

[36] 57 FR 18070.

[37] 57 FR 13540, 13541.

[38] Appendix F, Chapters 2 and 3.

[39] Appendix F, 4–12.

[40] Appendix F, Chapter 2 and Table 1.

[41] Appendix F, Chapters 2–4.

[42] Appendix F, Chapter 4; Exhibit F–I, Available Measures; Exhibit F–II, Construction Comparison; Exhibit F–III, Agricultural Comparison; and, Exhibit F–IV, Fugitive Dust Comparison.

[43] West Pinal County $PM_{10}$ Plan, Chapter 7; Table 7–4; Appendix D, Table D5–1.

[44] Appendix F, 29, 47, 51.

[45] West Pinal County $PM_{10}$ Plan, Chapters 6 and 7.

[46] West Pinal County $PM_{10}$ Plan, Chapter 6; Chapter 7, Table 7–4.

[47] West Pinal County $PM_{10}$ Plan, Chapters 6 and 7.

[48] West Pinal County $PM_{10}$ Plan, Chapter 6; Chapter 7, Table 7–4.

these adopted control measures were insufficient to attain the $PM_{10}$ NAAQS by the applicable attainment date, in part because the State overestimated the effectiveness of the RACM/RACT-designated adopted controls. As an example, ADEQ assumed high and insufficiently conservative compliance rates for agricultural operations that had either no previous experience implementing control measures, or little to no reliable documented compliance history. We review the State's analysis and attainment demonstration in Section III.D and provide detailed discussion in the Technical Support Document (TSD).

The Plan described the adopted control measures and concluded that a subset was reasonable and would achieve the NAAQS by the attainment date; therefore, the State concluded that the RACM/RACT-designated subset of adopted control measures constituted the necessary RACM/RACT for the area.[49] The State adopted several additional measures beyond the RACM/RACT measures to serve as contingency measures in the Plan. If the RACM/RACT-designated adopted controls actually sufficed to achieve attainment, then these control measures could have constituted sufficient RACM, as additional measures beyond those necessary for attainment need not necessarily be considered as RACM/RACT.[50] Because the adopted controls designated as RACM/RACT in the West Pinal County $PM_{10}$ Plan were insufficient, however, to achieve attainment, due in part to overestimates of the control efficiency of these rules, we find that the State terminated its RACM/RACT analysis prematurely. The control measures reserved for contingency measures that the State did not include as RACM/RACT should have been included and justified as RACM. Furthermore, because the State's determination regarding $PM_{10}$ precursors failed to demonstrate that precursors do not contribute significantly to a violation of the NAAQS, the State remains obligated to demonstrate that additional $PM_{10}$ precursor control measures are not required RACM/RACT.

Despite the RACM/RACT-designated rules and contingency measures adopted and implemented by the State, we find that the State failed to adopt RACM/RACT sufficient to achieve the $PM_{10}$ NAAQS, due in part, to overestimating the control effectiveness of these RACM/RACT control measures. Our conclusion is confirmed by the failure of the Plan's adopted and designated measures to result in attainment of the $PM_{10}$ NAAQS by the applicable attainment date of December 31, 2018. Because the adopted controls were insufficient to meet the $PM_{10}$ NAAQS by the attainment date, and the State excluded source categories, including sources of precursors, from its RACM/RACT demonstration without sufficient justification, we propose to disapprove the RACM/RACT demonstration in the West Pinal County $PM_{10}$ Plan and determine that the Plan does not provide for the implementation of all RACM/RACT as required by CAA section 172(c)(1) and section 189(a)(1)(C).

*D. Attainment Demonstration*

1. Statutory and Regulatory Requirements

Section 189(a)(1)(B) of the CAA requires that a plan for a Moderate $PM_{10}$ nonattainment area include a ''demonstration (including air quality modeling) that the plan will provide for attainment [of the $PM_{10}$ NAAQS] by the applicable attainment date.'' An attainment demonstration consists of several elements including technical analyses, such as base year and future year modeling, to locate and identify sources of emissions that are contributing to violations of the $PM_{10}$ NAAQS within the nonattainment area (*i.e.,* analyses related to the emissions inventory for the nonattainment area and the emissions reductions necessary to attain the standard). Section 188(c)(1) of the CAA requires Moderate areas to meet the $PM_{10}$ standard as expeditiously as practicable, but no later than the sixth calendar year from the area designation.

In addition to reviewing the attainment demonstration modeling and related analyses, we evaluate the Plan's control strategy and the efficacy of the Plan's adopted controls to meet the $PM_{10}$ NAAQS by the applicable date.

2. Summary of the State's Submission

ADEQ applied a form of proportional roll back and dispersion modeling using a micro-emissions inventory method to model attainment of the $PM_{10}$ NAAQS. ADEQ modeled two meteorological scenarios causing ambient air values in excess of the 24-hour $PM_{10}$ NAAQS of 150 $\mu g/m^3$, high wind conditions and stagnant or low wind conditions, at a representative subset of the monitoring sites in the nonattainment area.[51] Under ''stagnation'' conditions, wind speeds are typically below 3 mph and particles accumulate in the air without any meteorological reprieve. Under ''high wind'' conditions, elevated wind speeds (*e.g.,* over 12 mph) generate dust from disturbed soil surfaces, elevating $PM_{10}$ concentrations. Each selected monitoring site in each modeling scenario had design day specific micro-emissions inventories consistent with the chosen areal modeling domain and application. ADEQ calculated the 2008 Base, 2018 Base, and 2018 Attainment micro-emissions inventories for the given requirements of the modeling application at the respective monitoring site domain and meteorological day scenario.

The State's attainment demonstration approach is described in the Plan within the following documents: Chapter 7, ''Attainment Demonstration and Reasonable Further Progress''; Appendix A, ''Pinal County PM Inventory Preparation Plan'' (''IPP''); Appendix B, ''Pinal County $PM_{10}$ Nonattainment Area Emissions Inventories for 2008 and 2018 Base Years and Design Days'' (''Modeling EI''); Appendix C, ''Pinal County $PM_{10}$ Nonattainment Area Source Apportionment Modeling for 2008 and 2018 Base Scenario Design Days'' (''Modeling TSD''); and, Appendix D, ''Pinal County $PM_{10}$ Nonattainment Area 2018 Attainment Demonstration and Controlled Emissions Inventories.''

The West Pinal County $PM_{10}$ Plan discusses the control strategy within Chapter 6 of the Plan and in more detail within Appendix D of the Plan.

a. Modeling

As noted, the West Pinal County $PM_{10}$ Plan's attainment demonstration considers two specific problems contributing to nonattainment of the $PM_{10}$ standard in West Pinal County: (1) $PM_{10}$ emissions from windblown dust and human activity on days with elevated wind speeds; and (2) $PM_{10}$ emissions from human activity, particularly on days with very low wind or ''stagnant'' meteorological conditions.

- ADEQ developed a high wind day scenario for Cowtown, Maricopa, Pinal County Housing, and Stanfield monitors and surrounding area micro-emissions inventories. Each monitor has its own two domain micro-emissions inventory for modeling: High wind hours/windblown dust; and, low wind hours/activity-based emissions. The high wind scenario used a proportional rollback approach that accounts for the timing

[49] Appendix F, Chapter 4.

[50] See 81 FR 58010, 58035. Although such controls should be evaluated to determine if their adoption could advance attainment.

[51] West Pinal $PM_{10}$ Plan County, Section 7.1.

and geographic location of emissions contributing to NAAQS exceedances.[52]

• ADEQ developed a stagnation day scenario for Cowtown, Pinal County Housing, and Stanfield monitors and surrounding area micro-emissions inventories. The stagnant day scenarios used dispersion modeling from the American Meteorological Society (AMS)/EPA Regulatory Model (AERMOD). ADEQ chose design days from the fall season, September through November 2008 for this analysis.

b. Control Strategy for Attainment

ADEQ relied on the following portions of the AgBMP Rules for Pinal County to provide for attainment of the $PM_{10}$ standard: R18–2–610 and –610.03, commercial farms; AgBMP rule R18–2–611 and –611.03, commercial animal operations (except for dairy operations); and, R18–2–612 and –612.01, irrigation districts.[53] Tables 3 and 4 show the annual nonattainment area emissions inventories for the 2018 baseline estimate and the 2018 attainment estimate by source category and the control strategies' predicted emissions reductions. Within the windblown fugitive dust emissions inventories, ADEQ predicted almost all the emission reductions, 93 percent, to come from soil stabilization control measures on agricultural land. Within the activity-based emissions inventories, ADEQ predicted most of the emission reductions, 87 percent, to come from control measures applied to unpaved road operations on private agricultural land and canal roads; the remainder of predicted emission reductions come from control measures to reduce $PM_{10}$ emissions from on-field agriculture and animal feeding operations. As noted, the regulatory vehicle for these emissions reductions is the AgBMP rule provisions the State relied on to provide for attainment of the $PM_{10}$ standard and to implement RACM/RACT in the area.

TABLE 3—WINDBLOWN DUST/FUGITIVE EMISSIONS, 2018 BASE AND ATTAINMENT EMISSIONS INVENTORIES WITH ESTIMATED EMISSION REDUCTIONS

[tpy]

| Source category | Base 2018 | Attainment 2018 | Emission reductions |
|---|---|---|---|
| Developed Urban Lands | 248.1 | 248.1 | ..... |
| Developed Rural Lands (low density) | 1,959.7 | 1,959.7 | ..... |
| Unpaved Roads | 4,653.0 | 3,803.1 | 849.9 |
| Cleared Areas | 457.0 | 457.0 | ..... |
| Residential Construction | 837.5 | 837.5 | ..... |
| Dairies | 449.6 | 449.6 | ..... |
| CAFOs | 155.2 | 125.3 | 29.9 |
| Desert Shrubland | ..... | ..... | ..... |
| Agriculture | 19,510.1 | 7,122.0 | 12,388.1 |
| Commercial Construction | 441.4 | 441.4 | ..... |
| Other | 4,243.9 | 4,243.9 | ..... |
| Site Development | 552.2 | 552.2 | ..... |
| Total | 33,507.7 | 20,239.8 | 13,267.9 |

Source: West Pinal County $PM_{10}$ Plan, Table 5–3; Appendix B, Tables 5–31, 5–32, 5–33, 5–34.

TABLE 4—ACTIVITY BASED EMISSIONS, 2018 BASE AND ATTAINMENT EMISSIONS INVENTORIES WITH ESTIMATED EMISSION REDUCTIONS

[tpy]

| Source category | Base 2018 | Attainment 2018 | Emission reductions |
|---|---|---|---|
| Ag—Harvesting | 312.9 | 207.1 | 105.8 |
| Ag—Tilling | 2,540.3 | 1,658.0 | 882.3 |
| CAFOs | 1,620.6 | 1,369.2 | 251.4 |
| Paved Road* | 1,408.0 | 1,408.0 | ..... |
| Unpaved Road* | 45,105.3 | 37,186.4 | 7,918.9 |
| Fuel Combustion | 34.9 | 34.9 | ..... |
| Fires | 22.2 | 22.2 | ..... |
| Open Burning | 16.8 | 16.8 | ..... |
| Nonroad | 144.4 | 144.4 | ..... |
| Railroad | 45.4 | 45.4 | ..... |
| Construction | 8,499.8 | 8,499.8 | ..... |
| Dairy | 184.0 | 184.0 | ..... |
| Permitted Sources | 781.3 | 781.3 | ..... |
| Unpaved Parking | 251.5 | 251.5 | ..... |
| Total | 60,967.4 | 51,809.0 | 9,158.4 |

Source: West Pinal County $PM_{10}$ Plan, Table 5–3; Appendix B, Tables 5–31, 5–32, 5–33, 5–34

* Paved and Unpaved Road emissions estimates include direct vehicle emissions and fugitive dust emissions from vehicle re-entrainment.

[52] The term ''rollback'' refers to the assumption that the $PM_{10}$ concentrations are directly proportional to emissions. To predict the ambient effect of an emissions change, the concentration can be scaled, or ''rolled back,'' by the same percentage by which emissions are reduced. In ''proportional rollback,'' each source category is rolled back separately, since emissions from each will have a different level of control, and in general a different degree of dispersion. As in simple rollback, the ambient contribution of each individual source category scales with its emissions. For the ''weighted proportional rollback,'' source-to-monitor distance was accounted for via an inverse distance factor (1/d). For example, a source with only small emissions may nevertheless have a large contribution to the concentration if it was very close to the monitor. A change in a source's emissions causes a change in total concentration in proportion to that source's contribution to that particular monitor.

[53] West Pinal County $PM_{10}$ Plan, Chapters 6 and 7.

The State adopted and pre-implemented control measures to meet the contingency measures requirement within the Plan: The portion of the AgBMP Rules for Pinal County applicable to dairy operations (R18–2–611 and –611.03), along with the Pinal County Fugitive Dust Rule and the Pinal County Construction Dust Rule.[54] We address the contingency measures requirement of the Act more completely in Section III.F, where we point out that pre-implemented contingency measures are not approvable under CAA section 172(c)(9). Here, we mention the control measures, adopted and subsequently implemented as contingency measures, to emphasize two points: (1) Given the shortfall in attaining the $PM_{10}$ NAAQS, these control measures designated for contingency should have been evaluated and designated RACM/RACT, as we discussed in Section III.C; and (2) despite implementing the RACM/RACT control measures for attainment and the designated contingency measures, the West Pinal County area still failed to attain the $PM_{10}$ NAAQS, by a large margin.

3. The EPA's Review of the State's Submission

As previously discussed, the EPA issued a finding that the West Pinal County area failed to attain the $PM_{10}$ NAAQS by the outermost statutory attainment date of December 31, 2018.[55] In addition to our previous regulatory review of the air monitoring data from 2016–2018, detailed in our June 24, 2020 notice, we reviewed ambient air monitoring data collected from 2006–2018 to examine $PM_{10}$ values over time and recent trends over the 2016–2018 control strategy period of Plan implementation. Our detailed review of $PM_{10}$ data is included in our TSD provided in the docket for this proposal. We provide two general conclusions from our data review.

First, when considering the number of exceedances of the $PM_{10}$ standard, the data show that the West Pinal County monitoring sites have consistently measured many exceedances in every year between the start of the base year period, 2006–2008, and in 2018, the attainment year. While the number of exceedances each year has generally and gradually decreased over time, there is no clear evidence of a sustained decrease in recent years as ADEQ implemented control measures. For example, over the 2016 through 2018 period that would have been relevant to attainment by December 31, 2018, the annual number of exceedances of the 24-hour $PM_{10}$ NAAQS ranged from 29 to 38.[56] The form of the NAAQS allows for no more than one exceedance per year, averaged over a three year period. Furthermore, all eight monitors in the West Pinal County nonattainment area showed violations of the $PM_{10}$ NAAQS as determined by their 2018 design values.[57]

Second, design value trends show that the number of expected exceedances remain well above the $PM_{10}$ NAAQS of one exceedance per year. The high concentrations and number of exceedances clearly show that $PM_{10}$ concentrations well above the level of the NAAQS (150 $\mu g/m^3$) continue to be a major air quality problem in the West Pinal County nonattainment area despite the implementation of control measures meant to reduce $PM_{10}$ levels. For example, the design concentration for 2016–2018, the period in which values should be at or under 150 $\mu g/m^3$ to show attainment by 2018, is 403 $\mu g/m^3$, or 269 percent of the standard.[58]

TABLE 5—THREE-YEAR $PM_{10}$ MONITORING DATA STATISTICS FOR THE COWTOWN AND HIDDEN VALLEY MONITORING SITES [a]

| 3-Year period | 2006–2008 | 2007–2009 | 2008–2010 | 2009–2011 | 2010–2012 | 2011–2013 | 2012–2014 | 2013–2015 | 2014–2016 | 2015–2017 | 2016–2018 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Design Concentration ($\mu g/m^3$) | 916 | 653 | 539 | 1064 | 1064 | 1064 | 521 | 510 | [b] 357 | [b] 303 | 403 |
| 3-year Design Value ..... | 201.2 | 139.8 | 86.1 | 60.7 | 63 | 75.7 | 64 | 50.5 | [b] 38.3 | [b] 29.8 | 32.8 |

Sources: EPA AQS Quick Look Report, December 10, 2020, and EPA AQS Design Value Report, December 10, 2020. The design concentration for these sites is the 4th highest 24-hour concentration measured over each three-year period, as detailed in Section 6.3.1 of the $PM_{10}$ SIP Development Guideline, EPA–450/2–86–001 (June 1987).

[a] Data collected prior to 2016 were collected from the Cowtown monitoring site; data since 2016 were collected at the Hidden Valley monitoring site, as described in our TSD, page 6, within the docket for this rulemaking.

[b] The EPA's relocation approval letter stated that the data from Cowtown and Hidden Valley would be combined to form one continuous data record for design value calculations. Consequently, the 2014–2016 and 2015–2017 design values are each a composite data record consisting of 2014 and/or 2015 data from the Cowtown monitoring site, and 2016 and/or 2017 data from the Hidden Valley monitoring site, as applicable.

The West Pinal County 2015 $PM_{10}$ design value was 50.5 exceedances. For the area to meet the $PM_{10}$ standard by 2018, it could not have more than three exceedances of the $PM_{10}$ NAAQS across the three years, 2016–2018, to show a design value of 1.0 exceedances, averaged over three years. Instead, the Plan's control strategy resulted in the following number of primary exceedances: 30 in 2016; 38 in 2017; and 29 in 2018.[59] Not only did the Plan's control strategy fail to produce the effect intended in 2016, the designated control strategy rules and pre-implemented contingency measures failed to reduce $PM_{10}$ exceedances to a level needed to attain the $PM_{10}$ standard by December 31, 2018.

Given the ambient monitoring data unequivocally indicate that the Plan was insufficient to achieve attainment by the 2018 attainment date, we do not provide an exhaustive evaluation of the attainment demonstration analyses in the West Pinal County $PM_{10}$ Plan. Instead, we focused our review on two major deficiencies that preclude our approval of this Plan element. Our review of these two deficiencies is illustrative of the insufficiently conservative analyses or assumptions underlying the Plan's failed attainment demonstration. Specifically, we evaluated the ''design days'' ADEQ selected to conduct the modeling exercises and the specific design day micro-emissions inventories and rule control effectiveness assumptions ADEQ made to model the Plan's control strategy within the 2018 attainment modeling analyses. Next, we provide a short summary of our review. We also provide a more detailed review in our TSD.

First, we find the design days that ADEQ selected for modeling the Cowtown monitor under stagnation

[54] West Pinal County $PM_{10}$ Plan, Chapter 6; Chapter 7, Table 7–4.

[55] 85 FR 37756.

[56] See Table 2 in the TSD.

[57] See Table 1 in the TSD.

[58] See Table 3 and further discussion in Section II.B of the TSD.

[59] TSD, Table 2; EPA AQS Quick Look Report, December 10, 2020, in the docket for this rulemaking action.

conditions, and several monitors under high wind conditions, were chosen with inconsistent criteria and/or have data inaccuracies. In turn, these inconsistencies and inaccuracies led to design day concentration values that were likely too low to address adequately the range of exceedances experienced in the nonattainment area. For example, in selecting the stagnation scenario design day for Cowtown, ADEQ limited selection to fall 2008 (September to November) exceedance days despite the higher $PM_{10}$ concentrations and a comparable number of exceedance days in the spring season (March to May). Ultimately, the selected 2008 design day was the 68th highest out of the 137 total low wind/stagnation exceedance days identified by the State (*i.e.,* approximately 49% of the low wind/stagnation exceedance days had higher concentrations than the design day selected).[60] This middle range day was insufficiently conservative and was inadequate to represent the attainment issues during stagnation conditions and to address the range and severity of exceedances experienced at CWT.[61]

Second, we conclude that several data inputs and assumptions associated with modeling the control strategy were unsupported, overstated, or insufficiently conservative leading to an overestimate of the overall efficacy of the control strategy within the attainment demonstration. Specifically, in calculating the control effectiveness of the rules in the control strategy, two component assumptions or estimates were the primary cause of this overestimate: (1) Rule effectiveness, *i.e.,* the percentage of compliant facilities; and, (2) aggregate or net best management practices (BMP) control efficiencies. For example, we found that despite limited or no compliance data, the lack of compliance assistance program efficacy figures, the lack of automatic reporting requirements, and little to no farm experience implementing BMPs, ADEQ assumed high compliance rates with the AgBMP rule; in turn, this unjustifiably inflated the overall control effectiveness calculations. In addition, we found that the domain modeling micro-emissions inventory estimates that ADEQ derived from this limited BMP implementation data were not appropriately documented or supported and were insufficiently conservative due to overly optimistic or simplifying assumptions used to aggregate BMP control efficiency estimates, such as assuming that farms will either choose not to operate or will routinely implement higher cost and higher control efficiency BMPs on high risk days. Consequently, ADEQ assumed farms reduced emissions from cropland operations and unpaved roads to a greater extent than what could be supported by the documentation in the Plan.[62]

Based on our evaluation of the design days and modeling and control effectiveness assumptions in the Plan, we find that these several deficiencies in the analyses preclude approval of the attainment demonstration. In addition, after reviewing past and recent $PM_{10}$ data against the West Pinal County $PM_{10}$ Plan's attainment demonstration predictions, we conclude that:

- There is no clear evidence of a sustained decrease in the number of exceedances in recent years as control measures have been implemented (2015–2018);
- $PM_{10}$ concentrations well above the level of the 24-hour $PM_{10}$ NAAQS (150 $\mu g/m^3$) continue to be a major air quality problem in the West Pinal County nonattainment area despite the implementation of control measures designed to reduce $PM_{10}$ levels thus far; and
- The Plan's control strategy, whether considered as adopted RACM/RACT or as the entire suite of rules submitted with the Plan, was inadequate to attain the $PM_{10}$ NAAQS by December 31, 2018, as evidenced by the ambient $PM_{10}$ data.

Consequently, we propose to disapprove the modeled attainment demonstration in the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA section 189(a)(1)(B) and section 188(c)(1).

### *E. Reasonable Further Progress Demonstration*

#### 1. Statutory and Regulatory Requirements

The requirement for RFP in $PM_{10}$ nonattainment areas is specified in CAA section 172(c)(2) and is described in the General Preamble.[63] Under CAA section 171(1), RFP is defined as meaning such annual incremental reductions in emissions of the relevant air pollutant as are required under part D (''Plan Requirements for Nonattainment Areas'') of the CAA or as may reasonably be required by the EPA for the purpose of ensuring attainment of the applicable NAAQS by the applicable date. In addition, CAA section 189(c)(1) requires quantitative milestones that demonstrate RFP and must be achieved every 3 years until the nonattainment area is redesignated to attainment, beginning 4.5 years after a Moderate area's designation to nonattainment of the $PM_{10}$ NAAQS.[64] Therefore, Moderate area plans should contain quantitative milestones for 4.5 and 7.5 years after designation. These quantitative milestones should be constructed so that they can be tracked, quantified and/or measured adequately, and provide for an objective evaluation of RFP toward attainment of the NAAQS, particularly as part of milestone reporting.[65]

#### 2. Summary of the State's Submission

The West Pinal County $PM_{10}$ Plan discusses how the Plan provides for RFP in Section 7.2 and Appendix D and provides visual representation in Figure 7–1 and Figure D 5–1.[66] For the purposes of calculating annual increments of emission reductions for RFP, ADEQ assumed a linear ''glidepath'' with equal annual emissions reductions over the 2016–2018 implementation timeframe. This annual increment representing RFP is 7,475 tons per year.[67] The implementation of the Plan's control strategy is projected to produce almost all the needed emissions reductions in the first year, 2016, with slight and incremental emission reductions to follow in 2017 and 2018. Because ADEQ projected that most of the emissions reductions would come in the first year, the projected emissions were below the ''glidepath'' and ADEQ concluded that RFP was demonstrated.

#### 3. The EPA's Review of the State's Submission

Based in part on our review of the 2016–2018 ambient data and in part on the flaws identified in the West Pinal County $PM_{10}$ Plan attainment demonstration, we find that ADEQ did not adequately provide for annual increments of emissions reductions needed to attain the $PM_{10}$ NAAQS by 2018. Because the West Pinal County

[60] ''Low wind/stagnation exceedance days'' for purposes of this document are the exceedance days that remain once days identified by ADEQ as high wind day exceedances in IPP, Appendix C, Table C–1 are removed. See ''Cowtown 2008 Exceedances.xlxs'' in the docket for this action.

[61] See Section III.B.1. of the TSD for our complete review of design day selection for stagnation scenario at the Cowtown monitor. Also, see Section III.B.2 of the TSD for our complete review of design day selection for the high wind scenario.

[62] See Section III.C. of the TSD for our complete review of control effectiveness estimates.

[63] 57 FR at 13539.

[64] Ibid.

[65] 81 FR 58063–64.

[66] West Pinal County $PM_{10}$ Plan, 99 and Figure 7–1, 101; Appendix D, 45.

[67] West Pinal County $PM_{10}$ Plan, 100. Expected emission reductions from 2015 to 2018, 22,426 tons per year, are divided into 3 annual increments of 7,475 tons per year.

$PM_{10}$ plan failed to achieve attainment by the attainment date, the RFP demonstration based on the rate by which these reductions were to occur is also necessarily deficient. This was borne out by the monitoring data; no real rate of reduction of exceedances can be demonstrated over the period of implementation of the Plan's control measures, 2016–2018. Indeed, even with the early implementation of additional controls designated by the State as contingency measures to provide emissions reductions in the event of a failure to show RFP or to attain, West Pinal County still exceeded the $PM_{10}$ standard by a large margin as evidenced by the data in Table 5.

Regarding quantitative milestones, given the EPA's 2012 designation of nonattainment for West Pinal County, the State should have included quantitative milestones for mid-2016 and mid-2019 within the West Pinal County $PM_{10}$ Plan. Aside from the two glidepath depictions in Figure 7–1, the Plan provides no further discussion of quantitative milestones. What is presented in Figure 7–1 does not meet the criteria that the Plan's quantitative milestones should be trackable, quantified, and provide for an objective evaluation of RFP toward attainment of the NAAQS, by mid-2016. The West Pinal County $PM_{10}$ Plan does not address RFP or quantitative milestones in mid-2019.

For these reasons, we have determined that the West Pinal County $PM_{10}$ Plan fails to demonstrate RFP, consistent with applicable CAA requirements and EPA guidance. Therefore, we propose to disapprove the RFP demonstration and quantitative milestones for the West Pinal County area for the 24-hour $PM_{10}$ NAAQS under sections 172(c)(2) and 189(c)(1).

*F. Contingency Measures*

1. Statutory and Regulatory Requirements

Under the CAA, states must include contingency measures consistent with section 172(c)(9) in their nonattainment plan SIP submissions. Contingency measures are additional controls or measures to be implemented in the event the area fails to meet RFP or to attain the NAAQS by the applicable attainment date. The SIP should contain trigger mechanisms for the contingency measures, specify a schedule for implementation, and indicate that the measure will be implemented without significant further action by the state or the EPA.[68]

Neither the CAA nor the EPA's implementing regulations establish a specific level of emissions reductions that implementation of contingency measures must achieve, but the General Preamble reiterates the EPA's guidance recommendation that contingency measures should generally provide for emissions reductions approximately equivalent to one year's worth of RFP in the area.[69] Where a failure to attain or to meet RFP can be corrected in less than one year, the EPA may accept a proportionally lesser amount sufficient to correct the identified failure.[70]

It has been the EPA's longstanding interpretation of CAA section 172(c)(9) that states may meet the contingency measure requirement by relying on Federal measures (*e.g.,* Federal mobile source measures based on the incremental turnover of the motor vehicle fleet each year) and state or local measures already scheduled for implementation that provide emissions reductions in excess of those needed to meet any other nonattainment plan requirements, such as RACM/RACT, RFP, or expeditious attainment. The key is that the Act requires that contingency measures provide for additional emissions reductions that are not relied on for RFP or attainment and that are not included in the RFP or attainment demonstrations as meeting part of or all the contingency measure requirements. The purpose of contingency measures is to provide continued emissions reductions while a plan is being revised to meet the missed milestone or attainment date.

In *Bahr* v. *EPA,* the Ninth Circuit Court of Appeals rejected the EPA's interpretation of CAA section 172(c)(9) as allowing for early implementation of contingency measures.[71] The Ninth Circuit concluded that contingency measures must take effect at the time the area fails to make RFP or attain by the applicable attainment date, not before.[72] Consequently, within the geographic jurisdiction of the Ninth Circuit, states cannot rely on early-implemented measures to comply with the contingency measure requirements under CAA section 172(c)(9).[73]

2. Summary of the State's Submission

ADEQ developed the West Pinal County $PM_{10}$ Plan prior to the *Bahr* v. *EPA* decision, and the plan relies solely upon surplus emissions reductions from already implemented control measures during the 2016–2018 period to demonstrate compliance with the contingency measure requirements of CAA section 172(c)(9). The West Pinal County $PM_{10}$ Plan included the following early implemented state and local regulations to meet the contingency measures requirement for the $PM_{10}$ standard: The portion of the AgBMP Rules for Pinal County applicable to dairy operations (R18–2–611 and –611.03), and the Pinal County Fugitive Dust Rule and Construction Dust Rule.[74] Contingency Measures are also discussed in Appendix D.[75]

3. The EPA's Review of the State's Submission

Arizona is within the geographic jurisdiction of the Ninth Circuit Court of Appeals; therefore, after the *Bahr* v. *EPA* decision, the State cannot rely on already-implemented control measures to comply with the contingency measure requirement of CAA section 172(c)(9). To comply with CAA section 172(c)(9), as interpreted in the *Bahr* v. *EPA* decision, a state must develop, adopt and submit contingency measures to be triggered upon a failure to meet RFP milestones or failure to attain the NAAQS by the applicable attainment date regardless of the extent to which already-implemented measures would achieve surplus emissions reductions beyond those necessary to meet RFP milestones and beyond those predicted to achieve attainment of the NAAQS. Arizona's adopted and pre-implemented contingency measures do not comply with these requirements for failure to make RFP and failure to meet attainment contingency measures. Section 172(c)(9) requires contingency measures to address potential failures to achieve RFP milestones or failure to attain the NAAQS by the applicable attainment date. For these reasons, we propose to disapprove the contingency measures element of the West Pinal County $PM_{10}$ Plan as failing to meet the contingency measure requirements of CAA sections 172(c)(9).

[68] 81 FR 58066 (August 24, 2016).

[69] 57 FR 13498, 13543–13544.

[70] Id. at 13511.

[71] *Bahr* v. *EPA,* 836 F.3d 1218, 1235–1237 (9th Cir. 2016).

[72] Id. at 1235–1237.

[73] The *Bahr* v. *EPA* decision involved a challenge to an EPA approval of contingency measures under the general nonattainment area plan provisions for contingency measures in CAA section 172(c)(9), but, given the similarity between the statutory language in section 172(c)(9) and the ozone-specific contingency measure provision in section 182(c)(9), we find that the decision affects how both sections of the Act must be interpreted.

[74] West Pinal County $PM_{10}$ Plan, Chapter 6; Chapter 7, Table 7–4.

[75] Appendix D, 45, Table D5–1.

*G. Motor Vehicle Emissions Budgets for Transportation Conformity*

1. Statutory and Regulatory Requirements

Section 176(c) of the CAA requires Federal actions in nonattainment and maintenance areas to conform to the goals of the state's SIP to eliminate or reduce the severity and number of violations of the NAAQS and achieve timely attainment of the standards. Conformity to the goals of the SIP means that such actions will not: (1) Cause or contribute to violations of a NAAQS, (2) worsen the severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A. Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, the FHWA, and the FTA to demonstrate that an area's regional transportation plans and transportation improvement programs conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs or ''budgets'') contained in all control strategy attainment plans designed to attain the NAAQSs. Budgets are generally established for specific years and specific pollutants or precursors. Attainment plans for $PM_{10}$ nonattainment areas should identify budgets for mobile source emissions of $PM_{10}$, *i.e.,* vehicle and fugitive dust emissions, in the area for each RFP milestone year, as appropriate, and the attainment year, if the plan demonstrates attainment.[76]

For budgets to be approvable, they must meet, at a minimum, the EPA's adequacy criteria at 40 CFR 93.118(e)(4). To meet these requirements, the budgets must be consistent with the attainment and RFP requirements and reflect all the motor vehicle control measures contained in the attainment and RFP demonstrations.[77] Budgets may include a safety margin representing the difference between projected emissions and the total amount of emissions estimated to satisfy any requirements for attainment or RFP.

The EPA's process for determining adequacy of a budget consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the budget during a public comment period; and (3) making a finding of adequacy or inadequacy.[78]

2. Summary of the State's Submission

The West Pinal County $PM_{10}$ Plan includes a budget for the 2018 attainment year. As discussed in Section III.E, we are proposing to disapprove the RFP and quantitative milestones elements of the Plan. No interim RFP budget was submitted for 2016. The State's submitted 2018 conformity budget for $PM_{10}$ for the West Pinal County Area is provided in Table 6.

TABLE 6—2018 MOTOR VEHICLE EMISSIONS BUDGET FOR THE WEST PINAL COUNTY $PM_{10}$ NONATTAINMENT AREA

[Tons per year]

| Source | Emissions |
|---|---|
| Direct On-Road Mobile Sources (exhaust, tire and brake wear) | 173.7 |
| Unpaved Road Fugitive Dust ..... | 26,433.5 |
| Paved Road Fugitive Dust ..... | 1,211.1 |
| Road Construction/Maintenance | 168.8 |
| Total ..... | 27,987.1 |

Source: West Pinal County $PM_{10}$ Plan, Table 5–4.

The methodologies ADEQ used to develop the motor vehicle emissions budget are provided in Appendix B of the West Pinal County $PM_{10}$ Plan.[79] As discussed in section III.A. of this proposal, ADEQ used MOVES2014 in the development of this budget; this emissions factor model was the latest EPA approved version at the time the West Pinal County $PM_{10}$ Plan was developed. Paved road vehicle miles traveled (VMT) estimates for estimating direct and fugitive $PM_{10}$ emissions were provided by MAG using an interpolation methodology where 2018 VMT was estimated from 2015 and 2025 regional transportation modeling runs.[80] ADEQ used the most recently approved EPA provided AP–42 emissions factor equations to develop paved and unpaved road fugitive dust emissions estimates.[81] In addition to the line item source categories in the 2018 budget presented in Table 6, ADEQ specified that the budget includes an 81 ton per year safety margin.[82]

The EPA has neither found this 2018 budget to be adequate, nor have we acted on it in the past.

3. The EPA's Review of the State's Submission

As part of our review of the approvability of the motor vehicle emissions budget in the West Pinal County $PM_{10}$ Plan, we have evaluated the budget using the adequacy criteria specified in the transportation conformity rule.[83] Reviewing the budget against the criteria in the transportation conformity rule informs the EPA's decision to propose our action on the budget. We have determined that the 2018 budget submitted by Arizona for the West Pinal County area has not met several of these criteria.

First and foremost, § 93.118(e)(4)(iv) requires that a budget, when considered together with all other emissions sources, be consistent with applicable requirements for RFP, attainment, or maintenance (whichever is relevant to a given implementation plan submission). In this case, the West Pinal County area budget is not consistent with the requirements for attainment and RFP, as discussed in Sections III.D and E of this proposal and our proposed disapproval of these two Plan elements. Secondly, the West Pinal County budget is presented in a tons per year format for an attainment plan intended to meet the 24-hour $PM_{10}$ NAAQS. The budget must be consistent with the 24-hour timeframe of the attainment demonstration and $PM_{10}$ standard, and therefore should be presented in a tons per day format. Finally, § 93.118(e)(4)(iii) requires that the budget be clearly identified and precisely quantified. Although ADEQ describes an ''allowance or safety margin'' in the West Pinal County $PM_{10}$ Plan, the submitted budget does not clearly and explicitly identify this safety margin in its presentations of the budget.[84] Also, a safety margin, as

[76] 40 CFR 93.102(b)(1).

[77] 40 CFR 93.118(e)(4)(iii), (iv) and (v). For more information on the transportation conformity requirements and applicable policies on MVEBs, please visit our transportation conformity website at: *http://www.epa.gov/otaq/stateresources/transconf/index.htm.*

[78] 40 CFR 93.118(f)(2).

[79] Appendix B, 120–137, and 166–180.

[80] Appendix B, 120.

[81] ADEQ used the appropriate AP–42 guidance in sections 13.2.1 and 13.2.2 to calculate fugitive dust from paved and unpaved roads. The AP–42 emission factor equation inputs for estimating unpaved road fugitive dust emissions can be found in Appendix B, Table 5–11. The most recent EPA revision and approval of these AP–42 emission factor equations occurred in 2011 and are reflected in the Plan's estimates; 76 FR 6328 (February 4, 2011).

[82] West Pinal County $PM_{10}$ Plan, 62.

[83] 40 CFR 93.118(e)(4) and (5).

[84] West Pinal County $PM_{10}$ Plan, Table 5–4; Appendix D, Table D4–4.

defined in the Transportation Conformity rule, § 93.101, must be clearly presented and demonstrated to be outside and above the emissions level demonstrating attainment, but below the threshold of the applicable NAAQS.

We have reviewed the motor vehicle emissions budget in the West Pinal County $PM_{10}$ Plan and find that it does not meet applicable statutory and regulatory requirements including the adequacy criteria in 40 CFR 93.1118(e)(4) and (5). The primary deficiency is that the submitted 2018 budget is not consistent with, or derived from, a demonstration of attainment and RFP meeting the requirements of the Act. As discussed earlier in sections III.D and III.E, we are proposing herein to disapprove the Plan's attainment and RFP demonstrations. Therefore, we are proposing to disapprove the 2018 budget in the West Pinal County $PM_{10}$ Plan. In addition, because we are disapproving the attainment and RFP demonstrations, the 2018 budget is not eligible for a protective finding.[85]

If our proposed disapproval of the 2018 budget is finalized, upon the effective date of our final rule, the area would be subject to a conformity freeze under § 93.120 of the Transportation Conformity rule. No transportation project outside of the first four years of the currently conforming transportation plan and transportation improvement plan (TIP) or that meets the requirements of § 93.104(f) during the resulting conformity freeze may be found to conform until Arizona submits a new $PM_{10}$ control strategy/attainment plan, the EPA finds the submitted budget adequate per § 93.118 or approves the new control strategy/attainment plan and conformity to the new control/strategy implementation plan is determined.[86] Furthermore, if, as a result of our final disapproval action, the EPA imposes highway sanctions under section 179(b)(1) of the Act two years from the effective date of our final rule, then the conformity status of the transportation plan and TIP will lapse on that date and no new transportation plan, TIP, or project may be found to conform until Arizona submits a new $PM_{10}$ attainment plan, and conformity to this attainment plan is determined.[87]

## IV. Proposed Action

For the reasons discussed in this notice, under CAA section 110(k)(3), the EPA is proposing to approve and disapprove the following portions of the West Pinal County $PM_{10}$ Plan, submitted by the State on December 21, 2015. Our proposed approval and disapproval actions are as follows:

- We propose to approve the 2008 base year emissions inventory element for direct $PM_{10}$ in the West Pinal County $PM_{10}$ Plan as meeting the requirements of CAA sections 172(c)(3) for the 1987 $p.m._{10}$ NAAQS;
- We propose to disapprove the precursor demonstration in the West Pinal County $PM_{10}$ Plan because the demonstration is inadequate to show that emissions reductions from all $PM_{10}$ precursors do not contribute significantly to $PM_{10}$ levels exceeding the NAAQS, as required by CAA Section 189(e) for the 1987 $p.m._{10}$ NAAQS;
- We propose to disapprove the RACM/RACT demonstration element in the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA section 172(c)(1) and section 189(a)(1)(C) for the 1987 $p.m._{10}$ NAAQS; furthermore, the deficiencies in the State's precursor analysis mean that the State failed to establish in its RACM/RACT analysis that it was unnecessary to regulate $PM_{10}$ precursor emissions;
- We propose to disapprove the modeled attainment demonstration element for the 1987 $p.m._{10}$ NAAQS in the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA section 189(a)(1)(B) and section 188(c)(1) to demonstrate attainment of the 1987 $p.m._{10}$ NAAQS;
- We propose to disapprove the RFP demonstration element in the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA sections 172(c)(2) for the 1987 $p.m._{10}$ NAAQS;
- We propose to disapprove the quantitative milestones element in the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA section 189(c)(1) for the 1987 $p.m._{10}$ NAAQS;
- We propose to disapprove the contingency measures element of the West Pinal County $PM_{10}$ Plan because it does not meet the requirements of CAA section 172(c)(9) for the 1987 $p.m._{10}$ NAAQS; and,
- We propose to disapprove the motor vehicle emissions budget in West Pinal County $PM_{10}$ Plan for the attainment year of 2018 (see Table 6) because it is not consistent with or derived from, approvable RFP or and attainment demonstrations for the 1987 $PM_{10}$ NAAQS meeting the requirements of the Act.

The EPA is soliciting public comments on the issues discussed in this proposed rule. We will accept comments from the public on this proposal for the next 30 days and will consider those comments before taking final action.

## V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

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

### *B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not an Executive Order 13771 regulatory action because SIP approvals, including partial approvals, are exempted under Executive Order 12866.

### *C. Paperwork Reduction Act (PRA)*

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

### *D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

### *E. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

### *F. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the

[85] 40 CFR 93.120(a)(3).
[86] 40 CFR 93.120(a)(2).
[87] 40 CFR 93.120(a)(1).

distribution of power and responsibilities among the various levels of government.

*G. Executive Order 13175: Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

*J. National Technology Transfer and Advancement Act (NTTAA)*

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: December 23, 2020.

**John Busterud,**

*Regional Administrator, Region IX.*

[FR Doc. 2020–29092 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2020–0560; FRL–10018–95–OAR]**

**RIN 2060–AU59**

## National Emission Standards for Hazardous Air Pollutants: Mercury Cell Chlor-Alkali Plants Residual Risk and Technology Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is proposing the results of the residual risk and technology review (RTR) of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for mercury emissions from Mercury Cell Chlor-Alkali Plants, as required by the Clean Air Act (CAA). The EPA is proposing to find risks due to emissions of hazardous air pollutants (HAP) to be acceptable from the Mercury Cell Chlor-Alkali Plants source category, and to determine that the current NESHAP provides an ample margin of safety to protect public health and that no more stringent standards are necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. The EPA is proposing to amend the requirements for cell room fugitive mercury emissions to require work practice standards for the cell rooms and to require instrumental monitoring of cell room fugitive mercury emissions under the technology review. Furthermore, under our technology review and maximum achievable control technology (MACT) analysis, we are proposing to not require conversion to non-mercury production technology and invite comments and data and information regarding this proposed determination. In addition, the EPA is proposing standards for fugitive chlorine emissions from mercury cell chlor-alkali plants, which are not currently regulated under the NESHAP. The EPA is proposing to address applicability for thermal mercury recovery units when chlorine and caustic are no longer produced in mercury cells. The EPA is also proposing revisions related to emissions during periods of startup, shutdown, and malfunction (SSM); provisions for electronic submission of performance test results, performance evaluation reports, and Notification of Compliance Status (NOCS) reports; and correction of various compliance errors in the current rule.

**DATES:**

*Comments.* Comments must be received on or before February 22, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 8, 2021.

*Public hearing:* If anyone contacts us requesting a public hearing on or before January 13, 2021, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0560, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0560 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0560.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0560, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of

caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Phil Mulrine, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5289; fax number: (919) 541–4991; and email address: *mulrine.phil@epa.gov.* For specific information regarding the risk modeling methodology, contact James Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* Please note that the EPA is deviating from its typical approach because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* If requested, the virtual hearing will be held on January 25, 2021. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details on the virtual public hearing at *https://www.epa.gov//stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.*

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last day to pre-register to speak at the hearing will be January 21, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to Phil Mulrine at *mulrine.phil@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing is posted online at *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by January 15, 2021. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0560. In addition to this docket established for this rulemaking, relevant information can be found in dockets for previous rulemakings; EPA–HQ–OAR–2002–0016 and EPA HQ–OAR–2002–0017. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

*Instructions.* Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0560. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statue. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured

and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

*Submitting CBI.* Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0560. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

*Preamble acronyms and abbreviations.* We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEGL acute exposure guideline level two
AERMOD air dispersion model used by the HEM–3 model
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
ECHO EPA's Enforcement and Compliance History Online database
EPA Environmental Protection Agency
ERPG emergency response planning guidelines
ERT Electronic Reporting Tool
GACT generally available control technology
HAP hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.5.5
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
ICR Information Collection Request
IRIS EPA's Integrated Risk Information System
km kilometer
MACT maximum achievable control technology
MIR maximum individual risk
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NEI National Emissions Inventory
NESHAP national emission standards for hazardous air pollutants
NOAEL No Observed Adverse Effect Level
NOCS Notification of Compliance Status report
NRDC Natural Resources Defense Council
NSPS new source performance standards
OMB Office of Management and Budget
OSHA Occupational Safety and Health Administration
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PDF portable document format
PM particulate matter
POM polycyclic organic matter
ppm parts per million
PRA Paperwork Reduction Act
REL reference exposure level
RfC reference concentration
RTR residual risk and technology review
SAB Science Advisory Board
SSM startup, shutdown, and malfunction
SV screening value
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology. Fate, Transport, and Ecological Exposure model
UF uncertainty factor
URE unit risk estimate
USGS U.S. Geological Survey

*Organization of this document.* The information in this preamble is organized as follows:

## I. General Information

### *A. Does this action apply to me?*

The source category that is the subject of this proposal is Mercury Cell Chlor-Alkali Plants regulated under 40 CFR part 63, subpart IIIII. The North American Industry Classification System (NAICS) code for the chlor-alkali industry is 325180. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action.

In the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (*see* EPA–450/3–91–030, July 1992), the EPA listed the Chlorine Production source category. Subsequently, on December 19, 2003, the EPA divided the Chlorine Production source category into two subcategories because of the differences in the production methods and the HAP emitted. These subcategories are: (1) Mercury cell chlor-alkali plants; and (2) chlorine production plants that do not rely upon mercury cells for chlorine production (*e.g.,* diaphragm cell chlor-alkali plants, membrane cell chlor-alkali plants, etc.). The EPA issued separate final actions in December 2003 to address emissions of mercury from the mercury cell chlor-alkali plant subcategory sources (68 FR 70904) and deleted the non-mercury cell subcategory (68 FR 70948). This action addresses the Mercury Cell Chlor-Alkali Plant source category, where a mercury cell chlor-alkali plant is any facility where mercury cells are used to manufacture product chlorine, product caustic, and by-product hydrogen and where mercury may be recovered from wastes.

### *B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website. Information on the overall RTR program is available at *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html.*

The proposed changes to the CFR that would be necessary to incorporate the changes proposed in this action are set out in an attachment to the memorandum titled *Proposed Regulation Edits for 40 CFR part 63, subpart IIIII,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2020–0560). The document includes the specific proposed amendatory language for revising the CFR and, for the convenience of interested parties, a redline version of the regulation. Following signature by the EPA Administrator, the EPA will also post a copy of this memorandum and the attachments to *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.*

## II. Background

### *A. What is the statutory authority for this action?*

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of HAP from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on MACT to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, or control technologies.'' This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory reqruirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are defined in CAA section 112(a)(1) as those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources (not including motor vehicles or nonroad vehicles) are ''area sources,'' as defined in CAA section 112(a)(2). For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether

promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Residual Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [1] of approximately 1-in-10 thousand.'' (54 FR 38045). If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information, including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an ''adverse environmental effect'' as defined in CAA section 112(a)(7).

CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing standards for listed HAP known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (D.C. Cir. 2020).

### *B. What is this source category and how does the current NESHAP regulate HAP emissions?*

The Chlorine Production source category was initially listed as a category of major sources of HAP pursuant to section 112(c)(1) of the CAA on July 16, 1992 (57 FR 31576). At the time of the initial listing, the EPA defined the Chlorine Production source category as follows:

> The Chlorine Production Source Category includes any facility engaged in the production of chlorine. The category includes, but is not limited to, facilities producing chlorine by the following production methods: Diaphragm cell, mercury cell, membrane cell, hybrid fuel cell, Downs cell, potash manufacture, hydrochloric acid decomposition, nitrosyl chloride process, nitric acid/salt process, Kel-Chlor process, and sodium chloride/sulfuric acid process.[2]

Based on the differences in the production methods and the HAP emitted, the EPA decided to divide the Chlorine Production source category into two subcategories: (1) Mercury cell chlor-alkali plants; and (2) chlorine production plants that do not rely upon mercury cells for chlorine production (diaphragm cell chlor-alkali plants, membrane cell chlor-alkali plants, etc.). On July 3, 2002, the EPA issued separate proposals to address emissions of mercury from the mercury cell chlor-alkali plant subcategory sources (67 FR 44672) and emissions of chlorine and hydrochloric acid (HCl) from both subcategories (67 FR 44713). Separate final actions were taken on both proposals on December 19, 2003. As part of these separate final actions, the EPA deleted the non-mercury cell subcategory under the authority of CAA section 112(c)(9)(B)(ii) of the CAA (68 FR 70948).

The final rule for the Mercury Cell Chlor-Alkali Plants subcategory (68 FR 70904, December 19, 2003, codified at 40 CFR part 63 subpart IIIII), which covers both major and area sources, included standards for mercury emissions from two types of affected sources at plant sites where chlorine and caustic are produced in mercury cells: Mercury cell chlor-alkali production facilty affected sources and mercury recovery facility affected sources. The rule prohibits mercury emissions from new and reconstructed mercury cell chlor-alkali production facilities. 40 CFR 63.8190(a)(1). For existing mercury cell chlor-alkali production facilities, the standards include emission limitations for mercury emissions from process vents (including emissions from end-box ventilation systems and hydrogen systems) and work practices for fugitive mercury emissions from the cell room. 40 CFR 8190(a)(2), 8192(a) through (f). For new, reconstructed, and existing mercury recovery facilities, the NESHAP includes emission limitations for mercury emissions from oven type thermal recovery unit vents and non-oven type thermal recovery unit vents. 40 CFR 63.8190(a)(3). The rule did not include standards for chlorine or HCl, citing the authority of section 112(d)(4) of the CAA (68 FR 70906). In its 2003 action (68 FR 70904), the EPA promulgated the initial Mercury Cell Chlor-Alkali Plants NESHAP pursuant to CAA section 112(d)(2) and added the source category to the EPA's Source Category List under CAA sections 112(c)(1), as well as under (c)(3) and (k)(3)(B) and (c)(6), in each case because of the mercury emissions.

[1] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

[2] Documentation for Developing the Initial Source Category List. U.S. Environmental Protection Agency. EPA–450/3–91–030. July 1992. p. A–67. Available at: *https://www3.epa.gov/ttn/atw/socatlst/socatpg.html.*

Following promulgation of the 2003 Mercury Cell Chlor-Alkali Plants NESHAP, the EPA received a petition to reconsider several aspects of the rule from the Natural Resources Defense Council (NRDC). NRDC also filed a petition for judicial review of the rule in the U.S. Court of Appeals for the District of Columbia Circuit. In a letter dated April 8, 2004, the EPA granted NRDC's petition for reconsideration and on July 20, 2004, the court placed the petition for judicial review in abeyance pending the EPA's action on reconsideration. The EPA issued proposals on June 11, 2008 (73 FR 33258), and on March 14, 2011 (76 FR 13852), to respond to the reconsideration petition. We discuss the reconsideration and the 2008 and 2011 proposals further in section IV.A.2 of this preamble.

The use of mercury cell technology has been declining for decades due to conversions to non-mercury processes and closures. For example, in 1993, there were about 13 facilities in the U.S., and when we initiated the development of this RTR proposed rule in early 2020, there were two facilities operating. Since that time, one facility (Ashta Chemicals in Ohio) ceased operating the mercury cell process.[3] So, now only one mercury cell chlor-alkali plant remains in operation. The one remaining mercury cell chlor-alkali facility is owned by Westlake Chemical (operated by Eagle Natrium, LLC) and is located in Marshall County, West Virginia. This is a large integrated chemical production facility whose products include chlorine and caustic from their chlor-alkali processes. In addition to the mercury cell process, chlorine and caustic are also produced in diagraghm cells at the site.

### *C. What data collection activities were conducted to support this action?*

Data sources used for this effort include the 2017 National Emissions Inventory (NEI), title V permit information, conversations with the West Virginia Department of Environmental Protection, and conversations with facility representatives. The NEI data were examined, and the processes and related emission sources associated with the mercury cell chlor-alkali plant were identified. In addition, information from data collection efforts from previous regulatory efforts for the source category were consulted, including studies that were conducted for the 2002 proposals, the 2003 final actions, and the 2008 and 2011 proposals cited above.

### *D. What other relevant background information and data are available?*

There are other sources that are often used by the EPA in obtaining information for RTRs. Examples include the EPA's Enforcement and Compliance History Online (ECHO) database, the Reasonably Available Control Technology/Best Available Control Technology/Lowest Achievable Emission Rate Clearinghouse, and NESHAP for similar industries. However, these sources were not utilized for the review for the Mercury Cell Chlor-Alkali Plants NESHAP because (1) the mercury cell processes are primarily sources of fugitive emissions and are unique such that control measures and work practices from other industries would not be applicable, and (2) since there is only one operating facility, it was more practical to focus on the specifics of that single facility.

## III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

### *A. How do we consider risk in our decision-making?*

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' (54 FR at 38046). Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by emissions of HAP that are carcinogens from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects.[4] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the explanation in the EPA's response to comments on our policy under the Benzene NESHAP:

> The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will ''protect the public health''.

(54 FR at 38057). Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find,

[3] Ashta Chemicals in Ashtabula, Ohio, has stopped operating the mercury cell process, and is on schedule to complete the conversion to membrane cells by end of 2020. Source: Personal communication, phone conversation: Between Brittany Johnson, Environmental Manager, Ashta Chemicals and Phil Norwood, SC&A, Contractor for U.S. EPA, December 4, 2020.

[4] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.'' [5]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments. The Agency (1) conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

### *B. How do we perform the technology review?*

Our technology review primarily focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls to consider. We also review the NESHAP and the available data to determine if there are any unregulated emissions of HAP within the source category and evaluate this data for use in developing new emission standards. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

### *C. How do we estimate post-MACT risk posed by the source category?*

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions

[5] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the 2020 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the seven primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009; [6] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

The HAP emissions from the single mercury cell chlor-alkali plant includes mercury and chlorine. Hydrochloric acid historically had been associated with these facilities, but based on recent reviews of available information and discussions with Westlake Chemical, we conclude that any HCl emissions from the remaining operating facility in West Virginia are due to non-source category emissions sources such as HCl production operations (*i.e.,* they are not emitted by an affected source subject to the standards applicable to mercury cell chlor-alkali plants). The mercury emissions are emitted from several emission sources within the mercury cell chlor-alkali facility affected source at the one operating mercury cell chlor-alkali plant, which, for the purposes of the source category risk assessment, have been categorized into two general emission process groups: (1) Process vents and (2) fugitives from the mercury cell room building. Based on available data, we conclude the chlorine emissions are mostly or entirely emitted as fugitive emissions associated with the cell room or from pipes or other equipment used to pump the product chlorine to the chlorine storage units or other associated equipment in the mercury cell chlor-alkali facility affected source. The main source of emissions data used in our analyses was the NEI data submitted for calendar year 2017. Data on the numbers, types, dimensions, and locations of the emission points and non-point sources for each facility were obtained from the NEI and Google Earth™. A description of the data, approach, and rationale used to develop actual HAP emissions estimates is discussed in more detail in the document, *Development of the Residual Risk Review Emissions Dataset for the Mercury Cell Chlor-Alkali Plants Source Category,* which is available in the docket (Docket ID No. EPA–HQ–OAR–2020–0560).

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19992, 19998 through 19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34421, 34428, June 14, 2006, and 71 FR 76603, 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044)

For the Mercury Cell Chlor-Alkali Plants source category, the EPA assumed actual emissions are equal to allowable emissions. Allowable emissions are the estimated emissions that would occur under normal full-capacity operating conditions and as allowed under the applicable MACT standards. There is no available data that suggests the facility is operating at less than full capacity. There is also no evidence that the facility is controlling point source emissions to a degree greater than the emission limitations or that they are performing practices in excess of the required work practices for the control of fugitive emissions. This means that they are not reducing emissions beyond the levels required by the MACT standards which would result in actual emissions being less than allowable emissions. In addition, a review of ECHO indicates no enforcement actions for violations of the title V operating limits over the last 5 years, which would result in actual emissions being greater than allowable. Therefore, we are comfortable with the assumption that actual emissions are equal to the allowable emissions.

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[7] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[8] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 824 meteorological stations selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block [9] internal point locations and

[6] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www3.epa.gov/airtoxics/rrisk/rtrpg.html.*

[7] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[8] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[9] A census block is the smallest geographic area for which census statistics are tabulated.

populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the source category, we sum the risks for each of the carcinogenic HAP [10] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime'' (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

c. Risk From Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. As part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the environment,[11] we revised our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* and in Appendix 5 of the report:

[10] The EPA's 2005 *Guidelines for Carcinogen Risk Assessment* classifies carcinogens as: ''carcinogenic to humans,'' ''likely to be carcinogenic to humans,'' and ''suggestive evidence of carcinogenic potential.'' These classifications also coincide with the terms ''known carcinogen, probable carcinogen, and possible carcinogen,'' respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document, *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002), was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risk of these individual compounds to obtain the cumulative cancer risk is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *https://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[11] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis* (Draft Report, May 2017. *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html*).

*Technical Support Document for Acute Risk Screening Assessment.* This revised approach has been used in this proposed rule and in all other RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[12] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' [13] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[14] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or mg/m$^3$ (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [15] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For this source category, we used a default acute emissions multiplier of 10 as we have no information to suggest another factor to account for variability in hourly emissions data is more appropriate.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location. For this source category, the data refinements employed consisted of estimating the highest HQ that might occur outside facility boundaries with the use of satellite imagery of the facility with receptor locations. These refinements are discussed more fully in the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket for this source category.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library*).

For the Mercury Cell Chlor-Alkali Plant source category, mercury emissions were the only PB–HAP emitted by the source category, so we

[12] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for Mercury Cell Chlor-alkali Plants Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

[13] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[14] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[15] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association. Available at: *https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERPG%20Committee%20Standard%20Operating%20Procedures%20%20-%20March%202014%20Revision%20%28Updated%2010-2-2014%29.pdf.*

proceeded to the next step of the evaluation. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology. Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and polycyclic organic matter (POM). Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume 1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf.*) In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value (SV).''

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans, and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the SV is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a U.S. Geological Survey (USGS) database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and the USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [16]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [17]). If PB–HAP emission rates do not result in a Tier 2 SV greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume-rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

For further information on the multipathway assessment approach, see the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

5. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: Six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are HCl and hydrogen fluoride (HF).

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: Terrestrial soils, surface water bodies (includes water-

[16] Burger, J. 2002. *Daily consumption of wild fish and game: Exposures of high end recreationists. International Journal of Environmental Health Research,* 12:343–354.

[17] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: Probable effect levels, lowest-observed-adverse-effect level, and no-observed-adverse-effect level. In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Mercury Cell Chlor-Alkali Plant source category emitted any of the environmental HAP. For the Mercury Cell Chlor-Alkali Plant source category, we identified emissions of mercury and HCl. Because one or more of the environmental HAP evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary National Ambient Air Quality Standards (NAAQS) for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: The size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and square kilometers; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average SV around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

6. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks

from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data.

For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2014 NEI. The source category records of that NEI dataset were removed, evaluated, and updated as described in section II.C of this preamble. Once a quality assured source category dataset was available, it was placed back with the remaining records from the NEI for that facility. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

For this source category, we conducted the facility-wide assessment using a dataset that the EPA compiled from the 2017 NEI. We used the NEI data for the facility and did not adjust any category or ''non-category'' data. Therefore, there could be differences in the dataset from that used for the source category assessments described in this preamble. We analyzed risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, we made a reasonable attempt to identify the source category risks, and these risks were compared to the facility-wide risks to determine the portion of facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility, using the centroid of each census block, assuming lifetime exposure, and assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially

for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* pages 1 through 7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[18] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[19] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[20] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case actual exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[21]

[18] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[19] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[20] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, December 2002, and *Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

[21] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTRs.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume-rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct exposure to HAP in the air or through exposure to HAP that are deposited from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

## IV. Analytical Results and Proposed Decisions

### *A. What actions are we taking pursuant to CAA sections 112(d)(2) and 112(d)(3)?*

#### 1. MACT standards for Chlorine Emissions

In addition to mercury, based on the NEI, the Westlake, West Virginia, mercury cell chlor-alkali facility emits an estimated 0.24 tpy fugitive emissions of chlorine from the mercury cell chlor-alkali production facility affected source. Chlorine is not emitted from mercury thermal recovery units and furthermore, the facility does not have a mercury thermal recovery unit at the site. In the 2003 final rule, the EPA made the decision not to regulate chlorine and HCl in the Mercury Cell Chlor-Alkali Plant NESHAP based on the authority under section 112(d)(4) of the CAA. Specifically, the EPA based this decision on the ''determination that no further control is necessary because chlorine and HCl are ''health threshold pollutants,'' and chlorine and HCl levels emitted from chlorine production processes are below their threshold values within an ample margin of safety.'' (68 FR 70906, December 19, 2003).

However, the EPA has determined that it must now propose standards for all HAP emissions from the source category, including emissions of chlorine, pursuant to CAA section 112(d)(2) and (3).[22] As discussed in section III.C.1 above, while there are HCl emissions from the direct synthesis HCl production units at the Westlake, West Virginia, facility, they are not from processes that are part of the mercury cell chlor-alkali plant. Therefore, no emission limitations or work practices are being proposed for HCl since the emissions are not from parts of the site that are within the mercury cell chlor-alkali plant. As a result, we are only required to propose standards for chlorine emissions pursuant to CAA section 112(d)(2) and (3).

Fugitive chlorine emissions occur from equipment leaks in the cell room and throughout the other parts of the mercury cell chlor-alkali production facility affected source that handle and process the chlorine gas produced. As stated previously, mercury recovery units are not sources of chlorine emissions.

[22] The EPA not only has authority under CAA section 112(d)(2) and (3) to set MACT standards for previously unregulated HAP emissions at any time, but is required to address any previously unregulated HAP emissions as part of its periodic review of MACT standards under CAA section 112(d)(6). *LEAN* v. *EPA,* 955 F.3d at 1091–1099.

Section 112 of the CAA generally directs that standards be specified as numerical emission standards, if possible. However, if it is determined that it is not feasible to prescribe or enforce a numerical emission standard, CAA section 112(h) indicates that a design, equipment, work practice, or operational standard may be specified, provided the criteria of CAA section 112(h)(2) are met. Those criteria define ''not feasible to prescribe or enforce an emission standard'' to mean any situation in which the EPA determines that: (1) A HAP or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any federal, state, or local law, or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic reasons. Most fugitive chlorine emission sources at mercury cell chlor-alkali plants are associated with cell rooms. Potential fugitive chlorine emissions are also located in the chlorine processing area. For both the cell room and the chlorine processing area, the fugitive chlorine emissions are primarily due to equipment leaks. Due to the nature of equipment leaks (*i.e.,* low flow rate, occurring from individual pieces of equipment, high variability in time, and location of occurrence) it is technologically and economically impractical to collect the emissions and route them to a control device. As such, we believe that it is not feasible to either prescribe or enforce numerical emission limit(s) for fugitive chlorine emissions from cell rooms or any other location at the facility, under both of the criteria set forth in CAA section 112(h)(2)(A) and (B). Consequently, these proposed standards address fugitive chlorine emission sources at existing mercury cell chlor-alkali production facility affected sources through the establishment of work practice standards. As the NESHAP already effectively prohibits the construction or reconstruction of a mercury cell chlor-alkali production facility, there is no need to establish a new source MACT floor for fugitive chlorine emissions.

There are many incentives for the identification and correction of chlorine leaks and to reduce fugitive chlorine emissions throughout the mecury cell chlor-alkali plant. First, chlorine is a primary product of the process, so lost chlorine equals lost product and lost profit. Second, chlorine, particularly ''wet'' chlorine, is very corrosive to process equipment. Therefore, prompt repair of chlorine leaks reduces damange to process equipment. These corrosive properties also mean that small leaks can quickly become large leaks, which could result in chlorine releases that are dangerous to plant workers and the surrounding community. For these reasons, the Westlake, West Virginia, facility has a program in place to identify and repair fugitive chlorine leaks across the plant. Specifically, Westlake operators perform inspections during each shift to identify leaks of chlorine. Therefore, leaks are detected and corrective actions implemented to minimize and reduce any fugitive chlorine emissions. Based on available information, we understand that the method Westlake uses to identify leaks of chlorine from each piece of equipment is olfactory observations of chlorine gas. If leaks are detected using the olfactory method, the facility takes immediate actions to fix the identified leaks. Furthermore, Westlake has chlorine sensors installed and operated throughout the relevant process units. If one of these sensors measures a chlorine concentration of 2 parts per million by volume (ppmv) or greater, the facility takes action to identify and fix leaks. Since there is only one currently operating mercury cell chlor-alkali plant in the country, the MACT floor for existing sources is represented by the practices in place at the Westlake facility to reduce chlorine fugitive emissions.

As noted above, it is technologically and economically impractical to collect the emissions from every potential leak source at a facility and route them to a control device. The cell room building is generally under negative pressure and the air is routed through the roof vents. As a beyond-the-floor option for fugitive chlorine emissions, we considered requiring the air from the roof vents to be routed to a scrubber or other control device. However, the volume of the air flow from the Westlake cell room is over 700 million cubic feet per day, or almost 500,000 cubic feet per minute. It would be technically infeasible for any control device to handle this volume of gas throughput. Therefore, we rejected this beyond-the-floor option.

Therefore, we are proposing the MACT floor level of control which represents the procedures in place at the Westlake, West Virginia, site. We developed the work practices in the proposed amendments to reflect these procedures, along with associated recordkeeping and reporting requirements to demonstrate compliance. Specifically, we are proposing that facilities must identify and inspect each piece of equipment that contains chlorine gas with a concentration of at least 5 percent chlorine by volume throughout the mercury cell chlor-alkali production facility affected source for leaks at least once each 12 hours. We are requesting comment on whether the 5 percent by volume threshold for defining equipment that must be inspected for chlorine leaks is the appropriate threshold for identifying equipment with the potential to generate fugitive emissions of chlorine gas. Equipment that is under negative pressure would be excluded from this requirement. The method that we are proposing to identify leaks of chlorine from each piece of equipment is olfactory observations of chlorine gas. However, we solicit comments regarding other methods (*e.g.,* auditory or visual) that should also be allowed as a method to identify leaks.

When a leak is detected, we are proposing that a first attempt at repair be conducted within 1 hour of detection and that the leak be repaired within 1 day of detection. We are proposing that a leak is repaired when the evidence of the olfactory observation is eliminated.

Additionally, we are proposing that chlorine sensors be installed and operated continuously (at least one measure every 15 minutes) throughout the affected source. Each time one of these sensors measures a chlorine concentration of 2 ppmv or greater, the proposed rule would require a complete inspection for leaks of all equipment containing 5 percent chlorine by volume within 1 hour of detection. The chlorine sensors that the facility uses must have a detection limit of 2 ppm or less. Furthermore, we propose the sensor must be calibrated and maintained following the manufacturer's recommendations.

We are requesting comment on several aspects of the proposed requirements related to the use of chlorine sensors to identify leaks that may occur between the 12-hour regular inspections. First, we are requesting comment on where these ambient sensors should be located to ensure that chlorine emissions are detected by the ambient monitors. The proposed rule requires that they be placed throughout the mercury cell chlor-alkali manufacturing facility affected source, which includes ''all cell rooms and ancillary operations used in the manufacture of product chlorine, product caustic, and by-product hydrogen.'' We are requesting comment whether the rule should specify areas of the facility where sensors should be located and whether it should specify a

minimum number of sensors. We are requesting comment on the types (*i.e.,* detection methodology) of devices that should be used, the appropriate detection limit for these devices, and whether the devices should be subject to the continuous parameter monitoring requirements in 40 CFR 63.8 of the General Provisions of part 63. We are requesting comment on the appropriate sampling time and whether the proposed requirement that a measurement be taken every 15 minutes is appropriate, as well as the proposed 2 ppmv concentration level that triggers action (*i.e.,* additional inspections). In conjunction, we are requesting comment on whether action should be required based on a single measurement above the 2 ppmv action level, or whether it should be required when measurements averaged over a specified time period exceed 2 ppmv (*e.g.,* if the one-hour average concentration is greater than 2 ppmv). Finally, the proposed rule generically requires that records of all chlorine concentration measurements be maintained. We are requesting comments on whether the rule should include data acquisition system and data format requirements, and if so, what associated requirements might be appropriate.

The proposed rule would require that initial attempts at corrective actions of leaks be taken within 1 hour of detection, and the leak be repaired within 1 day of the date of detection. Records would be required to document the equipment containing more than 5 percent by volume of chlorine and the dates and times the inspections occurred. For each leak identified, records would also be required identifying the piece of equipment with the leak, the date and time it was identified, the date and time a first attempt to repair the leak was performed, the date and time the leak was stopped and repaired, and a description of the repair made to stop the leak. Records would also be required of any deviation from these work practices. Also, the number of leaks found and repaired during the reporting timeframe and any deviations from the work practices would be included in the periodic report.

2. Reconsideration Petition and Beyond-the-Floor Analysis for Mercury

In early 2004, the EPA received a petition for reconsideration pursuant to CAA section 307(d)(7)(B) and a petition for judicial review under CAA section 307(b)(1) from the NRDC regarding the 2003 Mercury Cell Chlor-Alkali MACT standards. In the petition for reconsideration, NRDC claimed that the EPA failed to conduct the required beyond-the-floor analysis under CAA section 112(d)(2) regarding whether to prohibit mercury emissions from existing sources, as the rule did for new and reconstructed sources. In a letter dated April 8, 2004, the EPA informed NRDC that it had granted the petition for reconsideration and would respond to NRDC's petition in a subsequent notice of proposed rulemaking. On July 20, 2004, the court put the litigation into abeyance and directed the EPA to file periodic status reports.

In 2006 and 2007, the EPA conducted a testing program to measure fugitive mercury emissions at two selected facilities to inform the reconsideration. The EPA provided final reports regarding the results of the study to NRDC as required by a joint stipulation filed in the litigation. Both of the studied facilities are no longer operational. On June 11, 2008 (73 FR 33258), the EPA published a proposed rule that provided the EPA's proposed response to the petition for reconsideration, which would require facilities to install and operate a continuous mercury monitoring system in the ''upper portions of the cell room'' and continue to perform the work practice standards (with reduced recordkeeping and reporting requirements and no floor-level monitoring). The EPA received comments from Oceana, PPG Industries, the Chlorine Institute, Olin Chlor-alkali Products, and an anonymous submittal.

Subsequently, in 2011, the EPA published a new proposed rulemaking in response to the petition for reconsideration (76 FR 13852, March 14, 2011). The new proposed rule contained two options that the EPA was considering. The first option was to require remaining existing facilities to convert to a non-mercury technology to produce chlorine as a beyond-the-floor measure under CAA section 112(d)(2). The second option included the combination of the continuous cell room monitoring program and work practice program originally proposed in 2008 as a beyond-the-floor measure. Like for the 2008 proposed rule, the EPA received a number of comments from various stakeholders both for and against the 2011 proposed rulemaking. All of the EPA's technical analyses for the proposed rulemakings, public comments, and other supporting information regarding the 2008 and 2011 proposals are available in the docket for the proposals (Docket ID No. EPA–HQ–OAR–2002–0017). No final action has been taken on the 2008 or 2011 proposals, or to respond to the petition for reconsideration, and the litigation concerning the 2003 NESHAP remains in abeyance with the EPA still subject to the court's order to file periodic status reports.

In conjunction with this proposed RTR action under CAA sections 112(d)(6) and 112(f)(2), the EPA, pursuant to CAA sections 112(d)(2) and (3), re-evaluated whether a beyond-the-floor requirement that facilities must convert to a non-mercury technology within 3 years would still be appropriate based on updated analyses compared to those supporting the 2011 proposal. In 2011 there were four such facilities still in operation. Two of these facilities were the subject of the EPA's studies of fugitive mercury emissions over 2006 and 2007, and they have since shut down. As described above, only one operating facility remains in the U.S. that uses the mercury cell process to produce chlorine. Based on our updated analysis, contained in the docket for this proposed rule, we estimate the capital costs would be about $69 million for the one remaining facility to convert to a non-mercury process. However, there would be savings over time due to the elimination of compliance costs associated with mercury and the higher efficiency and energy savings of switching to the membrane technology. The estimated annual costs, after accounting for the expected savings, are $2.8 million per year for the one remaining mercury cell facility. Based on reported mercury emissions, the cost effectiveness of the conversion is estimated to be $22,000 per pound of mercury emissions eliminated. However, we also note that the cost-effectiveness estimate is uncertain because, first, mercury emissions are based on calculations and assumptions regarding the facility's emissions (no test data are available for this facility), and second, because there are uncertainties with the cost estimates from the 2011 proposal as being transferable to the remaining facility. In the 2011 proposal, the estimated cost effectiveness was $20,000 per pound for the industry (see 76 FR 13852, March 14, 2011), but this was substantially based on the studies conducted for the two no longer operating sources.

Based on consideration of the updated costs and cost effectiveness and uncertainties, and given the passage of time, and the fact that the cost-effectiveness data and analysis done in 2011 were based on two facilities that are no longer operating, we question whether those 2011 analyses would still be transferable to the one remaining operating facility. Consequently, we are not proposing in this action to require the elimination of mercury as a beyond-

the-floor standard under CAA section 112(d)(2). However, we are soliciting comments, data, and other information regarding this proposed decision, including data and information regarding the capital and annual costs, cost effectiveness, non-air impacts, and other relevant information that would be relevant for the remaining facility regarding whether the NESHAP should include a zero-mercury standard as a beyond-the-floor MACT standard. We intend to consider any such submitted data and information, in addition to the data and information contained in the records for the 2008 and 2011 proposals and in this proposal, in reaching final conclusions under CAA section 112(d)(2) regarding a zero-mercury standard beyond-the-floor.

*B. What are the results of the risk assessment and analyses?*

As described above, for the Mercury Cell Chlor-Alkali Plant source category, we conducted an inhalation risk assessment for all HAP emitted, a multipathway screening assessment for the PB–HAP emitted, and an environmental risk screening assessment for the PB–HAP emitted from the source category. When we initiated this RTR and developed the risk input files, there were two facilities operating in the source category (Ashta in Ohio and Westlake in West Virginia); however, as noted above, Ashta has since permanently shut down the mercury cell process. We also conducted an environmental screening for HCl, because we initially had some HCl emissions in our data set, but as described above, after further review, we conclude those HCl emissions are due to non-category sources. We present results of the risk assessment briefly below and in more detail in the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

1. Chronic Inhalation Risk Assessment Results

The EPA estimated inhalation risk is based on actual and allowable emissions. The estimated baseline MIR posed by the source category is less than 1-in-1 million based on actual emissions and MACT-allowable emissions. The total estimated cancer incidence based on actual or allowable emission levels is 0.0000003 excess cancer cases per year, or one case every 3 million years. Emissions of 1,3-dichloropropene from the mercury cell building at Ashta accounted for 100 percent of the cancer incidence. No one is exposed to cancer risk greater than or equal to 1-in-1 million based upon actual and allowable emissions (see Table 1 of this preamble). However, based on the available data, the 1,3-dichloropropene was only emitted from Ashta, which is no longer operating as a mercury cell facility, as discussed above. Furthermore, we have no indication or data suggesting that this pollutant is emitted from the one remaining facility.

The maximum chronic noncancer TOSHI values for the source category were estimated to be less than 1 (0.05) based on actual and allowable emissions. For both actual and allowable emissions, respiratory risks were driven by chlorine emissions from the mercury cell building.

TABLE 1—INHALATION RISK ASSESSMENT SUMMARY FOR MERCURY CELL CHLOR-ALKALI PLANT [1] SOURCE CATEGORY

| Risk assessment | Number of facilities [2] | Maximum individual cancer risk (1-in-1 million) [3] | Estimated population at increased risk of cancer ≥ 1-in-1 million | Estimated annual cancer incidence (cases per year) | Maximum chronic noncancer TOSHI [4] | Maximum screening acute noncancer HQ [5] |
|---|---|---|---|---|---|---|
| **Baseline Actual Emissions** | | | | | | |
| Source Category | 2 | 0.004 | 0 | 0.0000003 | 0.05 (respiratory) | 2 (REL), 7E–4 (AEGL2). |
| Facility-Wide | 2 | 0.3 | 0 | 0.0001 | 0.05 (respiratory) | |
| **Baseline Allowable Emissions** | | | | | | |
| Source Category | 2 | 0.004 | 0 | 0.0000003 | 0.05 (respiratory) | |

[1] Based on actual and allowable emissions.
[2] Number of facilities in the risk assessment includes two facilities subject to 40 CFR part 63, subpart IIIII.
[3] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[4] Maximum TOSHI. The target organ with the highest TOSHI for the source category is the respiratory system.
[5] The maximum estimated acute exposure concentration was divided by available short-term threshold values to develop an array of HQ values. The acute HQ shown was based upon the lowest acute 1-hour dose-response value, the REL for mercury (elemental). When an HQ exceeds 1, we also show the HQ using the next lowest available acute dose-response value.

2. Screening Level Acute Risk Assessment Results

Based on our refined screening analysis of reasonable worst-case acute exposure to actual emissions from the category, both facilities exceeded an HQ of 1 (the HQ was 2) when compared to the 1-hour REL for mercury (elemental). As discussed in section III.C.3.c of this preamble, we used an acute hourly multiplier of 10 for all emission processes. For this HAP, there are no AEGL–1 or ERPG–1 values for comparison, but AEGL–2 or ERPG–2 values are available. For elemental mercury, when the maximum off-site concentration is compared with the AEGL–2 and ERPG–2, the maximum acute noncancer HQ is well below 1 (0.0007).

3. Multipathway Risk Screening Results

PB–HAP emissions (based on estimates of actual emissions) were reported from both facilities in the source category with both exceeding the Tier 1 non-cancer screening threshold emission rate for mercury. A Tier 2 screening analysis was conducted with no facilities having an SV greater than 1 for any scenario (the fisher and farmer had the highest SV at 0.4). There are no carcinogenic PB–HAP emitted from the source category. So, there are no cancer SVs to report. Further details on the Tier 2 screening analysis can be found in the *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* and *Appendix 10* of this report.

An SV in any of the tiers is not an estimate of the cancer risk or a noncancer HQ. Rather, an SV represents a high-end estimate of what the risk or HQ may be. For example, facility emissions resulting in an SV of 2 for a non-carcinogen can be interpreted to mean that we are confident that the HQ would be lower than 2. Similarly, facility emissions resulting in a cancer SV of 20 for a carcinogen means that we are confident that the cancer risk is lower than 20-in-1 million. Our confidence comes from the health-protective assumptions that are incorporated into the screens: we choose inputs from the upper end of the range of possible values for the influential parameters used in the screens, and we assume food consumption behaviors that would lead to high total exposure. This risk assessment estimates the maximum hazard for mercury through fish consumption based on upper bound screens. As discussed above, the maximum mercury Tier 2 noncancer SV based upon the fisher scenario resulted in an SV less than 1.

4. Environmental Risk Screening Results

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Mercury Cell Chlor-Alkali Plant source category for the following pollutants: HCl and mercury (methyl mercury and mercuric chloride). However, as noted above, we subsequently determined that the HCl emissions are due to non-category sources such as co-located HCl production.

In the Tier 1 screening analysis, methyl mercury and divalent mercury resulted in exceedances of ecological benchmarks by two facilities. Divalent mercury emissions had Tier 1 exceedances for the following benchmarks: Surface soil threshold level—invertebrate communities by a maximum SV of 4. Methyl mercury had Tier 1 exceedances for the following benchmarks: No Observed Adverse Effect Level (NOAEL)—avian ground insectivores (woodcock) by a maximum SV of 6.

A Tier 2 screening analysis was performed for divalent mercury and methyl mercury. In the Tier 2 screening analysis, divalent mercury emissions had no Tier 2 exceedances. Methyl mercury had Tier 2 exceedances for one facility exceeding the following benchmark: Surface soil NOAEL for avian ground insectivores (woodcock) by a maximum SV of 2 with 0.1 percent of the soil area being above an SV of 2.

For HCl, only one facility reported emissions. The average modeled concentration around this facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks. However, as explained above, after further investigation, we conclude that the reported HCl emissions are due to non-category sources.

5. Facility-Wide Risk Results

The EPA estimated inhalation risk based on facility-wide emissions to be 0.3-in-1 million, with an 0.0001 excess cancer cases per year, or one case every 10,000 years. Emissions of metals (arsenic, chromium VI, and nickel) from non-category sources account for 100 percent of the cancer incidence. No one is exposed to cancer risk greater than or equal to 1-in-1 million (see Table 1 of this preamble). The maximum chronic noncancer TOSHI value for the source category was the same for both actual emissions and allowable emissions with an HI less than 1 (0.05) for respiratory risks driven by chlorine emissions from the mercury cell building.

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risks to individual demographic groups of the populations living within 5 km and within 50 km of the facilities. In the analysis, we evaluated the distribution of HAP-related cancer and noncancer risks from the mercury cell chlor-alkali plant source category across different demographic groups within the populations living near the two facilities.[23]

Results of the demographic analysis indicate that, for three of the 11 demographic groups, age greater than or equal to 65, age greater than or equal to 25 years of age without a high school diploma, and people below the poverty level, the percentage of the population living within 5 km of facilities in the source category is greater than the corresponding national percentage for the same demographic groups. When examining the risk levels of those exposed to emissions from mercury cell chlor-alkali plant facilities, we find that no one is exposed to a cancer risk at or above 1-in-1 million or to a chronic noncancer TOSHI greater than 1.

The methodology and the results of the demographic analysis are presented in a technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Mercury Cell Chlor-Alkali Plant Source Category Operations,* available in the docket for this action.

*C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?*

1. Risk Acceptability

As explained in section II.A of this preamble, the EPA sets standards under CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1-in-10 thousand'' (54 FR 38045, September 14, 1989). The EPA weighed all health risk measures and information, including science policy assumptions and estimation uncertainties, in determining whether risk posed by emissions from the source category is acceptable.

As described above, the maximum cancer risk for inhalation exposure to actual and allowable emissions from the Mercury Cell Chlor-Alkali Plant source category is 0.004-in-1 million, which is more than four orders of magnitude below 100-in-1 million, which is the presumptive upper limit of acceptable risk. The EPA estimates emissions from the category would result in a cancer incidence of 0.0000003 excess cancer cases per year, or one case every 3 million years. Furthermore, as described above, the facility estimated to pose those cancer risks is no longer operating as a mercury cell facility. Inhalation exposures to HAP associated with chronic noncancer health effects result in a TOSHI of 0.05 based on actual and allowable emissions, 20 times below an exposure that the EPA has determined is without appreciable risk of adverse health effects. Exposures to HAP associated with acute noncancer health effects result in an HQ less than or equal to 2 based upon the 1-hour REL for elemental mercury, and when the maximum off-site concentration is compared with the AEGL–2 and ERPG–2, the maximum acute noncancer HQ is

[23] Demographic groups included in the analysis are: White, African American, Native American, other races and multiracial, Hispanic or Latino, children 17 years of age and under, adults 18 to 64 years of age, adults 65 years of age and over, adults without a high school diploma, people living below the poverty level, people living two times the poverty level, and linguistically isolated people.

well below 1 (0.0007). This information, in addition to the conservative (health-protective) assumptions built into the screening assessment, leads us to conclude that adverse effects from acute exposure to emissions of this HAP from this source category are not anticipated. Maximum noncancer hazard due to ingestion exposures estimated using health-protective risk screening assumptions are below an HQ of 1 (0.4) for the Tier 2 fisher scenario. The estimated ingestion cancer risk is zero since we did not identify any carcinogenic HAP emitted from the source category. Considering all of the health risk information and factors discussed above, as well as the uncertainties discussed in section III of this preamble, we propose that the risks posed by emissions from the Mercury Cell Chlor-Alkali Plant source category are acceptable.

2. Ample Margin of Safety Analysis

As directed by CAA section 112(f)(2), we conducted an analysis to determine whether the current emissions standards provide an ample margin of safety to protect public health. Under the ample margin of safety analysis, we evaluated the cost and feasibility of available control technologies and other measures (including the controls, measures, and costs reviewed under the technology review) that could be applied to this source category to further reduce the risks (or potential risks) due to emissions of HAP from the source category.

As described above, the only HAP emitted from this source category posing any risks of potential concern is elemental mercury, with a maximum noncancer acute HQ of 2 based on the REL. Therefore, we considered potential options to reduce mercury emissions under the ample margin of safety analysis. The options we considered under the ample margin of safety analysis are the exact same control options described under the technology review section of this preamble (see section IV.D below).

First, as described in greater detail under the technology review section, we evaluated the option of requiring a combination of implementing a cell room monitoring program and performing work practices as an approach to minimize mercury emissions. Under the technology review section, we determined that this option does constitutes a development in emissions control practices pursuant to CAA section 112(d)(6) with very low costs, and, therefore, we are proposing these requirements under the technology review. However, since the one operating facility already conducts these two actions, we do not expect any actual reductions in emissions and, therefore, we would expect no actual reductions in risks. Since this option is not expected to result in any risk reductions, we are not proposing to adopt those requirements pursuant to CAA section 112(f).

The other option we considered under the CAA section 112(d)(6) technology review (described in section IV.D of this preamble) as well as under CAA sections 112(d)(2) and (3), as described in section IV.A of this preamble, is to require zero mercury emissions from existing sources, which is the requirement for new and reconstructed mercury cell chlor-alkali production sources. This option would eliminate process vent and fugitive mercury emissions as it would force the remaining facility to convert the operation to a non-mercury process or close the mercury cell operation. As described in more detail in sections IV.A and IV.D of this preamble, we estimate the capital cost of converting the one remaining mercury cell facility to membrane cells is just over $69 million. The estimated emissions of mercury would be reduced from 126 pounds to zero pounds per year. Considering the costs of conversion annualized over a time period of 20 years, the annual costs are estimated to be approximately $2.8 million, which results in a cost effectiveness of approximately $22,000 per pound of mercury emissions eliminated. With regard to reductions in risks due to HAP emissions as a result of this option, since this option would force conversion or closure of the remaining one mercury cell facility, the risks due to emissions of HAP for the source category would be zero, since there would be no facilities in the source category.

Nevertheless, after considering the options described above, since the risks due to mercury emissions are already low (with a maximum acute noncancer HQ of less than or equal to 2 based upon the 1-hour REL and a maximum HQ of 0.0007 based on AEGL–2 and ERPG–2), and given the costs described above, and because of the substantial uncertainties in the emissions estimates and cost estimates, we are not proposing any additional standards for mercury under CAA section 112(f).

In summary, considering the very low cancer risks (MIR far less than 1-in-1 million) and very low chronic noncancer risks (HI of 0.05) to individuals exposed to HAP emitted from this source category, and after considering possible options for mercury as described above, we are proposing a determination that the existing standards provide an ample margin of safety to protect public health.

3. Adverse Environmental Effect

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect, as defined by CAA section 112(a)(7), as a result of HAP emissions from this source category, and we are proposing that it is not necessary to set a more stringent standard to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

*D. What are the results and proposed decisions based on our technology review?*

As noted above, 40 CFR part 63, subpart IIIII currently includes emission limitations for mercury emissions from process vents (including emissions from end-box ventilation systems, hydrogen systems, and mercury recovery facilities) and work practices for fugitive mercury emissions from the cell room. We have identified a development for cell room fugitive mercury emissions.

With regard to fugitive mercury emissions from the cell room, the current rule at 40 CFR 63.8192(a) through (f) requires a suite of equipment standards and work practices. It also provides the option, in lieu of the work practices otherwise required under CAA sections 63.8192(a) through (d), to institute a cell room monitoring program to continuously monitor the mercury vapor concentration in the upper portion of each cell room. See 40 CFR 63.8192 introductory text, and 40 CFR 63.8192(g). The single mercury cell facility still operating complies via this alternative. However, while not required to do so under the current regulation, the facility also performs all the work practices. Therefore, the EPA determined that the combination of implementing a cell room monitoring program and performing work practices constitutes a development in emissions control practices. This combination was the proposed option in the June 11, 2008, action (73 FR 33258), and also included as a co-proposal in the March 14, 2011 (76 FR 13852), action. Since the only facility in the source category is already implementing the monitoring program and performing these work practices, there would be no costs (with the exception of additional recordkeeping and reporting costs) or additional mercury emission reductions associated with implementing a standard that requires a combination of these practices.

We also identified the option to require zero mercury emissions from existing sources, which is the requirement for new and reconstructed mercury cell chlor-alkali production sources. This option would eliminate process vent and fugitive mercury emissions as it would force the remaining facility to convert the operation to a non-mercury process, or close the mercury cell operation, by a date no later than 3 years of the date of publication of the final rule. See CAA section 112(i)(3)(A). When the EPA originally listed the Chlorine Production source category in 1992, there were 13 mercury cell chlor-alkali plants in the U.S. Since that time, the number of facilities has steadily declined to the current situation with only one facility. Many owners of mercury cell facilities converted to the more efficient and more environmentally friendly membrane cell technology, while other mercury cell chlor-alkali plant owners have concluded the investment decision was currently not in their company's interest given their assessment of future economic conditions and have shut down their mercury cell chlor-alkali plants entirely. Therefore, the zero mercury emissions option is a demonstrated potential development in processes pursuant to CAA section 112(d)(6).

The EPA has considered this option previously since the promulgation of the regulation in 2003, in the context of evaluating whether a prohibition on mercury emissions would be a reasonable beyond-the-floor MACT measure under CAA section 112(d)(2). As discussed above, in 2008, the EPA proposed amendments to 40 CFR part 63, subpart IIIII (73 FR 33258, June 11, 2008). One of the options evaluated for this 2008 proposal was to require zero mercury emissions, and the EPA evaluated the impacts of requiring conversion of mercury cell chlor-alkali production plants to non-mercury technology. The EPA proposed ''to reject conversion to non-mercury technology as a beyond-the-floor control requirement because of the high cost impact this forced conversion would impose on the facilities in the industry.'' As noted above, the EPA proposed the combination of mercury cell room monitoring and work practices in the 2008 action (73 FR 33275).

Considering comments received on the 2008 proposed cost and impacts analysis of the option to convert to non-mercury technology, the EPA significantly refined the analysis. The results of the revised analyses were published in 2011, along with two proposed options to reduce mercury emissions. One was an option to require all mercury cell chlor-alkali facilities to comply with a zero-mercury emissions limitation within 3 years of the finalization of the proposal (76 FR 13852, March 14, 2011). The other proposed option was to require continuous monitoring of mercury in the upper regions of the cell room along with work practices, as under the 2008 proposal (and as being proposed here under CAA section 112(d)(6)). The revised analysis of the impacts of conversion from mercury cells to membrane cells is discussed in detail in the 2011 proposal and supporting documentation.

Comments were received on the updated analysis and supplemental 2011 proposal. An environmental advocacy commenter (Docket Item No. EPA–HQ–OAR–2002–0017–0152) supported the proposed zero-mercury option but also commented that the EPA had overstated the costs and understated the emission reductions and other benefits. Conversely, three industry representatives (Docket Item Nos. EPA–HQ–OAR–2002–0017–0150, –0151, and –0157) commented that the EPA's revised analysis had underestimated the costs and negative economic impacts and overstated the benefits. One industry representative (Docket ID No.EPA–HQ–OAR–2002–0150) provided an analysis of the impacts of conversion specific to the West Virginia facility (which is, as discussed previously, the only mercury cell plant currently still in operation). The commenter indicated that the cost of conversion estimated by the EPA for this facility (around $43 million) was considerably less than the estimates calculated by the facility (around $60 million). The commenter also provided a cost-effectiveness analysis, which showed a cost of over $77,000 per pound of mercury emissions eliminated for this facility. The EPA has not yet finalized either of the options included in the 2011 supplemental proposal, or otherwise issued a final beyond-the-floor MACT determination under CAA section 112(d)(2) for existing source mercury emissions, as discussed above.

For this proposal, the EPA re-examined the impacts of a zero-mercury option. Specifically, the EPA evaluated the costs and cost effectiveness of the replacement of the West Virginia mercury cell facility with a membrane cell facility. As pointed out above, the EPA's 2011 estimate for the capital cost to convert the West Virginia facility was just over $43 million and an annual cost of $2.6 million per year. The EPA updated this estimate by adjusting the costs to 2019 dollars and incorporating the actual costs of conversion incurred by the Ohio facility for their 2019/2020 conversion. The resulting updated estimate is that the capital cost of converting the West Virginia mercury cell facility to membrane cells is just over $69 million. The estimated emissions of mercury would be reduced from 126 pounds to zero pounds per year. Considering the costs of conversion annualized over a time period of 20 years, the annual costs are estimated to be approximately $2.8 million, which results in a cost effectiveness of approximately $22,000 per pound of mercury emissions eliminated.[24] While some commenters have suggested that the EPA's estimates of mercury emissions from mercury cell chlor-alkali facilities are underestimated due to ''unaccounted for'' mercury, the EPA's detailed study conducted prior to the 2008 proposal demonstrated otherwise. Specifically, the EPA stated ''The results of the almost one million dollar study of fugitive emissions from mercury cell chlor-alkali plants sponsored by EPA enables us to conclude that the levels of fugitive emissions for mercury chlor-alkali plants are much closer to the assumed emissions in the part 61 Mercury NESHAP, of 1,300 grams/day/plant (around 0.5 tons/yr/plant) than the levels assumed by NRDC (3 to 5 tons/yr/plant). The results of this study suggest that the emissions are routinely less than half of the 1,300 grams/day level, with overall fugitive emissions from the five operating facilities estimated at less than 1 ton per year of mercury.'' (73 FR 32666). This study, and the EPA's basis for their conclusion regarding the magnitude of mercury emissions from these facilities, is discussed in detail in the 2008 proposal (73 FR 33262 through 33267). In addition, the West Virginia facility is required under an agreement with the Attorney General of Maryland to limit mercury emissions from the facility to less than 150 pounds per year.[25]

The EPA also examined the non-air impacts associated with switching from mercury cell to non-mercury cell processes. For 2019, the West Virginia facility reported a total of 898.1 pounds of non-air mercury releases. This consists of 9 pounds to streams/water bodies, 883.3 pounds to Resource

[24] Memorandum. Norwood, P., SC&A, Inc. to Mulrine, P., EPA. *Updated Cost Analysis for Conversion of Mercury Cell Chlor-Alkali Plants to Membrane Cells.* December 3, 2020.

[25] *PPG to Lower Mercury Emissions at Natrium Plant. Environmental Protection Online.* August 25, 2009. Available at *https://eponline.com/Articles/2009/08/25/PPG-to-Lower-Mercury-Emissions-at-Natrium-Plant.aspx?Page=1&p=1.*

Conservation and Recovery Act, Subtitle C Landfills, and 5.8 pounds to other offsite sources. All these releases would be eliminated with the conversion to non-mercury cell processes. While the promulgation of a zero-mercury standard would eliminate these ongoing releases, there would be environmental impacts associated with the dismantling and decommissioning of the West Virginia mercury cell plant. In 2008, the EPA estimated that these activities would result in over 4,000 pounds of mercury in wastes (for example, from contaminated piping and other equipment). We believe this estimate still represents a reasonable estimate of the wastes that would be generated. In addition, the facility would need to deal with the several hundred tons of elemental mercury that is currently contained in the cells. The options for storing this mercury are limited by the Mercury Export Ban Act of 2008. The only realistic options for long-term storage of this mercury are to send it to U.S. Department of Energy storage facilities or to continue to store it onsite, both of which would result in ongoing costs to the facility.

Based on these factors, we are not proposing the option of a zero-mercury standard as part of our CAA section 112(d)(6) technology review for this source category at this time. Moreover, as we are now uncertain whether the assessments supporting the 2011 proposed option to require elimination of mercury emissions from existing sources continue to represent accurate estimates of the costs of requiring such elimination at the single remaining plant, we are proposing that promulgating a zero-mercury standard for existing sources would not be a reasonable beyond-the-floor MACT standard under CAA section 112(d)(2). However, we are soliciting comments, data, and other information regarding these proposed decisions, including data and information regarding the costs, cost effectiveness, non-air, and economic impacts and other relevant information regarding whether the NESHAP should include a zero-mercury standard as either a beyond-the-floor MACT standard or a revised standard under the technology review, and whether the proposed work practices for chlorine emissions and proposed amendments to the mercury work practices would be necessary if a zero-mercury standard were to be adopted. We intend to consider any such submitted data and information, in addition to the data and information contained in the records for the 2008 and 2011 proposals and in this proposal, in reaching final conclusions under CAA sections 112(d)(2) and (6) regarding a zero-mercury standard.

Based on the analyses discussed above, we are proposing the first option, which is to amend the rule to require both a cell room monitoring program and work practice standards. Specifically, the proposed amendments would require, beginning 6 months after the final rule is published, compliance with all work practices in the rule and associated recordkeeping and reporting requirements plus the cell room monitoring program. The exception is the work practice to develop and follow a floor-level mercury vapor measurement program required at 40 CFR 63.8192(d). The cell room monitoring program is similar to the floor-level program, except that it is more comprehensive and effective as it detects increased mercury levels throughout the cell room, while the floor-level program only detects increased levels near the floor-level walkways.

*E. What other actions are we proposing?*

In addition to the proposed actions described above, we are proposing additional revisions to the NESHAP. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure they are consistent with the decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008), in which the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We also are proposing various other changes to require electronic reporting of performance test results, notifications, and reports. We are also proposing two amendments to correct errors and improve the compliance provisions in the rule, as well as proposing amendments to address applicability for thermal mercury recovery units when chlorine and caustic are no longer produced in mercury cells. Our analyses and proposed changes related to these issues are discussed below.

1. SSM

In its 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the court vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and (h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously.

Consistent with *Sierra Club* v. *EPA,* we are proposing the elimination of the SSM exemptions in this NESHAP, and we are proposing that the emissions standards will apply at all times. We are also proposing several revisions to Table 5 (the General Provisions Applicability Table) which are explained in more detail below. For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that sources develop an SSM plan. We also are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as described below.

The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether we have successfully done so.

In proposing the standards in this rule, the EPA has considered startup and shutdown periods and, for the reasons explained below, is not proposing alternate standards for those periods. In 2011, the EPA proposed similar revisions to the SSM provisions as those being proposed here. During the comment period for the 2011 rule, the mercury cell chlor-alkali industry indicated that there were safety concerns associated with complying with the emissions standards during startup for the hydrogen vent stream. The industry provided general information that suggested that the control device could not be operated until the exhaust stream composition could be regulated. However, no additional data or information has been received since 2011, and it is unclear whether the one operating facility in the source category would violate its emissions standards during these startup times, whether the facility has changed operations since the 2011 rule to be able to comply with the emissions standards during startup, or whether there are other practices or standards that could apply during these periods to ensure emissions are limited or reduced. In the absence of evidence that the emissions standards cannot be met during startup, the EPA is proposing that the emissions standards apply at all times. However, we solicit comment and detailed information for any situations where separate standards, such as work practices, would be more appropriate during periods of startup and shutdown rather than the current standard.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment. (40 CFR 63.2) (definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards, and this reading has been upheld as reasonable by the court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016). Under CAA section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category (or the average emission limitation achieved by the best performing sources where, as here, there are fewer than 30 sources in the source category). There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the court has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of'' sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 112 standards.

As the court recognized in *U.S. Sugar Corp.,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. *Id.* at 608 (''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.''). As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.'''). See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99 percent removal goes offline as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99 percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

In the unlikely event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused, in part, by poor maintenance or careless operation. 40 CFR 63.2 (definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, CAA section 112 is reasonable and encourages practices that will avoid malfunctions and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations. *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

a. General Duty, SSM Plan, and Compliance with Standards

We are proposing to revise the General Provisions Applicability Table (Table 10) entry for ''§ 63.6(a)–(g), (i), (j)'' to ''§ 63.6(a)–(g), (i), (j), except for (e)(1)(i) and (ii), (e)(3), and (f)(1)'' and to add a new entry for ''§ 63.6(e)(1)(i) and (ii), (e)(3), and (f)(1),'' in which a ''No'' entry would be included in the column, ''Applies to Subpart IIIII.'' Section 63.6(e)(1)(i) describes the general duty to minimize emissions. Some of the language in that section is no longer necessary or appropriate in light of the elimination of the SSM exemption. We are proposing instead to add general duty regulatory text at 40 CFR 63.8222 that reflects the general duty to minimize emissions while eliminating the reference to periods covered by an SSM exemption. The current language in 40 CFR 63.6(e)(1)(i) characterizes what the general duty entails during periods of SSM. With the elimination of the SSM exemption, there is no need to differentiate between normal operations

and SSM events in describing the general duty. Therefore, the language the EPA is proposing for 40 CFR 63.8222 does not include that language from 40 CFR 63.6(e)(1). In addition, 40 CFR 63.6(e)(1)(ii) imposes requirements that are not necessary with the elimination of the SSM exemption or are redundant with the general duty requirement being added at 40 CFR 63.8222. Generally, 40 CFR 63.6(e)(3) requires development of an SSM plan and specifies SSM recordkeeping and reporting requirements related to the SSM plan. As noted, the EPA is proposing to remove the SSM exemptions. Therefore, affected units will be subject to an emission standard during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance and, thus, the SSM plan requirements are no longer necessary. The current language of 40 CFR 63.6(f)(1) exempts sources from nonopacity standards during periods of SSM. As discussed above, the court in *Sierra Club* v. *EPA* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standards apply continuously. Consistent with *Sierra Club* v. *EPA,* the EPA is proposing that the standards in this rule apply at all times.

b. Performance Testing

We are proposing to revise the General Provisions Applicability Table (Table 10) entry for ''§ 63.7(a)(1), (b)–(h)'' to ''§ 63.7(a)–(h), except for (a)(2) and (e)(1)'' and to add a new entry for ''§ 63.7(e)(1),'' in which a ''No'' entry would be included in the column, ''Applies to Subpart IIIII.'' Section 63.7(e)(1) describes performance testing requirements. The EPA is instead proposing to add a performance testing requirement at 40 CFR 63.8232(a). The performance testing requirements we are proposing to add differ from the General Provisions performance testing provisions in several respects. The regulatory text removes the cross-reference to 40 CFR 63.7(e)(1) and does not include the language in 40 CFR 63.7(e)(1) that restated the SSM exemption and language that precluded startup and shutdown periods from being considered ''representative'' for purposes of performance testing. The proposed performance testing provisions will not allow performance testing during startup and shutdown events. As in 40 CFR 63.7(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. The EPA is proposing to add language that requires the owner or operator to record the process information that is necessary to document operating conditions during the test and include in such record an explanation to support that such conditions represent normal operation. Section 63.7(e) requires that the owner or operator make available to the Administrator such records ''as may be necessary to determine the condition of the performance test'' available to the Administrator upon request but does not specifically require the information to be recorded. The regulatory text the EPA is proposing to add to this provision builds on that requirement and makes explicit the requirement to record the information.

c. Monitoring

We are proposing to revise the General Provisions Applicability Table (Table 10) entry for ''§ 63.8(a)(1), (a)(3); (b); (c)(1)–(4), (6)–(8); (d); (e); and (f)(1)–(5)'' to ''§ 63.8(a)(1), (a)(3); (b); (c)(1)(ii), (2)–(4), (6)–(8); (d)(1)–(2); (e); and (f)(1)–(5)'' and to add entries for ''§ 63.8(c)(1)(i) and (iii)'' and ''§ 63.8(d)(3)'' in which a ''No'' entry would be included in the column, ''Applies to Subpart IIIII,'' for the new entries. The cross-references to the general duty and SSM plan requirements in subparagraphs 40 CFR 63.8(c)(1)(i) and (iii) are not necessary in light of other requirements of 40 CFR 63.8 that require good air pollution control practices (40 CFR 63.8(c)(1)) and that set out the requirements of a quality control program for monitoring equipment (40 CFR 63.8(d)). In addition, the final sentence in 40 CFR 63.8(d)(3) refers to the General Provisions' SSM plan requirement which is no longer applicable. The EPA is proposing to add to the rule at 40 CFR 63.8242(a)(3)(v) text that is identical to 40 CFR 63.8(d)(3) except for the final sentence with the reference to SSM.

d. Recordkeeping and Reporting

We are proposing to revise the General Provisions Applicability Table (Table 10) entry for ''§ 63.10(a); (b)(1); (b)(2)(i)–(xii), (xiv); (b)(3); (c); (d)(1)–(2), (4)–(5); (e); (f)'' to ''§ 63.10(a); (b)(1); (b)(2)(vi)–(xii), (xiv); (b)(3); (c)(1)–(14); (d)(1)–(2), (4); (e); (f)'' and to add entries for ''§ 63.10(b)(2)(i)–(v),'' ''§ 63.10(c)(15),'' and ''§ 63.10(d)(5),'' in which a ''No'' entry would be included in the column, ''Applies to Subpart IIIII,'' for the new entries. Section 63.10(b)(2)(i) describes the recordkeeping requirements during startup and shutdown. These recording provisions are no longer necessary because the EPA is proposing that recordkeeping and reporting applicable to normal operations will apply to startup and shutdown. In the absence of special provisions applicable to startup and shutdown, such as a startup and shutdown plan, there is no reason to retain additional recordkeeping for startup and shutdown periods.

Section 63.10(b)(2)(ii) describes the recordkeeping requirements during a malfunction. The EPA is proposing to add such requirement to 40 CFR 63.8256(a)(2). The regulatory text we are proposing to add differs from the General Provisions it is replacing in that the General Provisions requires the creation and retention of a record of the occurrence and duration of each malfunction of process, air pollution control, and monitoring equipment. The EPA is proposing that this requirement apply to any deviation from an applicable requirement, which would include malfunctions, and is requiring that the source record the date, time, and duration of the deviation rather than the ''occurrence.'' The EPA is also proposing to add requirements to 40 CFR 63.8256(a)(2) a requirement that sources keep records that include a list of the affected source or equipment and actions taken to minimize emissions, an estimate of the quantity of each regulated pollutant emitted over the standard for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing to require that sources keep records of this information to ensure there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

When applicable, 40 CFR 63.10(b)(2)(iv) requires sources to record actions taken during SSM events when actions were inconsistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required. The requirement previously applicable under 40 CFR 63.10(b)(2)(iv)(B) to record actions to minimize emissions and record corrective actions is required by 40 CFR 63.8256(a)(2).

When applicable, 40 CFR 63.10(b)(2)(v) requires sources to record actions taken during SSM events to show that actions taken were consistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required.

The EPA is also proposing that 40 CFR 63.10(c)(15) no longer applies. When applicable, the provision allows an owner or operator to use the affected source's SSM plan or records kept to satisfy the recordkeeping requirements of the SSM plan, specified in 40 CFR 63.6(e), to also satisfy the requirements of 40 CFR 63.10(c)(10) through (12). The EPA is proposing to eliminate this requirement because SSM plans would no longer be required, and, therefore, 40 CFR 63.10(c)(15) no longer serves any useful purpose for affected units.

Section 63.10(d)(5) describes the reporting requirements for SSM. To replace the General Provisions reporting requirement, the EPA is proposing to add reporting requirements to 40 CFR 63.8254(b)(8) and (9). This language differs from the General Provisions requirement in that it does not require a stand-alone report. With this revision, we are proposing that sources that fail to meet an applicable standard or regulatory requirement at any time report the information concerning such events in the semi-annual compliance report already required under this rule. We are proposing that the report must contain the number, date, time, duration, and the cause of such events (including unknown cause, if applicable), a list of the affected source or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions.

Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing this requirement to ensure that there is adequate information to determine compliance, to allow the EPA to determine the severity of the failure to meet an applicable standard, and to provide data that may document how the source met the general duty to minimize emissions during a failure to meet an applicable standard.

We will no longer require owners or operators to determine whether actions taken to correct a malfunction are consistent with an SSM plan, because SSM plans would no longer be required. The proposed amendments, therefore, eliminate the cross-reference to 40 CFR 63.10(d)(5)(i) that contains the description of the previously required SSM report format and submittal schedule from this section. These specifications are no longer necessary because the events will be reported in otherwise required reports with similar format and submittal requirements.

Section 63.10(d)(5)(ii) describes an immediate report for startups, shutdown, and malfunctions when a source failed to meet an applicable standard but did not follow the SSM plan. We will no longer require owners or operators to report when actions taken during a startup, shutdown, or malfunction were not consistent with an SSM plan, because plans would no longer be required.

2. Electronic Reporting

The EPA is proposing that owners and operators of mercury cell chlor-alkali plants submit electronic copies of required performance test reports, notifications, and reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The proposed rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [26] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT. The proposed rule requires that each notification—such as a Revised NOCS—and each report—such as a semiannual report—be submitted as a PDF upload in CEDRI.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. These circumstances are (1) outages of the EPA's CDX or CEDRI which preclude an owner or operator from accessing the system and submitting required reports and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner or operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [27] to implement Executive Order 13563 and is in keeping with the EPA's agency-wide policy [28] developed in response to the White House's Digital Government Strategy.[29] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for*

[26] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[27] EPA's Final Plan for Periodic Retrospective Reviews, August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA/2011/0156/0154.*

[28] *E-Reporting Policy Statement for EPA Regulations,* September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013/09/30.pdf.*

[29] *Digital Government: Building a 21st Century Platform to Better Serve the American People,* May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

*Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

3. Compliance Provisions Rule Corrections

We are proposing amendments to correct errors and improve the compliance provisions of the rule. These changes, which are described below, were included in the March 14, 2011, proposal (76 FR 13865) and the June 2008 proposal (73 FR 33275).

a. Detection Limit for Mercury Monitor Analyzers

Paragraph 63.8242 (a)(2) requires mercury continuous monitor analyzers to have a detector capable of detecting a mercury concentration at or below 0.5 times the mercury concentration level measured during the performance test. Since promulgation of the NESHAP, we have realized that detecting a concentration of 0.5 times the mercury concentration could, in cases of low mercury concentrations, be infeasible for the monitoring devices on the market. Information available to us at this time shows that 0.1 µg/m3 is the detection limit of commonly commercially available analyzers. Analyzers with detection limits at this level are more than sufficient to determine compliance with the limitations in the NESHAP. Therefore, we are proposing to revise this paragraph to require a detector capable of detecting a mercury concentration at or below 0.5 times the mercury concentration measured during the test or 0.1 µg/m3.

b. Averaging Period for Mercury Recovery Unit Compliance

The NESHAP is inconsistent as to whether the rule requires a daily average or an hourly average to determine continuous compliance with the emissions standard for mercury recovery units. While 40 CFR 63.8243(b) indicates that this averaging period is daily, another paragraph, 40 CFR 63.8246(b), states that limit is based on the average hourly concentration of mercury. It was our intention for compliance to be based on a daily average, and the inclusion of ''hourly'' in 40 CFR 63.8246 (b) was a drafting error. Therefore, we are proposing to correct this error by replacing ''hourly'' in 40 CFR 63.8246(b) with ''daily.''

4. Applicability for Mercury Recovery Units

As discussed previously, all but one mercury cell plant has closed or converted to membrane cells since the promulgation of the 2003 Mercury Cell Chlor-Alkali Plants MACT. When these situations have occurred at plants with on-site thermal mercury recovery units, it has been common for these units to continue to operate to assist in the treatment of wastes associated with the shutdown/conversion. We are not aware of any mercury recovery units still in operation and the Westlake, West Virginia, facility does not operate a thermal mercury recovery unit that is subject to the emission limitations in the rule. Regardless, under the applicability of the 2003 Mercury Cell Chlor-Alkali Plants MACT, these units would no longer be an affected source after the chlorine production facility ceased operating. Furthermore, while the NESHAP already effectively prohibits the construction or reconstruction of a new mercury cell chlor-alkali production facility, it does not do the same for mercury recovery facilities. Therefore, there exists the possibility that there is an existing mercury recovery unit of which we are unaware or that a mercury recovery facility subject to new source standards could be constructed or reconstructed. Therefore, these proposed amendments would require any mercury recovery unit to comply with the requirements of the Mercury Cell Chlor-Alkali Plants MACT for such units, as long as the mercury recovery unit operates to recover mercury from wastes generated by a mercury cell chlor-alkali plant.

*F. What compliance dates are we proposing?*

From our assessment of the time frame needed for compliance with the entirety of the revised requirements, the EPA considers a period of 6 months to be the most expeditious compliance period practicable and, thus, is proposing that the affected source be in compliance with all of this regulation's revised requirements within 6 months of the regulation's effective date.

For existing sources, we are proposing two changes to the work practice standards. While these proposed work practice standards are based on the practices in place at the single facility in the source category, they will require some modifications to the procedures currently employed at the facility. Specifically, they will need to develop and implement a recordkeeping system to record and maintain the records required for the mercury cell work practices and to incorporate the required material in the requisite reports. Also, while the facility has standard operating procedures in place to reduce fugitive emissions of chlorine upon which the proposed requirements are based, they will need to develop and implement a recordkeeping system to record and maintain the records required for the fugitive chlorine inspection requirements and to incorporate the required material in the requisite reports. We propose that a 6-month period of time would be adequate for these activities.

In addition, we are proposing to add a requirement that notifications, performance test results, and compliance reports be submitted electronically. We are also proposing to change the requirements for SSM by removing the exemption from the requirements to meet the standards during SSM periods and by removing the requirement to develop and implement an SSM plan. Our experience with similar industries that are required to convert reporting mechanisms to install necessary hardware and software, become familiar with the process of submitting performance test results electronically through the EPA's CEDRI, test these new electronic submission capabilities, and reliably employ electronic reporting shows that a time period of a minimum of 3 months, and, more typically, 6 months is generally necessary to successfully accomplish these revisions. Our experience with similar industries further shows that this sort of regulated facility generally requires a time period of 6 months to read and understand the amended rule requirements; to evaluate their operations to ensure that they can meet the standards during periods of startup and shutdown as defined in the rule and make any necessary adjustments; and to update their operation, maintenance, and monitoring plans to reflect the revised requirements.

We solicit comment on the proposed compliance periods, and we specifically request submission of information from sources in this source category regarding specific actions that would need to be undertaken to comply with the proposed amended requirements and the time needed to make the adjustments for compliance with any of the revised requirements. We note that information provided may result in changes to the proposed compliance dates.

## V. Summary of Cost, Environmental, and Economic Impacts

*A. What are the affected sources?*

There is only one mercury cell chlor-alkali facility currently operating in the U.S. The facility will be subject to the Mercury Cell Chlor-Alkali Plants NESHAP affected by the proposed amendments to 40 CFR part 63, subpart IIIII.

*B. What are the air quality impacts?*

We are not proposing revisions to the mercury emission limits for process vents other than to make them applicable during SSM periods, and we do not anticipate any air quality impacts as a result of this proposed amendment, since the one subject facility is already in compliance with emission limits during all periods, including SSM. We are proposing changes to require both the mercury cell room monitoring program and the work practice standards for fugitive mercury emissions, and are proposing new work practice standards for fugitive chlorine emissions. However, these proposed changes are based on the current practices in place at the one subject facility. Therefore, we also do not anticipate any air quality impacts as a result of these proposed amendments to the work practices.

*C. What are the cost impacts?*

As noted earlier, the single facility in the source category is complying with the alternative cell room monitoring program. While not currently required, the facility is also implementing the work practices. Therefore, the only costs that would be incurred with the proposed requirement to comply with both the cell room monitoring program and the work practices are those costs associated with the work practice recordkeeping and reporting. We estimate these costs to be $36,000 per year for the mercury work practices recordkeeping and reporting and $49,000 for the chlorine inspection program recordkeeping and reporting (all costs in 2020 dollars). Another way to present these costs is to show them in terms of present value, in which the stream over time of costs per year for the proposal requirement is discounted to the present day. For this proposal, the present value of the costs in total is $445,000 in 2020 dollars, calculated over an 8-year period from 2022 to 2029 (assuming promulgation in 2021), estimated at a 7 percent discount rate and discounted to 2020. The equivalent annualized value of these costs, which is an annualized value of costs consistent with the present value, is $74,500 in 2020 dollars, and also estimated at a 7 percent discount rate and discounted to 2020.

*D. What are the economic impacts?*

Economic impact analyses focus on changes in market prices and output levels. If changes in market prices and output levels in the primary markets as a result of complying with the rule are significant enough, impacts on other markets may also be examined. Both the magnitude of costs needed to comply with a proposed rule and the distribution of these costs among affected facilities can have a role in determining how the market prices and output levels will change in response to a proposed rule. The total cost associated with this proposed rule is estimated to be $85,000 per year in 2020 dollars, which is the cost associated with additional recordkeeping and reporting costs. The economic impact associated with this cost, calculated as an annual cost per sales, for the parent firm owning the single affected facility is 0.001 percent, and is not expected to result in a significant market impact, regardless of whether it is fully passed on to the consumer or fully absorbed by the affected firm.

*E. What are the benefits?*

The EPA does not anticipate reductions in HAP emissions as a result of the proposed amendments to the Mercury Cell Chlor-Alkali Plants NESHAP. However, the proposed amendments would improve the rule by codifying the existing practices to reduce emissions into enforceable requirements, ensuring that the standards apply at all times. Also, requiring electronic submittal of initial notifications, performance test results, and reports will increase the usefulness of the data and ultimately result in less burden on the regulated community. Because these proposed amendments are not considered economically significant, as defined by Executive Order 12866, and because no emission reductions were estimated, we did not estimate any health benefits from reducing emissions.

## VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

## VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR website at *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2020–0560 (through the method described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the project website at *https://www.epa.gov/stationary-sources-air-pollution/mercury-cell-chloralkali-plants-national-emissions-standards.*

## VIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

*B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

*C. Paperwork Reduction Act (PRA)*

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2046.10. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

The information requirements in this rulemaking are based on the notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These notifications, reports, and records are essential in determining compliance, and are specifically authorized by CAA section 114 (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart B.

The EPA is proposing amendments that revise provisions pertaining to emissions during periods of SSM; add requirements for electronic reporting of notifications and reports and performance test results; and make other minor clarifications and corrections. This information will be collected to assure compliance with the Mercury Cell Chlor-Alkali Plants NESHAP.

*Respondents/affected entities:* Owners or operators of mercury cell chlor-alkali facilities.

*Respondent's obligation to respond:* Mandatory (42 U.S.C. 7414).

*Estimated number of respondents:* One total for the source category. This facility is already a respondent and no new facilities are expected to become respondents as a result of this proposed action.

*Frequency of response:* Initially, occasionally, and semi-annually.

*Total estimated burden:* 3,567 total hours (per year) for the source category, of which 1,680 are estimated as a result of this action. Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* The total estimated cost of the rule is $428,000 (per year) for the source category, including $8,200 annualized capital or operation and maintenance costs. We estimate that $0 of the $8,200 in total annualized capital or operation and maintenance costs is a result of this proposed action. Recordkeeping and reporting costs of $205,000 estimated as a result of this action are included in the $428,000 in total costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submissions@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 8, 2021. The EPA will respond to any ICR-related comments in the final rule.

*D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. The parent company for the single affected facility in the source category is not a small entity given the Small Business Administration small business size definition for this industry (1,000 employees or greater for NAICS 325180).

*E. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

*F. Executive Order 13132: Federalism*

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

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

This action does not have tribal implications, as specified in Executive Order 13175. The mercury cell chlor-alkali plant affected by this proposed action is not owned or operated by tribal governments or located within tribal lands. Thus, Executive Order 13175 does not apply to this action.

*H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. As the proposed rule amendments would not change emissions of HAP and risk to anyone exposed, the EPA estimates that the proposed rule amendments would have no effect on risks to children. This action's health and risk assessments are contained in section IV.B of this preamble and the document, *Residual Risk Assessment for the Mercury Cell Chlor-Alkali Plant Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this rulemaking.

*I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

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

*J. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not change the existing technical standards in the rule.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not change the level of environmental protection for any affected populations and does not have any disproportionately high and adverse human health or environmental effects on any population, including any

minority, low income, or indigenous populations.

To gain a better understanding of the source category and near source populations, the EPA conducted a demographic analysis for mercury cell chlor-alkali facilities to identify any overrepresentation of minority, low income, or indigenous populations with cancer risks above 1-in-1 million. This analysis only gives some indication of the prevalence of sub-populations that may be exposed to air pollution from the sources; it does not identify the demographic characteristics of the most highly affected individuals or communities, nor does it quantify the level of risk faced by those individuals or communities. More information on the source category's risk can be found in section IV of this preamble. The complete demographic analysis results and the details concerning its development are presented in the technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Mercury Cell Chlor-Alkali Facilities,* available in the docket for this action.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

**Andrew Wheeler,**

*Administrator.*

[FR Doc. 2021–00174 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2020–0535; FRL–10018–38–OAR]**

**RIN 2060–AU65**

### National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining Residual Risk and Technology Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposal presents the results of the U.S. Environmental Protection Agency's (EPA's) residual risk and technology review (RTR) for the National Emission Standards for the Hazardous Air Pollutants (NESHAP) for Primary Magnesium Refining, as required under the Clean Air Act (CAA). Based on the results of the risk review, the EPA is proposing that risks from emissions of air toxics from this source category are acceptable and that after removing the exemptions for startup, shutdown, and malfunction (SSM), the NESHAP provides an ample margin of safety. Furthermore, under the technology review, we are proposing one development in technology and practices that will require continuous pH monitoring for all control devices used to meet the acid gas emission limits of this subpart. In addition, as part of the technology review, the EPA is addressing a previously unregulated source of chlorine emissions, known as the chlorine bypass stack (CBS), by proposing a maximum achievable control technology (MACT) emissions standard for chlorine emissions from this source. The EPA also is proposing amendments to the regulatory provisions related to emissions during periods of SSM, including removing exemptions for periods of SSM and adding a work practice standard for malfunction events associated with the chlorine reduction burner (CRB); all emission limits will apply at all other times. In addition, the EPA is proposing electronic reporting of performance test results and performance evaluation reports.

**DATES:** *Comments.* Comments must be received on or before February 22, 2021. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before February 8, 2021.

*Public hearing:* If anyone contacts us requesting a public hearing on or before January 13, 2021, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA–HQ–OAR–2020–0535, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2020–0535 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2020–0535.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2020–0535, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except federal holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Michael Moeller, Sector Policies and Programs Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–2766; fax number: (919) 541–4991 and email address: *moeller.michael@epa.gov.* For specific information regarding the risk modeling methodology, contact Jim Hirtz, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0881; fax number: (919) 541–0840; and email address: *hirtz.james@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* Please note that the EPA is deviating from its typical approach for public hearings because the President has declared a national emergency. Due to the current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and

local orders for social distancing to limit the spread of COVID–19, the EPA cannot hold in-person public meetings at this time.

To request a virtual public hearing, contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* If requested, the virtual hearing will be held on January 25, 2021. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.*

The EPA will begin pre-registering speakers for the hearing upon publication of this document in the **Federal Register**, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/* or contact the public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov.* The last day to pre-register to speak at the hearing will be January 21, 2021. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/stationary-sources-air-pollution/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to Michael Moeller, email address: *moeller.michael@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/stationary-sources-air-pollution/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact our public hearing team at (888) 372–8699 or by email at *SPPDpublichearing@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please pre-register for the hearing with the public hearing team at the phone number or website provided above and describe your needs by January 15, 2021. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2020–0535. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov*.

*Instructions.* Direct your comments to Docket ID No. EPA–HQ–OAR–2020–0535. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

*Submitting CBI.* Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage

media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2020–0535. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

*Preamble acronyms and abbreviations.* We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEGL acute exposure guideline level
AERMOD air dispersion model used by the HEM–3 model
CAA Clean Air Act
CalEPA California EPA
CBI Confidential Business Information
CBS chlorine bypass stack
CDC Centers for Disease Control and Prevention
CDX Central Data Exchange
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
CPMS continuous parameter monitoring system
CRB chlorine reduction burner
EPA Environmental Protection Agency
ERPG emergency response planning guideline
ERT Electronic Reporting Tool
HAP hazardous air pollutant(s)
HCl hydrochloric acid
HEM–3 Human Exposure Model, Version 1.5.5
HF hydrogen fluoride
HI hazard index
HQ hazard quotient
IRIS Integrated Risk Information System
km kilometer
LOAEL lowest-observed-adverse-effect-level
MACT maximum achievable control technology
mg/m3 milligrams per cubic meter
MIR maximum individual risk
NAAQS National Ambient Air Quality Standards
NAICS North American Industry Classification System
NESHAP national emission standards for hazardous air pollutants
NOAEL no-observed-adverse-effect-level
OAQPS Office of Air Quality Planning and Standards
OMB Office of Management and Budget
PAH polycyclic aromatic hydrocarbons
PB–HAP hazardous air pollutants known to be persistent and bio-accumulative in the environment
PM particulate matter
POM polycyclic organic matter
ppm parts per million
REL reference exposure level
RfC reference concentration
RfD reference dose
RTR residual risk and technology review
SAB Science Advisory Board
SSM startup, shutdown, and malfunction
TOSHI target organ-specific hazard index
tpy tons per year
TRIM.FaTE Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure model
UF uncertainty factor
µg/m3 microgram per cubic meter
URE unit risk estimate
VCS voluntary consensus standards

*Organization of this document.* The information in this preamble is organized as follows:



## I. General Information

### *A. Does this action apply to me?*

The source category that is the subject of this proposal is the Primary Magnesium Refining major sources regulated under 40 CFR part 63, subpart TTTTT. The North American Industry Classification System (NAICS) code for the primary magnesium refining industry is 331410. This category and NAICS code are not intended to be exhaustive, but rather provide a guide for readers regarding the entities that this proposed action is likely to affect. The proposed standards, once promulgated, will be directly applicable to the affected sources. Federal, state, local, and tribal government entities would not be affected by this proposed action. As defined in the *Initial List of Categories of Sources Under Section 112(c)(1) of the Clean Air Act Amendments of 1990* (see 57 FR 31576, July 16, 1992) and *Documentation for Developing the Initial Source Category List, Final Report* (see EPA–450/3–91–030, July 1992), the Primary Magnesium Refining source category is any facility engaged in producing metallic magnesium. The source category

includes, but is not limited to, metallic magnesium produced using the Dow sea-water process or the Pidgeon process. The Dow sea-water process involves the electrolysis of molten magnesium chloride. The Pidgeon process involves the thermal reduction of magnesium oxide with ferrosilicon.

*B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this proposed action at *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the proposal and key technical documents at this same website. Information on the overall RTR program is available at *https://www.epa.gov/ttn/atw/rrisk/rtrpg.html.*

The proposed changes to the CFR that would be necessary to incorporate the changes proposed in this action are set out in an attachment to the memorandum titled *Proposed Regulation Edits for 40 CFR part 63, subpart TTTTT,* available in the docket for this action (Docket ID No. EPA–HQ–OAR–2020–0535). The document includes the specific proposed amendatory language for revising the CFR and, for the convenience of interested parties, a redline version of the regulation. Following signature by the EPA Administrator, the EPA will also post a copy of this memorandum and the attachments to *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.*

## II. Background

*A. What is the statutory authority for this action?*

The statutory authority for this action is provided by sections 112 and 301 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA establishes a two-stage regulatory process to develop standards for emissions of hazardous air pollutants (HAP) from stationary sources. Generally, the first stage involves establishing technology-based standards and the second stage involves evaluating those standards that are based on MACT to determine whether additional standards are needed to address any remaining risk associated with HAP emissions. This second stage is commonly referred to as the ''residual risk review.'' In addition to the residual risk review, the CAA also requires the EPA to review standards set under CAA section 112 every 8 years and revise the standards as necessary taking into account any ''developments in practices, processes, or control technologies.'' This review is commonly referred to as the ''technology review.'' When the two reviews are combined into a single rulemaking, it is commonly referred to as the ''risk and technology review.'' The discussion that follows identifies the most relevant statutory sections and briefly explains the contours of the methodology used to implement these statutory requirements. A more comprehensive discussion appears in the document titled *CAA Section 112 Risk and Technology Reviews: Statutory Authority and Methodology,* in the docket for this rulemaking.

In the first stage of the CAA section 112 standard setting process, the EPA promulgates technology-based standards under CAA section 112(d) for categories of sources identified as emitting one or more of the HAP listed in CAA section 112(b). Sources of HAP emissions are either major sources or area sources, and CAA section 112 establishes different requirements for major source standards and area source standards. ''Major sources'' are those that emit or have the potential to emit 10 tons per year (tpy) or more of a single HAP or 25 tpy or more of any combination of HAP. All other sources are ''area sources.'' For major sources, CAA section 112(d)(2) provides that the technology-based NESHAP must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts). These standards are commonly referred to as MACT standards. CAA section 112(d)(3) also establishes a minimum control level for MACT standards, known as the MACT ''floor.'' In certain instances, as provided in CAA section 112(h), the EPA may set work practice standards in lieu of numerical emission standards. The EPA must also consider control options that are more stringent than the floor. Standards more stringent than the floor are commonly referred to as beyond-the-floor standards. For area sources, CAA section 112(d)(5) gives the EPA discretion to set standards based on generally available control technologies or management practices (GACT standards) in lieu of MACT standards.

The second stage in standard-setting focuses on identifying and addressing any remaining (*i.e.,* ''residual'') risk pursuant to CAA section 112(f). For source categories subject to MACT standards, section 112(f)(2) of the CAA requires the EPA to determine whether promulgation of additional standards is needed to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. Section 112(d)(5) of the CAA provides that this residual risk review is not required for categories of area sources subject to GACT standards. Section 112(f)(2)(B) of the CAA further expressly preserves the EPA's use of the two-step approach for developing standards to address any residual risk and the Agency's interpretation of ''ample margin of safety'' developed in the National Emissions Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants (Benzene NESHAP) (54 FR 38044, September 14, 1989). The EPA notified Congress in the Residual Risk Report that the Agency intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11). The EPA subsequently adopted this approach in its residual risk determinations and the United States Court of Appeals for the District of Columbia Circuit (the Court) upheld the EPA's interpretation that CAA section 112(f)(2) incorporates the approach established in the Benzene NESHAP. See *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Cir. 2008).

The approach incorporated into the CAA and used by the EPA to evaluate residual risk and to develop standards under CAA section 112(f)(2) is a two-step approach. In the first step, the EPA determines whether risks are acceptable. This determination ''considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [1] of approximately 1 in 10 thousand.'' (54 FR 38045). If risks are unacceptable, the EPA must determine the emissions standards necessary to reduce risk to an acceptable level without considering costs. In the second step of the approach, the EPA considers whether the emissions standards provide an ample margin of safety to protect public health ''in consideration of all health information,

[1] Although defined as ''maximum individual risk,'' MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk if an individual were exposed to the maximum level of a pollutant for a lifetime.

including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.'' *Id.* The EPA must promulgate emission standards necessary to provide an ample margin of safety to protect public health or determine that the standards being reviewed provide an ample margin of safety without any revisions. After conducting the ample margin of safety analysis, we consider whether a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

CAA section 112(d)(6) separately requires the EPA to review standards promulgated under CAA section 112 and revise them ''as necessary (taking into account developments in practices, processes, and control technologies)'' no less often than every 8 years. In conducting this review, which we call the ''technology review,'' the EPA is not required to recalculate the MACT floor. *Natural Resources Defense Council (NRDC)* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir. 2008). *Association of Battery Recyclers, Inc.* v. *EPA,* 716 F.3d 667 (D.C. Cir. 2013). The EPA may consider cost in deciding whether to revise the standards pursuant to CAA section 112(d)(6). The EPA is required to address regulatory gaps, such as missing standards for listed air toxics known to be emitted from the source category. *Louisiana Environmental Action Network (LEAN)* v. *EPA,* 955 F.3d 1088 (D.C. Cir. 2020).

*B. What is this source category and how does the current NESHAP regulate its HAP emissions?*

The EPA initially promulgated the Primary Magnesium Refining NESHAP on October 10, 2003 (68 FR 58615), and it is codified at 40 CFR part 63, subpart TTTTT. This NESHAP regulates HAP emissions from new and existing primary magnesium refining facilities that are major sources of HAP. The source category is comprised of one plant that is owned by US Magnesium LLC and located in Rowley, Utah.

The plant produces magnesium from brine (salt water) taken from the Great Salt Lake. The production process concentrates the magnesium salts in the brine, then processes the brine to remove impurities that would affect metal quality. After the brine solution is converted to a powder mixture of magnesium chloride and magnesium oxide in the spray dryers, the powder is conveyed to the melt/reactors. The melt/reactor melts the powder mixture and converts the remaining magnesium oxide to magnesium chloride by injecting chlorine into the molten salt. The purified molten salt is then transferred to the electrolytic cells where it is separated into magnesium metal and chlorine by electrolysis. The electrolysis process passes a direct electric current through the molten magnesium chloride, causing the dissociation of the salt and resulting in the generation of chlorine gas and magnesium metal. The magnesium metal is then transferred to the foundry for casting into ingots for sale. The chlorine produced is piped to a chlorine plant where it is liquefied for reuse or sale.

The HAP emitted from the Primary Magnesium Refining source category are chlorine, hydrochloric acid (HCl), dioxin/furan, and trace amounts of HAP metals. Emission controls include various combinations of wet scrubbers (venturi and packed-bed scrubber) for acid gas and particulate matter (PM) control.

Chlorine is emitted from the melting and purification of reactor cell product and is controlled by conversion to HCl in the CRB and subsequent absorption of the HCl in venturi and packed-bed scrubber. Using these control technologies, upwards of 99.9 percent control of chlorine is achieved. The electrowinning of the melted magnesium chloride to magnesium metal produces as a byproduct chlorine gas which is recovered at the chlorine plant. When the chlorine plant is inoperable, the chlorine produced at the electrolytic cells is routed through the CBS which contains a packed-bed scrubber and uses ferrous chloride as the adsorbing medium.

HCl is emitted from the spray drying and storage of magnesium chloride powder and the melting and purification of reactor cell product prior to the electrowinning process. HCl emissions are controlled by venturi and packed-bed scrubbers.

Dioxins/furans are generated in the melt/reactor and are subject to incidental control by the wet scrubbers used to control chlorine, HCl, and PM.

The current rule requires compliance with emission limits, operating limits for control devices, and work practice standards. The emission limits include mass rate emission limits in pounds per hour (lbs/hr) for chlorine, HCl, PM, and particulate matter less than or equal to 10 microns ($PM_{10}$). Additional emission limits in grains per dry standard cubic foot (gr/dscf) apply to magnesium chloride storage bins. The emission limits are shown in Table 1 of this preamble.

TABLE 1—MASS RATE EMISSION LIMITS

[LBS/HR]

| Emission point | Chlorine | HCl | PM | $PM_{10}$ |
|---|---|---|---|---|
| Spray dryers | ..... | 200 | 100 | ..... |
| Magnesium chloride storage bins [1] | ..... | 47.5 | ..... | 2.7 |
| Melt/reactor system | 100 | 7.2 | ..... | 13.1 |
| Launder off-gas system | 26.0 | 46.0 | 37.5 | |

[1] Additional limits are 0.35 gr/dscf of HCl and 0.016 gr/dscf of $PM_{10}$.

The current rule also includes an emission limit for each melt/reactor system of 36 nanograms of dioxin/furan toxicity equivalents per dry standard cubic meter corrected to 7 percent oxygen.

Performance tests are required to demonstrate compliance with the emission limits and must be conducted at least twice during each title V operating permit term (at midterm and renewal). The source is also required to monitor operating parameters for control devices subject to operating limits established during the performance tests and carry out the procedures in their fugitive dust emissions control plan and their operation and maintenance plan. For wet scrubbers, the source is required to use continuous parameter monitoring systems (CPMS) to measure and record the hourly average pressure drop and scrubber water flow rate. To

demonstrate continuous compliance, the source must keep records documenting conformance with the monitoring requirements and the installation, operation, and maintenance requirements for CPMS.

*C. What data collection activities were conducted to support this action?*

For the Primary Magnesium Refining source category, the EPA used emissions and supporting data from the 2017 National Emissions Inventory (NEI) as the primary data to develop the model input file for the residual risk assessment. The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors, and HAP. The database includes estimates of annual air pollutant emissions from point, nonpoint, and mobile sources in the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every 3 years. The NEI includes data necessary for conducting risk modeling, including annual HAP emissions estimates from individual emission sources at facilities and the related emissions release parameters. Additional information on the development of the modeling file can be found in Appendix 1 to the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket for this proposed rule.

*D. What other relevant background information and data are available?*

Information used to estimate emissions from the primary magnesium refining facility was obtained primarily from the EPA's 2017 NEI database, available at: *https://www.epa.gov/air-emissions-inventories/2017-national-emissions-inventory-nei-data.* Supplemental information was used from publicly available documents from the Utah Department of Environmental Quality (*http://eqedocs.utah.gov/*) and the EPA Region 8 Superfund Remedial Investigation (*https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0802704*). Data on the numbers, types, dimensions, and locations of the emission points for the facility were obtained from the NEI, Google Earth™, and US Magnesium facility representatives. The HAP emissions from US Magnesium were categorized by source into one of the four emission process groups as follows: Spray dryers, magnesium chloride storage bins, melt/reactor system, and the CBS. Data on HAP emissions, including the HAP emitted, emission source, emission rates, stack parameters (such as temperature, velocity, flowrate, etc.), and latitude and longitude were compiled into a draft modeling file. To ensure the quality of the emissions data, the EPA subjected the draft modeling file to a variety of quality checks. The draft modeling file was made available to the facility to review the emission release parameters and the emission rates. Source latitudes and longitudes were checked in Google Earth™ to verify accuracy and were corrected as needed. These and other quality control efforts resulted in a more accurate emissions dataset. Additional information on the development of the modeling file can be found in Appendix 1 to the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket for this proposed rule.

## III. Analytical Procedures and Decision-Making

In this section, we describe the analyses performed to support the proposed decisions for the RTR and other issues addressed in this proposal.

*A. How do we consider risk in our decision-making?*

As discussed in section II.A of this preamble and in the Benzene NESHAP, in evaluating and developing standards under CAA section 112(f)(2), we apply a two-step approach to determine whether or not risks are acceptable and to determine if the standards provide an ample margin of safety to protect public health. As explained in the Benzene NESHAP, ''the first step judgment on acceptability cannot be reduced to any single factor'' and, thus, ''[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.'' (54 FR 38046). Similarly, with regard to the ample margin of safety determination, ''the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.'' *Id.*

The Benzene NESHAP approach provides flexibility regarding factors the EPA may consider in making determinations and how the EPA may weigh those factors for each source category. The EPA conducts a risk assessment that provides estimates of the MIR posed by emissions of HAP that are carcinogens from each source in the source category, the hazard index (HI) for chronic exposures to HAP with the potential to cause noncancer health effects, and the hazard quotient (HQ) for acute exposures to HAP with the potential to cause noncancer health effects.[2] The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The scope of the EPA's risk analysis is consistent with the explanation in EPA's response to comments on our policy under the Benzene NESHAP:

> The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the *Vinyl Chloride* mandate that the Administrator ascertain an acceptable level of risk to the public by employing his expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and thereby implicitly permits consideration of any and all measures of health risk which the Administrator, in his judgment, believes are appropriate to determining what will ''protect the public health''.

(54 FR 38057). Thus, the level of the MIR is only one factor to be weighed in determining acceptability of risk. The Benzene NESHAP explained that ''an MIR of approximately one in 10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes an MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.'' *Id.* at 38045. In other

[2] The MIR is defined as the cancer risk associated with a lifetime of exposure at the highest concentration of HAP where people are likely to live. The HQ is the ratio of the potential HAP exposure concentration to the noncancer dose-response value; the HI is the sum of HQs for HAP that affect the same target organ or organ system.

words, risks that include an MIR above 100-in-1 million may be determined to be acceptable, and risks with an MIR below that level may be determined to be unacceptable, depending on all of the available health information. Similarly, with regard to the ample margin of safety analysis, the EPA stated in the Benzene NESHAP that: ''EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.'' *Id.* at 38061. We also consider the uncertainties associated with the various risk analyses, as discussed earlier in this preamble, in our determinations of acceptability and ample margin of safety.

The EPA notes that it has not considered certain health information to date in making residual risk determinations. At this time, we do not attempt to quantify the HAP risk that may be associated with emissions from other facilities that do not include the source category under review, mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in the category.

The EPA understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. We recognize that such consideration may be particularly important when assessing noncancer risk, where pollutant-specific exposure health reference levels (*e.g.,* reference concentrations (RfCs)) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse noncancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in an increased risk of adverse noncancer health effects. In May 2010, the Science Advisory Board (SAB) advised the EPA ''that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area.'' [3]

In response to the SAB recommendations, the EPA incorporates cumulative risk analyses into its RTR risk assessments. The Agency (1) conducts facility-wide assessments, which include source category emission points, as well as other emission points within the facilities; (2) combines exposures from multiple sources in the same category that could affect the same individuals; and (3) for some persistent and bioaccumulative pollutants, analyzes the ingestion route of exposure. In addition, the RTR risk assessments consider aggregate cancer risk from all carcinogens and aggregated noncancer HQs for all noncarcinogens affecting the same target organ or target organ system.

Although we are interested in placing source category and facility-wide HAP risk in the context of total HAP risk from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. Estimates of total HAP risk from emission sources other than those that we have studied in depth during this RTR review would have significantly greater associated uncertainties than the source category or facility-wide estimates. Such aggregate or cumulative assessments would compound those uncertainties, making the assessments too unreliable.

### *B. How do we perform the technology review?*

Our technology review primarily focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. Where we identify such developments, we analyze their technical feasibility, estimated costs, energy implications, and non-air environmental impacts. We also consider the emission reductions associated with applying each development. This analysis informs our decision of whether it is ''necessary'' to revise the emissions standards. In addition, we consider the appropriateness of applying controls to new sources versus retrofitting existing sources. For this exercise, we consider any of the following to be a ''development'':

- Any add-on control technology or other equipment that was not identified and considered during development of the original MACT standards;
- Any improvements in add-on control technology or other equipment (that were identified and considered during development of the original MACT standards) that could result in additional emissions reduction;
- Any work practice or operational procedure that was not identified or considered during development of the original MACT standards;
- Any process change or pollution prevention alternative that could be broadly applied to the industry and that was not identified or considered during development of the original MACT standards; and
- Any significant changes in the cost (including cost effectiveness) of applying controls (including controls the EPA considered during the development of the original MACT standards).

In addition to reviewing the practices, processes, and control technologies that were considered at the time we originally developed the NESHAP, we review a variety of data sources in our investigation of potential practices, processes, or controls. We also review the NESHAP and the available data to determine if there are any unregulated emissions of HAP within the source category and evaluate this data for use in developing new emission standards. See sections II.C and II.D of this preamble for information on the specific data sources that were reviewed as part of the technology review.

### *C. How do we estimate post-MACT risk posed by the source category?*

In this section, we provide a complete description of the types of analyses that we generally perform during the risk assessment process. In some cases, we do not perform a specific analysis because it is not relevant. For example, in the absence of emissions of HAP known to be persistent and bioaccumulative in the environment (PB–HAP), we would not perform a multipathway exposure assessment. Where we do not perform an analysis, we state that we do not and provide the reason. While we present all of our risk assessment methods, we only present risk assessment results for the analyses actually conducted (see section IV.B of this preamble).

The EPA conducts a risk assessment that provides estimates of the MIR for cancer posed by the HAP emissions from each source in the source category, the HI for chronic exposures to HAP with the potential to cause noncancer health effects, and the HQ for acute exposures to HAP with the potential to

[3] Recommendations of the SAB Risk and Technology Review Methods Panel are provided in their report, which is available at: *https://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf.*

cause noncancer health effects. The assessment also provides estimates of the distribution of cancer risk within the exposed populations, cancer incidence, and an evaluation of the potential for an adverse environmental effect. The seven sections that follow this paragraph describe how we estimated emissions and conducted the risk assessment. The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule.* The methods used to assess risk (as described in the seven primary steps below) are consistent with those described by the EPA in the document reviewed by a panel of the EPA's SAB in 2009; [4] and described in the SAB review report issued in 2010. They are also consistent with the key recommendations contained in that report.

1. How did we estimate actual emissions and identify the emissions release characteristics?

The HAP emissions from US Magnesium fall into the following pollutant categories: Acid gases (*i.e.,* HCl and chlorine), metals (HAP metals) and dioxins/furans. The HAP are emitted from several emission sources at US Magnesium which, for the purposes of the source category risk assessment, have been categorized into four emission process groups as follows: Spray dryers, magnesium chloride storage bins, melt/reactor system, and the CBS. The main sources of emissions data include the NEI data submitted for calendar year 2017 and supplemental information gathered from the public domains of the Utah Department of Environmental Quality (DEQ) (*http://eqedocs.utah.gov/*) and the EPA Region 8 Superfund Remedial Investigation, available at: *https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0802704,* and also available in the docket for this action (Docket ID No. EPA–HQ–OAR–2020–0535). Data on the numbers, types, dimensions, and locations of the emission points for the facility were obtained from the NEI, Utah DEQ, Google Earth™, and from representatives of the US Magnesium facility. A description of the data, approach, and rationale used to develop actual HAP emissions estimates is discussed in more detail in Appendix 1 to the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket (Docket ID No. EPA–HQ–OAR–2020–0535).

2. How did we estimate MACT-allowable emissions?

The available emissions data in the RTR emissions dataset include estimates of the mass of HAP emitted during a specified annual time period. These ''actual'' emission levels are often lower than the emission levels allowed under the requirements of the current MACT standards. The emissions allowed under the MACT standards are referred to as the ''MACT-allowable'' emissions. We discussed the consideration of both MACT-allowable and actual emissions in the final Coke Oven Batteries RTR (70 FR 19992, 19998 and 19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP RTR (71 FR 34421, 34428, June 14, 2006, and 71 FR 76603, 76609, December 21, 2006, respectively). In those actions, we noted that assessing the risk at the MACT-allowable level is inherently reasonable since that risk reflects the maximum level facilities could emit and still comply with national emission standards. We also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP approach. (54 FR 38044.)

Allowable emission rates for US Magnesium were developed based on the MACT emission limits. Specifically, given that the facility operates continuously throughout the year, the pound per hour emission limits for each emission process groups were used to calculate allowable emission totals. For sources without MACT limits in the current NESHAP, allowable emissions were assumed to equal to actual emissions since the facility operated continuously, at or near maximum capacity, during calendar year 2017. For a detailed description of the estimation of allowable emissions, see Appendix 1 to the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket (Docket ID No. EPA–HQ–OAR–2020–0535).

3. How do we conduct dispersion modeling, determine inhalation exposures, and estimate individual and population inhalation risk?

Both long-term and short-term inhalation exposure concentrations and health risk from the source category addressed in this proposal were estimated using the Human Exposure Model (HEM–3).[5] The HEM–3 performs three primary risk assessment activities: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 kilometers (km) of the modeled sources, and (3) estimating individual and population-level inhalation risk using the exposure estimates and quantitative dose-response information.

a. Dispersion Modeling

The air dispersion model AERMOD, used by the HEM–3 model, is one of the EPA's preferred models for assessing air pollutant concentrations from industrial facilities.[6] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year (2016) of hourly surface and upper air observations from 824 meteorological stations selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block [7] internal point locations and populations provides the basis of human exposure calculations (U.S. Census, 2010). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant-specific dose-response values is used to estimate health risk. These are discussed below.

b. Risk From Chronic Exposure to HAP

In developing the risk assessment for chronic exposures, we use the estimated annual average ambient air concentrations of each HAP emitted by each source in the source category. The HAP air concentrations at each nearby census block centroid located within 50 km of the facility are a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene

[4] U.S. EPA. *Risk and Technology Review (RTR) Risk Assessment Methodologies: For Review by the EPA's Science Advisory Board with Case Studies—MACT I Petroleum Refining Sources and Portland Cement Manufacturing,* June 2009. EPA–452/R–09–006. *https://www.epa.gov/airtoxics/rrisk/rtrpg.html.*

[5] For more information about HEM–3, go to *https://www.epa.gov/fera/risk-assessment-and-modeling-human-exposure-model-hem.*

[6] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[7] A census block is the smallest geographic area for which census statistics are tabulated.

NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

For each facility, we calculate the MIR as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, 52 weeks per year, 70 years) exposure to the maximum concentration at the centroid of each inhabited census block. We calculate individual cancer risk by multiplying the estimated lifetime exposure to the ambient concentration of each HAP (in micrograms per cubic meter ($\mu g/m^3$)) by its unit risk estimate (URE). The URE is an upper-bound estimate of an individual's incremental risk of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use UREs from the EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without IRIS values, we look to other reputable sources of cancer dose-response values, often using California EPA (CalEPA) UREs, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by the EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate. The pollutant-specific dose-response values used to estimate health risk are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

To estimate individual lifetime cancer risks associated with exposure to HAP emissions from each facility in the source category, we sum the risks for each of the carcinogenic HAP [8] emitted by the modeled facility. We estimate cancer risk at every census block within 50 km of every facility in the source category. The MIR is the highest individual lifetime cancer risk estimated for any of those census blocks. In addition to calculating the MIR, we estimate the distribution of individual cancer risks for the source category by summing the number of individuals within 50 km of the sources whose estimated risk falls within a specified risk range. We also estimate annual cancer incidence by multiplying the estimated lifetime cancer risk at each census block by the number of people residing in that block, summing results for all of the census blocks, and then dividing this result by a 70-year lifetime.

To assess the risk of noncancer health effects from chronic exposure to HAP, we calculate either an HQ or a target organ-specific hazard index (TOSHI). We calculate an HQ when a single noncancer HAP is emitted. Where more than one noncancer HAP is emitted, we sum the HQ for each of the HAP that affects a common target organ or target organ system to obtain a TOSHI. The HQ is the estimated exposure divided by the chronic noncancer dose-response value, which is a value selected from one of several sources. The preferred chronic noncancer dose-response value is the EPA RfC, defined as ''an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime'' (*https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&vocabName=IRIS%20Glossary*). In cases where an RfC from the EPA's IRIS is not available or where the EPA determines that using a value other than the RfC is appropriate, the chronic noncancer dose-response value can be a value from the following prioritized sources, which define their dose-response values similarly to the EPA: (1) The Agency for Toxic Substances and Disease Registry (ATSDR) Minimum Risk Level (*https://www.atsdr.cdc.gov/mrls/index.asp*); (2) the CalEPA Chronic Reference Exposure Level (REL) (*https://oehha.ca.gov/air/crnr/notice-adoption-air-toxics-hot-spots-program-guidance-manual-preparation-health-risk-0*); or (3) as noted above, a scientifically credible dose-response value that has been developed in a manner consistent with the EPA guidelines and has undergone a peer review process similar to that used by the EPA. The pollutant-specific dose-response values used to estimate health risks are available at *https://www.epa.gov/fera/dose-response-assessment-assessing-health-risks-associated-exposure-hazardous-air-pollutants.*

c. Risk From Acute Exposure to HAP That May Cause Health Effects Other Than Cancer

For each HAP for which appropriate acute inhalation dose-response values are available, the EPA also assesses the potential health risks due to acute exposure. For these assessments, the EPA makes conservative assumptions about emission rates, meteorology, and exposure location. As part of our efforts to continually improve our methodologies to evaluate the risks that HAP emitted from categories of industrial sources pose to human health and the environment,[9] we revised our treatment of meteorological data to use reasonable worst-case air dispersion conditions in our acute risk screening assessments instead of worst-case air dispersion conditions. This revised treatment of meteorological data and the supporting rationale are described in more detail in *Residual Risk Assessment for Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* This revised approach has been used in this proposed rule and in all other RTR rulemakings proposed on or after June 3, 2019.

To assess the potential acute risk to the maximally exposed individual, we use the peak hourly emission rate for each emission point,[10] reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile), and the point of highest off-site exposure. Specifically, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions co-occur

[8] The EPA's 2005 *Guidelines for Carcinogen Risk Assessment* classifies carcinogens as: ''carcinogenic to humans,'' ''likely to be carcinogenic to humans,'' and ''suggestive evidence of carcinogenic potential.'' These classifications also coincide with the terms ''known carcinogen, probable carcinogen, and possible carcinogen,'' respectively, which are the terms advocated in the EPA's *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). In August 2000, the document, *Supplemental Guidance for Conducting Health Risk Assessment of Chemical Mixtures* (EPA/630/R–00/002), was published as a supplement to the 1986 document. Copies of both documents can be obtained from *https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=20533&CFID=70315376&CFTOKEN=71597944.* Summing the risk of these individual compounds to obtain the cumulative cancer risk is an approach that was recommended by the EPA's SAB in their 2002 peer review of the EPA's National Air Toxics Assessment (NATA) titled *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at *https://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[9] See, *e.g.,* U.S. EPA. *Screening Methodologies to Support Risk and Technology Reviews (RTR): A Case Study Analysis* (Draft Report, May 2017. *https://www3.epa.gov/ttn/atw/rrisk/rtrpg.html*).

[10] In the absence of hourly emission data, we develop estimates of maximum hourly emission rates by multiplying the average actual annual emissions rates by a factor (either a category-specific factor or a default factor of 10) to account for variability. This is documented in *Residual Risk Assessment for Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule* and in Appendix 5 of the report: *Technical Support Document for Acute Risk Screening Assessment.* Both are available in the docket for this rulemaking.

and that a person is present at the point of maximum exposure.

To characterize the potential health risks associated with estimated acute inhalation exposures to a HAP, we generally use multiple acute dose-response values, including acute RELs, acute exposure guideline levels (AEGLs), and emergency response planning guidelines (ERPG) for 1-hour exposure durations, if available, to calculate acute HQs. The acute HQ is calculated by dividing the estimated acute exposure concentration by the acute dose-response value. For each HAP for which acute dose-response values are available, the EPA calculates acute HQs.

An acute REL is defined as ''the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.'' [11] Acute RELs are based on the most sensitive, relevant, adverse health effect reported in the peer-reviewed medical and toxicological literature. They are designed to protect the most sensitive individuals in the population through the inclusion of margins of safety. Because margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact. AEGLs represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to 8 hours.[12] They are guideline levels for ''once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.'' *Id.* at 21. The AEGL–1 is specifically defined as ''the airborne concentration (expressed as ppm (parts per million) or mg/m$^3$ (milligrams per cubic meter)) of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.'' The document also notes that ''Airborne concentrations below AEGL–1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.'' *Id.* AEGL–2 are defined as ''the airborne concentration (expressed as parts per million or milligrams per cubic meter) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.'' *Id.*

ERPGs are ''developed for emergency planning and are intended as health-based guideline concentrations for single exposures to chemicals.'' [13] *Id.* at 1. The ERPG–1 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to 1 hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.'' *Id.* at 2. Similarly, the ERPG–2 is defined as ''the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual's ability to take protective action.'' *Id.* at 1.

An acute REL for 1-hour exposure durations is typically lower than its corresponding AEGL–1 and ERPG–1. Even though their definitions are slightly different, AEGL–1s are often the same as the corresponding ERPG–1s, and AEGL–2s are often equal to ERPG–2s. The maximum HQs from our acute inhalation screening risk assessment typically result when we use the acute REL for a HAP. In cases where the maximum acute HQ exceeds 1, we also report the HQ based on the next highest acute dose-response value (usually the AEGL–1 and/or the ERPG–1).

For this source category, maximum hourly emission estimates were available, so we did not use the default emissions multiplier of 10. For the melt/reactor system and CBS, hourly emission estimates were initially based on an upper peak-to-mean ratio (*i.e.,* 95th percentile) of the highest daily emission total and the daily average. This resulted in a factor of 8 for the melt/reactor system and 4.5 for the CBS. For all other processes, data from the CPMS of the associated wet scrubbers indicated that their operation was continuous and a factor of 1 was used. As described in the risk assessment section of this preamble, we also assessed a worst-case acute risk scenario based on the estimated maximum hourly emissions rate (see risk assessment section for more details). A further discussion of why these factors were chosen can be found in Appendix 1 to the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* available in the docket for this rulemaking.

In our acute inhalation screening risk assessment, acute impacts are deemed negligible for HAP for which acute HQs are less than or equal to 1, and no further analysis is performed for these HAP. In cases where an acute HQ from the screening step is greater than 1, we assess the site-specific data to ensure that the acute HQ is at an off-site location. For this source category, the data refinements employed consisted of reviewing modeling results to ensure we were evaluating locations and risks that were off-site, in places where the public could congregate for an hour or more, and also evaluating further the potential peak estimated actual emissions reported by the facility, which we assume could occur during rebuild/rehabilitative maintenance of the melt/reactor CRB control device. The CRB has an infrequent, but, periodic rebuild cycle where the refractory needs to be replaced and rebuilt about every 6 to 7 years. During this period, based on available information, we estimate the acute factor could be as high as 29, which is about 3.5 times higher than the initial modeled melt/reactor acute factor. These refinements are discussed more fully in the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the 2020 Risk and Technology Review Proposed Rule,* which is available in the docket for this source category.

4. How do we conduct the multipathway exposure and risk screening assessment?

The EPA conducts a tiered screening assessment examining the potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* ingestion). We first determine whether any sources in the

[11] CalEPA issues acute RELs as part of its Air Toxics Hot Spots Program, and the 1-hour and 8-hour values are documented in *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* which is available at *https://oehha.ca.gov/air/general-info/oehha-acute-8-hour-and-chronic-reference-exposure-level-rel-summary.*

[12] National Academy of Sciences, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals,* page 2. Available at *https://www.epa.gov/sites/production/files/2015-09/documents/sop_final_standing_operating_procedures_2001.pdf.* Note that the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances ended in October 2011, but the AEGL program continues to operate at the EPA and works with the National Academies to publish final AEGLs (*https://www.epa.gov/aegl*).

[13] *ERPGS Procedures and Responsibilities.* March 2014. American Industrial Hygiene Association. Available at: *https://www.aiha.org/get-involved/AIHAGuidelineFoundation/EmergencyResponsePlanningGuidelines/Documents/ERPG%20Committee%20Standard%20Operating%20Procedures%20%20-%20March%202014%20Revision%20%28Updated%2010-2-2014%29.pdf.*

source category emit any HAP known to be persistent and bioaccumulative in the environment, as identified in the EPA's Air Toxics Risk Assessment Library (see Volume 1, Appendix D, at *https://www.epa.gov/fera/risk-assessment-and-modeling-air-toxics-risk-assessment-reference-library).*

For the Primary Magnesium Refining source category, we identified potential PB–HAP emissions for arsenic compounds, lead compounds, cadmium compounds, mercury compounds, and dioxins/furans, so we proceeded to the next step of the evaluation. Except for lead, the human health risk screening assessment for PB–HAP consists of three progressive tiers. In a Tier 1 screening assessment, we determine whether the magnitude of the facility-specific emissions of PB–HAP warrants further evaluation to characterize human health risk through ingestion exposure. To facilitate this step, we evaluate emissions against previously developed screening threshold emission rates for several PB–HAP that are based on a hypothetical upper-end screening exposure scenario developed for use in conjunction with the EPA's Total Risk Integrated Methodology.Fate, Transport, and Ecological Exposure (TRIM.FaTE) model. The PB–HAP with screening threshold emission rates are arsenic compounds, cadmium compounds, chlorinated dibenzodioxins and furans, mercury compounds, and polycyclic organic matter (POM). Based on the EPA estimates of toxicity and bioaccumulation potential, these pollutants represent a conservative list for inclusion in multipathway risk assessments for RTR rules. (See Volume 1, Appendix D at *https://www.epa.gov/sites/production/files/2013-08/documents/volume_1_reflibrary.pdf.*) In this assessment, we compare the facility-specific emission rates of these PB–HAP to the screening threshold emission rates for each PB–HAP to assess the potential for significant human health risks via the ingestion pathway. We call this application of the TRIM.FaTE model the Tier 1 screening assessment. The ratio of a facility's actual emission rate to the Tier 1 screening threshold emission rate is a ''screening value.''

We derive the Tier 1 screening threshold emission rates for these PB–HAP (other than lead compounds) to correspond to a maximum excess lifetime cancer risk of 1-in-1 million (*i.e.,* for arsenic compounds, polychlorinated dibenzodioxins and furans, and POM) or, for HAP that cause noncancer health effects (*i.e.,* cadmium compounds and mercury compounds), a maximum HQ of 1. If the emission rate of any one PB–HAP or combination of carcinogenic PB–HAP in the Tier 1 screening assessment exceeds the Tier 1 screening threshold emission rate for any facility (*i.e.,* the screening value is greater than 1), we conduct a second screening assessment, which we call the Tier 2 screening assessment. The Tier 2 screening assessment separates the Tier 1 combined fisher and farmer exposure scenario into fisher, farmer, and gardener scenarios that retain upper-bound ingestion rates.

In the Tier 2 screening assessment, the location of each facility that exceeds a Tier 1 screening threshold emission rate is used to refine the assumptions associated with the Tier 1 fisher and farmer exposure scenarios at that facility. A key assumption in the Tier 1 screening assessment is that a lake and/or farm is located near the facility. As part of the Tier 2 screening assessment, we use a U.S. Geological Survey (USGS) database to identify actual waterbodies within 50 km of each facility and assume the fisher only consumes fish from lakes within that 50 km zone. We also examine the differences between local meteorology near the facility and the meteorology used in the Tier 1 screening assessment. We then adjust the previously-developed Tier 1 screening threshold emission rates for each PB–HAP for each facility based on an understanding of how exposure concentrations estimated for the screening scenario change with the use of local meteorology and the USGS lakes database.

In the Tier 2 farmer scenario, we maintain an assumption that the farm is located within 0.5 km of the facility and that the farmer consumes meat, eggs, dairy, vegetables, and fruit produced near the facility. We may further refine the Tier 2 screening analysis by assessing a gardener scenario to characterize a range of exposures, with the gardener scenario being more plausible in RTR evaluations. Under the gardener scenario, we assume the gardener consumes home-produced eggs, vegetables, and fruit products at the same ingestion rate as the farmer. The Tier 2 screen continues to rely on the high-end food intake assumptions that were applied in Tier 1 for local fish (adult female angler at 99th percentile fish consumption [14]) and locally grown or raised foods (90th percentile consumption of locally grown or raised foods for the farmer and gardener scenarios [15]). If PB–HAP emission rates do not result in a Tier 2 screening value greater than 1, we consider those PB–HAP emissions to pose risks below a level of concern. If the PB–HAP emission rates for a facility exceed the Tier 2 screening threshold emission rates, we may conduct a Tier 3 screening assessment.

There are several analyses that can be included in a Tier 3 screening assessment, depending upon the extent of refinement warranted, including validating that the lakes are fishable, locating residential/garden locations for urban and/or rural settings, considering plume-rise to estimate emissions lost above the mixing layer, and considering hourly effects of meteorology and plume-rise on chemical fate and transport (a time-series analysis). If necessary, the EPA may further refine the screening assessment through a site-specific assessment.

In evaluating the potential multipathway risk from emissions of lead compounds, rather than developing a screening threshold emission rate, we compare maximum estimated chronic inhalation exposure concentrations to the level of the current National Ambient Air Quality Standard (NAAQS) for lead.[16] Values below the level of the primary (health-based) lead NAAQS are considered to have a low potential for multipathway risk.

For further information on the multipathway assessment approach, see the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

[14] Burger, J. 2002. *Daily consumption of wild fish and game: Exposures of high end recreationists. International Journal of Environmental Health Research,* 12:343–354.

[15] U.S. EPA. *Exposure Factors Handbook 2011 Edition (Final).* U.S. Environmental Protection Agency, Washington, DC, EPA/600/R–09/052F, 2011.

[16] In doing so, the EPA notes that the legal standard for a primary NAAQS—that a standard is requisite to protect public health and provide an adequate margin of safety (CAA section 109(b))—differs from the CAA section 112(f) standard (requiring, among other things, that the standard provide an ''ample margin of safety to protect public health''). However, the primary lead NAAQS is a reasonable measure of determining risk acceptability (*i.e.,* the first step of the Benzene NESHAP analysis) since it is designed to protect the most susceptible group in the human population—children, including children living near major lead emitting sources. 73 FR 67002/3; 73 FR 67000/3; 73 FR 67005/1. In addition, applying the level of the primary lead NAAQS at the risk acceptability step is conservative, since that primary lead NAAQS reflects an adequate margin of safety.

5. How do we conduct the environmental risk screening assessment?

a. Adverse Environmental Effect, Environmental HAP, and Ecological Benchmarks

The EPA conducts a screening assessment to examine the potential for an adverse environmental effect as required under section 112(f)(2)(A) of the CAA. Section 112(a)(7) of the CAA defines ''adverse environmental effect'' as ''any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.''

The EPA focuses on eight HAP, which are referred to as ''environmental HAP,'' in its screening assessment: Six PB–HAP and two acid gases. The PB–HAP included in the screening assessment are arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. The acid gases included in the screening assessment are HCl and hydrogen fluoride (HF).

HAP that persist and bioaccumulate are of particular environmental concern because they accumulate in the soil, sediment, and water. The acid gases, HCl and HF, are included due to their well-documented potential to cause direct damage to terrestrial plants. In the environmental risk screening assessment, we evaluate the following four exposure media: Terrestrial soils, surface water bodies (includes water-column and benthic sediments), fish consumed by wildlife, and air. Within these four exposure media, we evaluate nine ecological assessment endpoints, which are defined by the ecological entity and its attributes. For PB–HAP (other than lead), both community-level and population-level endpoints are included. For acid gases, the ecological assessment evaluated is terrestrial plant communities.

An ecological benchmark represents a concentration of HAP that has been linked to a particular environmental effect level. For each environmental HAP, we identified the available ecological benchmarks for each assessment endpoint. We identified, where possible, ecological benchmarks at the following effect levels: Probable effect levels, lowest-observed-adverse-effect level (LOAEL), and no-observed-adverse-effect level (NOAEL). In cases where multiple effect levels were available for a particular PB–HAP and assessment endpoint, we use all of the available effect levels to help us to determine whether ecological risks exist and, if so, whether the risks could be considered significant and widespread.

For further information on how the environmental risk screening assessment was conducted, including a discussion of the risk metrics used, how the environmental HAP were identified, and how the ecological benchmarks were selected, see Appendix 9 of the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

b. Environmental Risk Screening Methodology

For the environmental risk screening assessment, the EPA first determined whether any facilities in the Primary Magnesium Refining source category emitted any of the environmental HAP. For the Primary Magnesium Refining source category, we identified emissions of HCl and dioxins, and potential emissions of arsenic, cadmium, and mercury. Because one or more of the environmental HAP evaluated are emitted by at least one facility in the source category, we proceeded to the second step of the evaluation.

c. PB–HAP Methodology

The environmental screening assessment includes six PB–HAP, arsenic compounds, cadmium compounds, dioxins/furans, POM, mercury (both inorganic mercury and methyl mercury), and lead compounds. With the exception of lead, the environmental risk screening assessment for PB–HAP consists of three tiers. The first tier of the environmental risk screening assessment uses the same health-protective conceptual model that is used for the Tier 1 human health screening assessment. TRIM.FaTE model simulations were used to back-calculate Tier 1 screening threshold emission rates. The screening threshold emission rates represent the emission rate in tons of pollutant per year that results in media concentrations at the facility that equal the relevant ecological benchmark. To assess emissions from each facility in the category, the reported emission rate for each PB–HAP was compared to the Tier 1 screening threshold emission rate for that PB–HAP for each assessment endpoint and effect level. If emissions from a facility do not exceed the Tier 1 screening threshold emission rate, the facility ''passes'' the screening assessment, and, therefore, is not evaluated further under the screening approach. If emissions from a facility exceed the Tier 1 screening threshold emission rate, we evaluate the facility further in Tier 2.

In Tier 2 of the environmental screening assessment, the screening threshold emission rates are adjusted to account for local meteorology and the actual location of lakes in the vicinity of facilities that did not pass the Tier 1 screening assessment. For soils, we evaluate the average soil concentration for all soil parcels within a 7.5-km radius for each facility and PB–HAP. For the water, sediment, and fish tissue concentrations, the highest value for each facility for each pollutant is used. If emission concentrations from a facility do not exceed the Tier 2 screening threshold emission rate, the facility ''passes'' the screening assessment and typically is not evaluated further. If emissions from a facility exceed the Tier 2 screening threshold emission rate, we evaluate the facility further in Tier 3.

As in the multipathway human health risk assessment, in Tier 3 of the environmental screening assessment, we examine the suitability of the lakes around the facilities to support life and remove those that are not suitable (*e.g.,* lakes that have been filled in or are industrial ponds), adjust emissions for plume-rise, and conduct hour-by-hour time-series assessments. If these Tier 3 adjustments to the screening threshold emission rates still indicate the potential for an adverse environmental effect (*i.e.,* facility emission rate exceeds the screening threshold emission rate), we may elect to conduct a more refined assessment using more site-specific information. If, after additional refinement, the facility emission rate still exceeds the screening threshold emission rate, the facility may have the potential to cause an adverse environmental effect.

To evaluate the potential for an adverse environmental effect from lead, we compared the average modeled air concentrations (from HEM–3) of lead around each facility in the source category to the level of the secondary NAAQS for lead. The secondary lead NAAQS is a reasonable means of evaluating environmental risk because it is set to provide substantial protection against adverse welfare effects which can include ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

d. Acid Gas Environmental Risk Methodology

The environmental screening assessment for acid gases evaluates the potential phytotoxicity and reduced productivity of plants due to chronic exposure to HF and HCl. The environmental risk screening methodology for acid gases is a single-tier screening assessment that compares modeled ambient air concentrations (from AERMOD) to the ecological benchmarks for each acid gas. To identify a potential adverse environmental effect (as defined in section 112(a)(7) of the CAA) from emissions of HF and HCl, we evaluate the following metrics: The size of the modeled area around each facility that exceeds the ecological benchmark for each acid gas, in acres and square kilometers; the percentage of the modeled area around each facility that exceeds the ecological benchmark for each acid gas; and the area-weighted average screening value around each facility (calculated by dividing the area-weighted average concentration over the 50-km modeling domain by the ecological benchmark for each acid gas). For further information on the environmental screening assessment approach, see Appendix 9 of the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action.

6. How do we conduct facility-wide assessments?

To put the source category risks in context, we typically examine the risks from the entire ''facility,'' where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category emission points of interest, but also emissions of HAP from all other emission sources at the facility for which we have data. For this source category, we conducted the facility-wide assessment using a dataset compiled from the 2017 NEI. The source category records of that NEI dataset were removed, evaluated, and updated as described in section II.C of this preamble: What data collection activities were conducted to support this action? Once a quality assured source category dataset was available, it was placed back with the remaining records from the NEI for that facility. The facility-wide file was then used to analyze risks due to the inhalation of HAP that are emitted ''facility-wide'' for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of the facility-wide risks that could be attributed to the source category addressed in this proposal. We also specifically examined the facility that was associated with the highest estimate of risk and determined the percentage of that risk attributable to the source category of interest. The *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available through the docket for this action, provides the methodology and results of the facility-wide analyses, including all facility-wide risks and the percentage of source category contribution to facility-wide risks.

7. How do we consider uncertainties in risk assessment?

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health and environmentally protective. A brief discussion of the uncertainties in the RTR emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. Also included are those uncertainties specific to our acute screening assessments, multipathway screening assessments, and our environmental risk screening assessments. A more thorough discussion of these uncertainties is included in the *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* which is available in the docket for this action. If a multipathway site-specific assessment was performed for this source category, a full discussion of the uncertainties associated with that assessment can be found in Appendix 11 of that document, *Site-Specific Human Health Multipathway Residual Risk Assessment Report.*

a. Uncertainties in the RTR Emissions Dataset

Although the development of the RTR emissions dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, errors in emission estimates, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years, and they do not reflect short-term fluctuations during the course of a year or variations from year to year. The estimates of peak hourly emission rates for the acute effects screening assessment were based on an emission adjustment factor applied to the average annual hourly emission rates, which are intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

We recognize there is uncertainty in ambient concentration estimates associated with any model, including the EPA's recommended regulatory dispersion model, AERMOD. In using a model to estimate ambient pollutant concentrations, the user chooses certain options to apply. For RTR assessments, we select some model options that have the potential to overestimate ambient air concentrations (*e.g.,* not including plume depletion or pollutant transformation). We select other model options that have the potential to underestimate ambient impacts (*e.g.,* not including building downwash). Other options that we select have the potential to either under- or overestimate ambient levels (*e.g.,* meteorology and receptor locations). On balance, considering the directional nature of the uncertainties commonly present in ambient concentrations estimated by dispersion models, the approach we apply in the RTR assessments should yield unbiased estimates of ambient HAP concentrations. We also note that the selection of meteorology dataset location could have an impact on the risk estimates. As we continue to update and expand our library of meteorological station data used in our risk assessments, we expect to reduce this variability.

c. Uncertainties in Inhalation Exposure Assessment

Although every effort is made to identify all of the relevant facilities and emission points, as well as to develop accurate estimates of the annual emission rates for all relevant HAP, the uncertainties in our emission inventory likely dominate the uncertainties in the exposure assessment. Some uncertainties in our exposure assessment include human mobility, using the centroid of each census block, assuming lifetime exposure, and

assuming only outdoor exposures. For most of these factors, there is neither an under nor overestimate when looking at the maximum individual risk or the incidence, but the shape of the distribution of risks may be affected. With respect to outdoor exposures, actual exposures may not be as high if people spend time indoors, especially for very reactive pollutants or larger particles. For all factors, we reduce uncertainty when possible. For example, with respect to census-block centroids, we analyze large blocks using aerial imagery and adjust locations of the block centroids to better represent the population in the blocks. We also add additional receptor locations where the population of a block is not well represented by a single location.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and noncancer effects from both chronic and acute exposures. Some uncertainties are generally expressed quantitatively, and others are generally expressed in qualitative terms. We note, as a preface to this discussion, a point on dose-response uncertainty that is stated in the EPA's *2005 Guidelines for Carcinogen Risk Assessment;* namely, that ''the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective'' (the EPA's *2005 Guidelines for Carcinogen Risk Assessment,* page 1 through 7). This is the approach followed here as summarized in the next paragraphs.

Cancer UREs used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk.[17] That is, they represent a ''plausible upper limit to the true value of a quantity'' (although this is usually not a true statistical confidence limit). In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[18] Chronic noncancer RfC and reference dose (RfD) values represent chronic exposure levels that are intended to be health-protective levels. To derive dose-response values that are intended to be ''without appreciable risk,'' the methodology relies upon an uncertainty factor (UF) approach,[19] which considers uncertainty, variability, and gaps in the available data. The UFs are applied to derive dose-response values that are intended to protect against appreciable risk of deleterious effects.

Many of the UFs used to account for variability and uncertainty in the development of acute dose-response values are quite similar to those developed for chronic durations. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute dose-response value at another exposure duration (*e.g.,* 1 hour). Not all acute dose-response values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the dose-response value or values being exceeded. Where relevant to the estimated exposures, the lack of acute dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Uncertainty also exists in the selection of ecological benchmarks for the environmental risk screening assessment. We established a hierarchy of preferred benchmark sources to allow selection of benchmarks for each environmental HAP at each ecological assessment endpoint. We searched for benchmarks for three effect levels (*i.e.,* no-effects level, threshold-effect level, and probable effect level), but not all combinations of ecological assessment/environmental HAP had benchmarks for all three effect levels. Where multiple effect levels were available for a particular HAP and assessment endpoint, we used all of the available effect levels to help us determine whether risk exists and whether the risk could be considered significant and widespread.

Although we make every effort to identify appropriate human health effect dose-response values for all pollutants emitted by the sources in this risk assessment, some HAP emitted by this source category are lacking dose-response assessments. Accordingly, these pollutants cannot be included in the quantitative risk assessment, which could result in quantitative estimates understating HAP risk. To help to alleviate this potential underestimate, where we conclude similarity with a HAP for which a dose-response value is available, we use that value as a surrogate for the assessment of the HAP for which no value is available. To the extent use of surrogates indicates appreciable risk, we may identify a need to increase priority for an IRIS assessment for that substance. We additionally note that, generally speaking, HAP of greatest concern due to environmental exposures and hazard are those for which dose-response assessments have been performed, reducing the likelihood of understating risk. Further, HAP not included in the quantitative assessment are assessed qualitatively and considered in the risk characterization that informs the risk management decisions, including consideration of HAP reductions achieved by various control options.

For a group of compounds that are unspeciated (*e.g.,* glycol ethers), we conservatively use the most protective dose-response value of an individual compound in that group to estimate risk. Similarly, for an individual compound in a group (*e.g.,* ethylene glycol diethyl ether) that does not have a specified dose-response value, we also apply the most protective dose-response value from the other compounds in the group to estimate risk.

e. Uncertainties in Acute Inhalation Screening Assessments

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that the EPA conducts as part of the risk review under section 112 of the CAA. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and the presence of a person. In the acute screening assessment that we conduct under the RTR program, we assume that peak emissions from the source category and reasonable worst-case air dispersion conditions (*i.e.,* 99th percentile) co-occur. We then include the additional assumption that a person is located at this point at the same time. Together, these assumptions represent a reasonable worst-case actual exposure scenario. In most cases, it is unlikely that a person would be located at the point of maximum exposure during the time when peak emissions and

[17] IRIS glossary (*https://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=IRIS%20Glossary*).

[18] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[19] See *A Review of the Reference Dose and Reference Concentration Processes,* U.S. EPA, December 2002, and *Methods for Derivation of Inhalation Reference Concentrations and Application of Inhalation Dosimetry,* U.S. EPA, 1994.

reasonable worst-case air dispersion conditions occur simultaneously.

f. Uncertainties in the Multipathway and Environmental Risk Screening Assessments

For each source category, we generally rely on site-specific levels of PB–HAP or environmental HAP emissions to determine whether a refined assessment of the impacts from multipathway exposures is necessary or whether it is necessary to perform an environmental screening assessment. This determination is based on the results of a three-tiered screening assessment that relies on the outputs from models—TRIM.FaTE and AERMOD—that estimate environmental pollutant concentrations and human exposures for five PB–HAP (dioxins, POM, mercury, cadmium, and arsenic) and two acid gases (HF and HCl). For lead, we use AERMOD to determine ambient air concentrations, which are then compared to the secondary NAAQS standard for lead. Two important types of uncertainty associated with the use of these models in RTR risk assessments and inherent to any assessment that relies on environmental modeling are model uncertainty and input uncertainty.[20]

Model uncertainty concerns whether the model adequately represents the actual processes (*e.g.,* movement and accumulation) that might occur in the environment. For example, does the model adequately describe the movement of a pollutant through the soil? This type of uncertainty is difficult to quantify. However, based on feedback received from previous EPA SAB reviews and other reviews, we are confident that the models used in the screening assessments are appropriate and state-of-the-art for the multipathway and environmental screening risk assessments conducted in support of RTRs.

Input uncertainty is concerned with how accurately the models have been configured and parameterized for the assessment at hand. For Tier 1 of the multipathway and environmental screening assessments, we configured the models to avoid underestimating exposure and risk. This was accomplished by selecting upper-end values from nationally representative datasets for the more influential parameters in the environmental model, including selection and spatial configuration of the area of interest, lake location and size, meteorology, surface water, soil characteristics, and structure of the aquatic food web. We also assume an ingestion exposure scenario and values for human exposure factors that represent reasonable maximum exposures.

In Tier 2 of the multipathway and environmental screening assessments, we refine the model inputs to account for meteorological patterns in the vicinity of the facility versus using upper-end national values, and we identify the actual location of lakes near the facility rather than the default lake location that we apply in Tier 1. By refining the screening approach in Tier 2 to account for local geographical and meteorological data, we decrease the likelihood that concentrations in environmental media are overestimated, thereby increasing the usefulness of the screening assessment. In Tier 3 of the screening assessments, we refine the model inputs again to account for hour-by-hour plume-rise and the height of the mixing layer. We can also use those hour-by-hour meteorological data in a TRIM.FaTE run using the screening configuration corresponding to the lake location. These refinements produce a more accurate estimate of chemical concentrations in the media of interest, thereby reducing the uncertainty with those estimates. The assumptions and the associated uncertainties regarding the selected ingestion exposure scenario are the same for all three tiers.

For the environmental screening assessment for acid gases, we employ a single-tiered approach. We use the modeled air concentrations and compare those with ecological benchmarks.

For all tiers of the multipathway and environmental screening assessments, our approach to addressing model input uncertainty is generally cautious. We choose model inputs from the upper end of the range of possible values for the influential parameters used in the models, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure. This approach reduces the likelihood of not identifying high risks for adverse impacts.

Despite the uncertainties, when individual pollutants or facilities do not exceed screening threshold emission rates (*i.e.,* screen out), we are confident that the potential for adverse multipathway impacts on human health is very low. On the other hand, when individual pollutants or facilities do exceed screening threshold emission rates, it does not mean that impacts are significant, only that we cannot rule out that possibility and that a refined assessment for the site might be necessary to obtain a more accurate risk characterization for the source category.

The EPA evaluates the following HAP in the multipathway and/or environmental risk screening assessments, where applicable: Arsenic, cadmium, dioxins/furans, lead, mercury (both inorganic and methyl mercury), POM, HCl, and HF. These HAP represent pollutants that can cause adverse impacts either through direct exposure to HAP in the air or through exposure to HAP that are deposited from the air onto soils and surface waters and then through the environment into the food web. These HAP represent those HAP for which we can conduct a meaningful multipathway or environmental screening risk assessment. For other HAP not included in our screening assessments, the model has not been parameterized such that it can be used for that purpose. In some cases, depending on the HAP, we may not have appropriate multipathway models that allow us to predict the concentration of that pollutant. The EPA acknowledges that other HAP beyond these that we are evaluating may have the potential to cause adverse effects and, therefore, the EPA may evaluate other relevant HAP in the future, as modeling science and resources allow.

## IV. Analytical Results and Proposed Decisions

### *A. What actions are we taking pursuant to CAA sections 112(d)(2) and 112(d)(3)?*

In this proposal, pursuant to CAA section 112(d)(2) and (3) , we are proposing to establish an emission standard requiring MACT level control of chlorine emissions from the CBS. The results and proposed decisions based on the analyses performed pursuant to CAA section 112(d)(2) and (3) are presented below.

In the primary magnesium refining process, the electrowinning of the melted magnesium chloride to magnesium metal produces as a byproduct chlorine gas which is piped to, and recovered at, the co-located chlorine plant. At the chlorine plant, the chlorine gas is liquified and then stored for either reuse back into the magnesium refining process or sold to the market. When the chlorine plant is inoperable (*e.g.,* due to a malfunction or planned maintenance), the chlorine gas produced at the electrolytic cells is routed through the CBS. The CBS contains a packed-bed scrubber which uses ferrous chloride as the adsorbing

[20] In the context of this discussion, the term ''uncertainty'' as it pertains to exposure and risk encompasses both *variability* in the range of expected inputs and screening results due to existing spatial, temporal, and other factors, as well as *uncertainty* in being able to accurately estimate the true result.

medium to control chlorine emissions. The reaction of chlorine with ferrous chloride in the scrubbing medium creates a valuable by-product, ferric chloride, which the facility sells to the market. Since the CBS produces this valuable product, in addition to routing chlorine gas to the CBS when the chlorine plant is inoperable, the facility also routinely intentionally routes smaller amounts of chlorine gas (also known as tail gas) from the chlorine plant to the CBS during normal operations to produce ferric chloride.

Based on available information from the facility and the current title V permit, we estimate the scrubbers achieve at least 95 percent control efficiency and that the remaining chlorine gas (up to 5 percent) is emitted to the atmosphere. As a potentially significant source of chlorine emissions from the refining process, we are proposing to establish an emission standard requiring MACT level control of chlorine emissions from the CBS.

MACT standards must reflect the maximum degree of emissions reduction achievable through the application of measures, processes, methods, systems or techniques, including, but not limited to, measures that: (1) Reduce the volume of or eliminate pollutants through process changes, substitution of materials or other modifications; (2) enclose systems or processes to eliminate emissions; (3) capture or treat pollutants when released from a process, stack, storage, or fugitive emissions point; (4) are design, equipment, work practice, or operational standards (including requirements for operator training or certification); or (5) are a combination of the above. See CAA section 112(d)(2)(A) through (E). The MACT standards may take the form of design, equipment, work practice, or operational standards where the EPA determines either that: (1) A pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (2) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. See CAA section 112(h)(1) and (2).

The MACT ''floor'' is the minimum control level required for MACT standards promulgated under CAA section 112(d) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emissions control that is achieved in practice by the best-controlled similar source. The MACT floor for existing sources can be less stringent than floors for new sources, but not less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). Once the EPA has set the MACT floor, it may then impose stricter standards (''beyond-the-floor'' limits) if the EPA determines them to be achievable taking into consideration the cost of achieving the emission reductions, any non-air quality health and environmental impacts, and energy requirements.

Since there is only one primary magnesium refinery in the source category, the MACT floor for new and existing sources is established by the emission limitation achieved at that source. As described above, currently the CBS chlorine emissions are controlled by a ferrous chloride packed-bed scrubber. A representative from US Magnesium explained that chlorine removal can be calculated to be up to 100 percent stoichiometrically under fixed mass flow and ferric chloride recirculation rates. However, due to high variability in flow rates during the range of normal operations, the actual efficiency is expected to be less than 100 percent (for more information see email from Rob Hartman, US Magnesium, to Michael Moeller, EPA, which is available in the docket for this proposed rulemaking). Based on the limited available information and applying engineering judgement as described above, the facility and the state of Utah assume that the scrubbers achieve an average removal efficiency of 95 percent for purposes of determining and reporting daily chlorine emissions as required by the tile V permit. However, there are no stack test data available to confirm this value. Therefore, based on the available information, we propose 95 percent reduction of chlorine emissions as the MACT floor for the CBS for new and existing sources in the source category.

In addition to determining the MACT floor level of control, as part of our development of the proposed MACT standard, we assessed whether stricter standards (''beyond-the-floor'' limits) are achievable taking into consideration the cost of achieving additional emission reductions, any non-air quality health and environmental impacts, and energy requirements. We identified one potential control option, using a combination of a thermal incinerator coupled with a wet scrubber, that could achieve chlorine control efficiencies greater than the current 95 percent. The thermal incinerator reacts chlorine with natural gas to produce HCl gas. This process is highly efficient at converting chlorine into HCl and based on the available information, we estimate that 99 percent of the chlorine is converted to HCl. The HCl gas stream, which has greater solubility than chlorine, is then controlled through absorption via a wet scrubber. The wet scrubber removal efficiency of HCl is estimated to be 99 percent. This combination of controls could be expected to achieve 98 percent reduction of chlorine emissions. With regard to costs of achieving these additional emission reductions, based on limited information, we estimate the capital costs for these beyond-the-floor controls would be about $1.3 million, annualized costs would be about $1.4 million, and would achieve an estimated 300 tpy reduction, with estimated cost effectiveness of $4,657 per ton of chlorine reductions. However, as explained in the technical memorandum cited below, we note that there are substantial uncertainties with the baseline emissions estimates, the emissions reductions that would be achieved, and the cost estimates. This is primarily due to lack of test data and lack of information regarding flow rates, renovation costs, and other factors. For example, without test data to corroborate, the actual efficiency of the current control could be higher (or lower) than the estimated 95 percent. The facility has determined that chlorine removal, under stoichiometrically ideal conditions, can be calculated to be up to 100 percent. If the current control is higher than the 95 percent, the additional emission reductions and the cost effectiveness would be reduced. If the current control approaches 98 percent, there would be no additional reductions to achieve. In regard to uncertainties with the cost estimates, there is a large range of values for the costs associated with the installation and operating of a thermal incinerator and wet scrubber devices. To account for this, we used the midpoint of the cost range; however, due to the unique nature of this industry and without additional information about the CBS, the actual costs could be anywhere within the range and even beyond it. Using the upper end estimates of the cost range, capital costs could be as high as $2.1 million, annualized costs up to $2.5 million and an estimated cost effectiveness of $8,152 per ton. In addition, there would be additional economic impacts beyond these estimated costs due to the loss of facility revenue from the elimination of the production of a valuable by-product

that is created with the current controls. For more information regarding the beyond-the-floor analysis, the uncertainties and our conclusions, see the *Beyond-the-floor Assessment for the Chlorine Bypass Stack* memorandum, which is available in the docket for this proposed action.

We note that the cost-effectiveness is within the range of cost effectiveness accepted for beyond-the-floor controls for some other HAP in NESHAP for other source categories (*e.g.,* Secondary Lead Smelting, 77 FR 3, January 5, 2012, and Ferroalloys Production, 80 FR 125, June 30, 2015). We have not identified any previous NESHAP that accepted or rejected such cost-effectiveness estimates specifically for chlorine.

Nevertheless, given the issues and substantial uncertainties described above, we are not proposing this beyond-the-floor standard. We also note that we did not identify any relevant non-air quality health and environmental impacts, and energy requirements. Although we are not proposing this beyond-the-floor standard, we are soliciting comments, data and other information regarding the beyond-the-floor analysis (including costs estimates, baseline emissions, emissions reductions, and loss of product/revenue), and we are soliciting comments regarding our proposed determination and whether it would be appropriate to require these beyond-the-floor controls under the NESHAP, and if so, why.

Therefore, based on all the analyses presented above, we are proposing a MACT floor emissions standard for the CBS that will require new and existing sources in the source category to operate the control device and demonstrate 95 percent reduction of chlorine emissions. Specifically, we propose the following conditions: The facility must operate the control device (*e.g.,* a CBS scrubber) at all times when chlorine emissions are being routed to the CBS; except for circumstances under which emissions are routed to the CBS due to a chlorine plant malfunction and the CBS control device is not in operation, the CBS control device must be operating as soon as practicable but no later than 15 minutes after the routing of the chlorine emissions to the CBS. The facility must also document, and keep records, regarding each malfunction event, as described below. To demonstrate 95 percent control efficiency is achieved, we are proposing to require that new and existing sources in the source category conduct periodic performance tests that include inlet and outlet test samples. These tests would be conducted no less frequently than twice per permit term of a source's title V permit (at mid-term and renewal), which would be at least two tests every 5 years. We are proposing to require that new and existing sources in the source category use EPA Method 26A in 40 CFR part 60, appendix A (*i.e.,* the reference method for chlorine) to demonstrate compliance with the MACT standard. In addition to the performance compliance tests, with regard to parametric monitoring, we are proposing to require that new and existing sources in the source category measure and record the pH, liquid flow, and pressure drop of the control device on an on-going basis to demonstrate continuous compliance with the chlorine standard, and maintain such records. During a malfunction event, the owner or operator would be required to follow the typical recordkeeping and reporting associated with malfunction events (described in section IV.E), and also keep records of the date and time the control device was started, and also conduct the same measurements and monitoring of the parameters described above (*i.e.,* pH, liquid flow, and pressure drop). However, we are also seeking comments regarding these proposed requirements, and whether the EPA should consider alternative standards, or methodology modifications or parameters to demonstrate compliance and, if so, an explanation of those alternatives and why they would be appropriate.

Although we are proposing a MACT floor level of control for new and existing sources of 95 percent reduction of chlorine emissions based on the information presented above, we acknowledge there are some uncertainties regarding the actual control efficiency achieved under normal variable operations. Therefore, we are soliciting comments, data, or other information regarding the 95 percent control efficiency limit and whether a different limit, higher or lower, would be appropriate and, if so, why such a different limit would be appropriate to represent the MACT floor level of control. As described above, we are not proposing a beyond-the-floor option primarily due to significant uncertainties in the emissions and in the costs of achieving additional emission reductions. We conclude that the current scrubbing system represents MACT for the CBS. However, we are soliciting comments, data, and other information regarding the analyses for our proposed MACT floor standard and the beyond-the-floor option and our determinations. For more information regarding the beyond-the-floor analysis and our conclusions, see the *Beyond-the-floor Assessment for the Chlorine Bypass Stack* memorandum, which is available in the docket for this proposed action.

*B. What are the results of the risk assessment and analyses?*

1. Chronic Inhalation Risk Assessment Results

Table 2 of this preamble provides a summary of the results of the chronic inhalation risk assessment for HAP emissions for the source category, and an upper-end assessment of acute inhalation risks (based on the 95th percentile of 2017 hourly emissions estimates). Additional analyses and refinements regarding potential acute risks, including potential higher-end acute risks, are described later in this section. More detailed information on the risk assessment can be found in the document titled *Residual Risk Assessment for the Primary Magnesium Refining Source Category in Support of the Risk and Technology Review 2020 Proposed Rule,* available in the docket for this rule.

TABLE 2—PRIMARY MAGNESIUM REFINING SOURCE CATEGORY INHALATION RISK ASSESSMENT RESULTS

| Number of facilities [1] | Maximum individual cancer risk (in 1 million) [2] based on . . . | | Population at increased risk of cancer ≥ 1-in-1 million based on . . . | | Annual cancer incidence (cases per year) based on . . . | | Maximum chronic non-cancer TOSHI based on . . . | | Maximum screening acute noncancer HQ [3] based on . . . |
|---|---|---|---|---|---|---|---|---|---|
| | Actual emissions | Allowable emissions | Actual emissions | Allowable emissions | Actual emissions | Allowable emissions | Actual emissions | Allowable emissions | 95th percentile of actual emissions |
| 1 ..... | 0.08 | 0.08 | 0 | 0 | 0.00001 | 0.00001 | *1 | *0.6 | 3–REL<br><1 AEGL–1 (chlorine). |

[1] Number of facilities evaluated in the risk analysis.
[2] Maximum individual excess lifetime cancer risk due to HAP emissions from the source category.
[3] Arsenic REL. The maximum estimated acute exposure concentration was divided by available short-term dose-response values to develop an array of HQ values. HQ values shown use the lowest available acute dose-response value, which in most cases is the REL. When an HQ exceeds 1, we also show the HQ using the next lowest available acute dose-response value.
* (Respiratory).

Results of the inhalation risk assessment based on estimates of actual emissions indicate that the maximum lifetime individual cancer risk (or MIR) posed by the single facility is 0.08-in-1 million, with arsenic compounds, dioxins/furans, chromium (VI) compounds, and nickel compounds predominantly emitted from spray dryers and the melt/reactor system as the major contributors to the risk. The total estimated cancer incidence from this source category is 0.00001 excess cancer cases per year, or one excess case in every 100,000 years. No people are estimated to have inhalation cancer risks above 1-in-1 million due to HAP emitted from the facility in this source category. The HEM–3 model predicted the maximum chronic noncancer HI value for the source category could be up to 2 (respiratory effects), driven by emissions of chlorine from the melt/reactor system and that two people could be expected to be exposed to TOSHI levels above 1. However, due to the large distance to the nearest residential areas, the MIR and maximum chronic HI receptor is approximately 26 km from the plant. Based upon the distance of the plant to the MIR receptor with a local average wind of 5 meters per second, the facility's plume would reach this receptor in approximately 1.4 hours. After reviewing the decay rates for chlorine and receptor distances for this facility, we determined that these emission sources should be modeled taking photo-decay into account. The HEM–3 model does not consider photo-decay. Therefore, a separate refined analysis considering decay was performed to assess the impact on the chronic noncancer HI. Based upon the reactivity of chlorine and the time to reach the MIR location, we would expect the chlorine concentration at the MIR to decrease by approximately 44 percent when accounting for photo-decay, resulting in a chronic noncancer HI value for the source category of 1 (respiratory) with no people expected to be exposed to a HI of greater than 1. Details on this refinement is presented in Appendix 12 of the source category risk report, which is available in the docket for this action.

Considering MACT-allowable emissions, results of the inhalation risk assessment indicate that the cancer MIR is 0.08-in-1 million, again with arsenic compounds, dioxins/furans, chromium (VI) compounds, and nickel compounds predominantly emitted from spray dryers and the melt/reactor system as the major contributors to the risk. The total estimated cancer incidence from this source category based on allowable emissions is 0.00001 excess cancer cases per year, or one excess case in every 100,000 years. No people are estimated to have cancer risks above 1-in-1 million from HAP emitted from the facility in this source category. No individuals are estimated to have exposures that result in a noncancer HI at or above 1 at allowable emission rates.

2. Screening Level Acute Risk Assessment Results

To better characterize the potential health risks associated with estimated worst-case acute exposures to HAP, and in response to a key recommendation from the SAB's peer review of the EPA's RTR risk assessment methodologies, we examined a wider range of available acute health metrics than we do for our chronic risk assessments. This is in acknowledgement that there are generally more data gaps and uncertainties in acute reference values than there are in chronic reference values. By definition, the acute REL represents a health-protective level of exposure, with effects not anticipated below those levels, even for repeated exposures. However, the level of exposure that would cause health effects is not specifically known. Therefore, when an REL is exceeded and an AEGL–1 or ERPG–1 level is available (*i.e.,* levels at which mild, reversible effects are anticipated in the general public for a single exposure), we typically use them as an additional comparative measure, as they provide an upper bound for exposure levels above which exposed individuals could experience effects. As the exposure concentration increases above the acute REL, the potential for effects increases.

Based on our initial acute risk assessment, the maximum acute HQs from actual baseline emissions, based on a review of all modeled receptors for the US Magnesium facility, identified an exceedance of one acute benchmark (for chlorine) with an HQ of 8 based on the 1-hour REL, but that receptor is located on-site with no public access. We then evaluated the off-site receptors, which resulted in a highest refined (off-site) screening acute HQ for chlorine of 3 (based on the acute REL for chlorine). For this initial model run, we assumed an upper-end estimate of hourly potential acute emissions from the primary source of the chlorine emissions (*i.e.,* the melt/reactor system) of 8 times higher than the annual average emissions rate (which is the estimated 95 percent value of the range of estimated emissions in 2017). Further, this exceedance was only predicted to occur in a non-residential area with limited public access in a parking lot shared with a neighboring facility (ATI Titanium LLC). A review of the other surrounding property off-site of the US Magnesium facility identified public land managed by the Bureau of Land Management with an HQ (REL) of 2, access highways to the facilities off of the Interstate (I–80) with an HQ of 0.4 and the MIR residential location for the source category having an HQ of 0.3. No facilities were estimated to have an HQ based on AEGL or EPRG benchmarks greater than 1. Based on these initial estimated actual acute emissions (95th percentile), the refined acute results (with maximum acute HQ of 3) indicate that these upper end emissions are unlikely to pose significant risk to the general public.

However, we also evaluated the potential acute HQ values based on estimated worst-case emissions, which we understand have occurred during periodic rebuilding and rehabilitative maintenance events of the melt/reactor control device (*i.e.,* the CRB), as discussed previously in section III.C.3.c. Because of the infrequent nature of the CRB rebuilds (every 6 to 7 years) chronic risks are not expected to change; however, acute risks could increase significantly during these time periods. Based on available information, we estimate the worst-case chlorine emissions from the melt/reactor to be as high as 3.6 times the acute emissions modeled initially *(i.e.,* the 95th percentile estimate), or 29 times annual average emissions rates. During these events, assuming a linear increase in risks compared to emissions, we estimate the maximum off-site acute HQs could be up to 11 in the parking lot shared with the neighboring facility, 7 on public uninhabited lands and 1 at the nearest residential location. Further details on the acute HQ risk analyses and results are provided in Appendix 10 of the risk report for this source category.

3. Multipathway Risk Screening Results

The lone facility in the source category reported estimated emissions of carcinogenic PB–HAP (arsenic and dioxins) and non-carcinogenic PB–HAP (cadmium and mercury). The facility reported emissions of carcinogenic PB–HAP (arsenic and dioxins) that exceeded a Tier 1 cancer screening threshold emission rate and reported emissions of non-carcinogenic PB–HAP (mercury) that exceeded a Tier 1 noncancer screening threshold emission rate. Because the facility exceeded the Tier 1 multipathway screening threshold emission rate for one or more PB–HAP, we used additional facility site-specific information to perform a Tier 2 assessment and determine the maximum chronic cancer and noncancer impacts for the source category. Based on the Tier 2 multipathway cancer assessment, the dioxin emissions exceeded the Tier 2 screening threshold emission rate by a factor of 20 and a factor of 40 for arsenic. The multipathway risk screening Tier 2 assessment resulted in a combined dioxin and arsenic emission rate that exceeded the Tier 2 cancer screening value by a factor of 60 for the gardener scenario. The Tier 2 screening value for all other PB–HAP potentially emitted from the source category (mercury compounds and cadmium compounds) were less than 1.

A Tier 3 cancer screening assessment was conducted for both the fisher and gardener scenarios. Based on this Tier 3 screening assessment, a refined lake screening was conducted as well as identification of a residential receptor location (*i.e.,* MIR location from the inhalation assessment) for the gardener scenario. This review resulted in the removal of multiple lakes and the placement of the residential receptor approximately 20 km south of the facility. Based upon these refinements, the fisher scenario resulted in a cancer screening value of 7 and the gardener scenario resulted in a cancer screening value of 1.

An exceedance of a screening threshold emission rate in any of the tiers cannot be equated with a risk value or an HQ (or HI). Rather, it represents a high-end estimate of what the risk or hazard may be. For example, screening threshold emission rate of 2 for a non-carcinogen can be interpreted to mean that we are confident that the HQ would be lower than 2. Similarly, a tier screening threshold emission rate of 7 for a carcinogen means that we are confident that the risk is lower than 7-in-1 million. Our confidence comes from the conservative, or health-protective, assumptions encompassed in the screening tiers: We choose inputs from the upper end of the range of possible values for the influential parameters used in the screening tiers, and we assume that the exposed individual exhibits ingestion behavior that would lead to a high total exposure.

4. Environmental Risk Screening Results

As described in section III.A of this document, we conducted an environmental risk screening assessment for the Primary Magnesium Refining source category for the following pollutants: Arsenic, cadmium, dioxins/furans, HCl, lead, and mercury.

In the Tier 1 screening analysis for PB–HAP (other than lead, which was evaluated differently), arsenic, cadmium, and divalent mercury emissions had no Tier 1 exceedances for any ecological benchmark. Dioxin/furan emissions at one facility had Tier 1 exceedances for the surface soil NOAEL (mammalian insectivores—shrew) benchmark by a maximum screening value of 400. Methyl mercury at one facility had Tier 1 exceedances for the surface soil NOAEL (avian ground insectivores—woodcock) by a maximum screening value of 2.

A Tier 2 screening assessment was performed for methyl mercury and dioxin/furan emissions. Methyl mercury had no Tier 2 exceedances for any ecological benchmark. Dioxin/furan emissions had Tier 2 exceedances for the surface soil NOAEL (mammalian insectivores—shrew) benchmark by a maximum screening value of 4. This screening value was refined by removing soil areas located on-site. The refined Tier 2 screening value for dioxins/furans is 3.

A Tier 3 screening analysis was performed for dioxin emissions. In the Tier 3 screen, after incorporating chemical losses due to plume-rise into the calculation, the screening value remained 3 (surface soil NOAEL). Also in the Tier 3 screen, we conducted runs of the screening scenario within TRIM.FaTE with the following site-specific time-series data: Hourly meteorology, time series of leaf litterfall and air-leaf chemical exchanges, facility emissions, and hourly values of emission release height equivalent to hourly plume-rise height. After incorporating these time-series data in the analysis, the screening value is 2 (surface soil NOAEL). No other dioxin/furan benchmarks were exceeded in Tier 2 or 3. Specifically, the following dioxin/furan benchmarks were not exceeded in the Tier 2 or 3 screen:

- Fish—Avian Piscivores (NOAEL, geometric-maximum-allowable-toxicant-level (GMATL), and LOAEL)
- Fish—Mammalian Piscivores (NOAEL, GMATL, and LOAEL)
- Sediment Community (No-effect, Threshold, and Probable-Effect)
- Surface Soil (Threshold)
- Water-column Community (Threshold, Frank-Effect)

For lead, we did not estimate any exceedances of the secondary lead NAAQS.

For HCl, the average modeled concentration around the facility (*i.e.,* the average concentration of all off-site data points in the modeling domain) did not exceed any ecological benchmark. In addition, each individual modeled concentration of HCl (*i.e.,* each off-site data point in the modeling domain) was below the ecological benchmarks for the facility.

Based on the results of the environmental risk screening analysis, we do not expect an adverse environmental effect as a result of HAP emissions from this source category.

5. Facility-Wide Risk Results

Facility-wide risks were estimated using the NEI-based data described in section III.C of this preamble. The maximum facility-wide cancer MIR is 0.08-in-1 million, mainly driven by arsenic compounds, dioxins/furans, chromium (VI) compounds, and nickel compounds predominantly emitted

from spray dryers and the melt/reactor system. The total estimated cancer incidence from the whole facility is 0.00001 excess cancer cases per year, or one excess case in every 100,000 years. No people are estimated to have cancer risks above 1-in-1 million from exposure to HAP emitted from both MACT and non-MACT sources at the single facility in this source category. The maximum facility-wide TOSHI for the source category is estimated by HEM–3 to be 2, mainly driven by emissions of chlorine from the melt/reactor system. Approximately two people are exposed to noncancer HI levels above 1, based on facility-wide emissions from the facility in this source category. However, once refined for photo-decay, the maximum facility-wide TOSHI for the source category is estimated to be 1 and no one is exposed to an HI greater than 1.

6. What demographic groups might benefit from this regulation?

To examine the potential for any environmental justice issues that might be associated with the source category, we performed a demographic analysis, which is an assessment of risk to individual demographic groups of the populations living near the facilities at different risk levels. However, because no one is exposed to a cancer risk greater than 1-in-1 million or a chronic noncancer HQ greater than 1, we only evaluated the population distributions living near the facility.

The results of the demographic analysis are summarized in Table 3 below. These results, for various demographic groups, are based on the population living within 50 km of the facility (the nearest resident is over 20 km from the facility).

The results of the Primary Magnesium Refining source category demographic analysis indicate that for the population subgroups living within 50-km of the facility only one subgroup (people 0 to 17 years) is above its corresponding national average (40 percent versus 23 percent nationally).

The methodology and the results of the demographic analysis are presented in further details in a technical report, *Risk and Technology Review—Analysis of Demographic Factors for Populations Living Near Primary Magnesium Refining Source Category Operations,* available in the docket for this action.

TABLE 3—SUMMARY OF DEMOGRAPHIC ASSESSMENT FOR THE PRIMARY MAGNESIUM REFINING SOURCE CATEGORY

[Demographic group]

| Total | Minority [1] | African American (%) | Native American (%) | Other and multiracial (%) | Hispanic or Latino (%) | Ages 0 to 17 (%) | Ages 18 to 64 (%) | Ages 65 and up (%) | Over 25 without a HS diploma (%) | Below the poverty level (%) | Linguistic isolation (%) |
|---|---|---|---|---|---|---|---|---|---|---|---|
| National Averages | | | | | | | | | | | |
| 317,746,049 .. | 38 | 12 | 0.8 | 7 | 18 | 23 | 63 | 14 | 14 | 14 | 6 |
| Population Surrounding the Source Category Emissions [2] | | | | | | | | | | | |
| 20,598 ..... | 9 | 0.2 | 0.1 | 2 | 6 | 40 | 54 | 6 | 5 | 7 | 1 |

[1] Minority population is the total population minus the white population.
[2] Proximity population statistics are provided irrespective of cancer and noncancer risk living within 50 km of the facility.

*C. What are our proposed decisions regarding risk acceptability, ample margin of safety, and adverse environmental effect?*

1. Risk Acceptability

As noted in section III of this preamble, the EPA sets standards under CAA section 112(f)(2) using ''a two-step standard-setting approach, with an analytical first step to determine an 'acceptable risk' that considers all health information, including risk estimation uncertainty, and includes a presumptive limit on MIR of approximately 1-in-10 thousand'' (see 54 FR 38045, September 14, 1989). In this proposal, the EPA estimated risks based on actual and allowable emissions under the current NESHAP from the Primary Magnesium Refining source category.

The estimated inhalation cancer risk to the individual most exposed to actual or allowable emissions from the source category is 0.08-in-1 million. The estimated incidence of cancer due to inhalation exposures is 0.00001 excess cancer cases per year, or 1 excess case every 100,000 years. No people are estimated to have cancer risks above 1-in-1 million from HAP emitted from the facility in this source category.

The estimated, refined, maximum chronic noncancer TOSHI from inhalation exposure for this source category is 1, indicating low likelihood of adverse noncancer effects from long-term inhalation exposures.

The multipathway risk assessment results indicate a maximum cancer risk of 7-in-1 million based on ingestion exposures estimated for dioxins using the health protective risk screening assumptions of a Tier 3 fisher exposure scenario.

The initial acute risk screening assessment of upper-end estimates of acute inhalation impacts (which were based on the 95th percentile estimate of hourly emissions) indicates a maximum off-site acute HQ (REL) of 3, located at an adjacent facility. A review of the surrounding property off-site of the US Magnesium facility also identified public land managed by the Bureau of Land Management with an HQ of 2. Access highways to the facilities off of the highway (I–80) show an HQ of 0.4, with the MIR residential location for the source category having an HQ of 0.3.

After the initial acute risk assessment, we also evaluated the potential risks associated with an estimate of the worst-case actual hourly peak emissions, which we understand can occur during rebuilding/rehabilitative maintenance events of the CRB. During these events, we estimate that maximum off-site acute HQ (REL) can be as high as 11 in the parking lot shared with the neighboring facility, 7 on public uninhabited lands, and 1 at the nearest residential location. However, as is discussed in section IV.E of this preamble, by removing the SSM exemptions in this proposed action, proposing work practice standards for periods of malfunction, and with current emission limits in the NESHAP applying at all other times, including rebuild/rehabilitative maintenance of the CRB, this potential elevated acute risk will be significantly reduced. Therefore, based on this assessment, the refined acute results indicate that at baseline, the acute HQ could be as high as 11, but once the proposed rule is finalized, including the removal of the exemptions, peak emissions are unlikely to pose significant risk.

Considering all of the health risk information and factors discussed

above, including the uncertainties discussed in section III of this preamble, the EPA proposes that the risks for this source category under the current NESHAP provisions are acceptable. However, we note that we have some concerns regarding the potential acute risks estimated for the baseline scenario, but as described above, and below in the ample margin of safety analysis section, these potential risks will be significantly reduced once this proposed rule is finalized.

2. Ample Margin of Safety Analysis

As directed by CAA section 112(f)(2), we conducted an analysis to determine whether the current emissions standards provide an ample margin of safety to protect public health. Under the ample margin of safety analysis, the EPA considers all health factors evaluated in the risk assessment and evaluates the cost and feasibility of available control technologies and other measures (including the controls, measures, and costs reviewed under the technology review) that could be applied to this source category to further reduce the risks (or potential risks) due to emissions of HAP identified in our risk assessment. In this analysis, we considered the results of the technology review, risk assessment, and other aspects of the NESHAP review to determine whether there are any emission reduction measures necessary to provide an ample margin of safety with respect to the risks associated with these emissions.

The inhalation cancer risk due to HAP emissions from the Primary Magnesium Refining source category is less than 1-in-1 million and the chronic noncancer TOSHI due to inhalation exposures is estimated to be 1 and no one exposed to an HI greater than 1. Additionally, the results of the acute screening analysis showed that risks were below a level of concern during normal operations.

As described above, there are potential elevated acute risks associated with CRB controls on the melt/reactor; however, by removing the SSM exemptions in this proposed action, proposing work practice standards for periods of malfunction, and with current emission limits applying at all other times, including rebuild/rehabilitative maintenance of the CRB, these potential elevated acute risks will be significantly reduced.

With regard to PB–HAP, we identified and investigated the installation of activated carbon injection (ACI) and a baghouse with catalytic filters as an option to further reduce dioxin emissions and risks. The use of ACI plus catalytic filters to reduce dioxin emissions was evaluated and determined not to be cost effective during the original NESHAP. Based on our current review of that information, we do not believe the associated costs for installing and operating a baghouse have changed significantly since the original NESHAP. When evaluating the cost effectiveness of installing ACI and a baghouse with catalytic filters during the development of the 2003 Primary Magnesium Refining NESHAP, a full cost analysis was performed for the facility. Based on our reevaluation of this information and an updated analysis, we estimate these controls would have capital cost of about $1 million, annual costs of $600,000, and would achieve about 2 grams reduction per year (95 percent reduction), with cost effectiveness of $289,000 per gram of dioxin removal, and the maximum cancer risk would be reduced from 7-in-1 million to about 1-in-1 million (for more details see Legacy Docket A–2002–0043, Document II–B–5). Due to the relatively high cost, coupled with the small reduction in dioxin emissions, we conclude that these controls are not cost effective, and would only achieve modest reduction in risks. We did not identify any relevant non-air quality health and environmental impacts, and energy requirements. Based upon the relatively low baseline risks, minimal available risk reductions, and lack of cost-effective control options to reduce emissions, we are not proposing revised standards for dioxins and furans in this action.

In summary, we are proposing that baseline risks from the source category are acceptable, and we are proposing rule changes (described above) to remove SSM exemptions and add work practice standards for CRB malfunction events. With these proposed revisions along with the current emissions limits for chlorine and other HAP applying at all times, the potential acute risks of chlorine will be addressed. Furthermore, we did not identify cost-effective controls for dioxins. Therefore, we are proposing that after the rule changes described above are finalized, the NESHAP will provide an ample margin of safety to protect public health. Since the removal of the SSM exemptions and addition of work practices for malfunctions help address the acute risks, we are proposing to adopt these amendments under CAA section 112(f), in addition to authorities 112(d)(2), 112(d)(3), or 112(h), as described elsewhere in this preamble.

3. Adverse Environmental Effect

As described in section III.A of this preamble, we conducted an environmental risk screening assessment for the Primary Magnesium Refining source category. We do not expect there to be an adverse environmental effect as a result of HAP emissions from this source category and we are proposing that it is not necessary to set any additional standards, beyond those described above, to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.

*D. What are the results and proposed decisions based on our technology review?*

As described in section III.B of this preamble, the technology review focuses on the identification and evaluation of developments in practices, processes, and control technologies that have occurred since the MACT standards were promulgated. We also evaluate, during the technology review, whether there are any unregulated emissions of HAP within the source category, and we establish standards if we identify unregulated emissions. In conducting the technology review, we reviewed various informational sources regarding the emissions from the Primary Magnesium Refining source category. The review included a search of the internet and Reasonably Available Control Technology, Best Available Control Technology, and Lowest Achievable Emission Rate Clearinghouse database, reviews of air permits, and discussions with industry representatives. We reviewed these data sources for information on practices, processes, and control technologies that were not considered during the development of the Primary Magnesium Refining NESHAP. We also looked for information on improvements in practices, processes, and control technologies that have occurred since the development of the Primary Magnesium Refining NESHAP.

Based on this review, the EPA identified a development in technology and practices regarding pH monitoring for acid gas control devices. Specifically, the EPA is proposing to amend the emission limitations and operating parameters set forth in 40 CFR 63.9890(b) to include pH as an additional operational parameter for all control devices used to meet the acid gas emission limits of this subpart. We have determined that this change reflects a development in technology and practices pursuant to CAA section 112(d)(6), that is consistent with other

NESHAP that cover acid-gas emitting source categories, such as the HCl Production source category, that requires pH as an operational parameter. Monitoring and maintaining the appropriate pH levels are important to ensure the effectiveness of acid gas control devices (*i.e.,* wet scrubbers). This is particularly relevant to this source category since each stack covered in this subpart is subject to an acid gas emissions limitation (either chlorine, HCl, or both). Therefore, in addition to maintaining the hourly average pressure drops and scrubber liquid flow rates, we are proposing that pH must also be measured and maintained within the operating range values established during the performance test for all control devices used to meet the acid gas emission limits of this subpart. The proposed installation, operation, and maintenance requirements specifically for pH are included in 40 CFR 63.9921(a)(3). In addition, there are minor amendments to 40 CFR 63.9916, 63.9917, 63.9920, and 63.9923 to include pH in all CPMS related requirements.

Furthermore, as described above in section IV.A, we evaluated the potential to require an incinerator and wet scrubber to achieve additional reductions of chlorine from the CBS, however, due to significant uncertainties in emissions and costs of controls, we are not proposing such controls under CAA section 112(d)(2) or (d)(3). For the same reasons, we are also not proposing such controls under CAA section 112(d)(6).

In addition, as part of the technology review, we identified a previously unregulated process and pollutant, and are regulating them under CAA sections 112(d)(2) and (3), as described in section IV.A, above.

In summary, after reviewing all of this information, we identified one development in technology and practices regarding pH monitoring for acid gas control devices. We did not identify any additional cost-effective developments in practices, processes, or control technologies used at primary magnesium refining facilities since promulgation of the MACT standard that warrant revision to the NESHAP pursuant to CAA section 112(d)(6) at this time. For all four emission points, US Magnesium uses wet scrubbers (packed-bed and venturi scrubbers) to achieve the emission limits. We concluded that wet scrubbing systems are the most appropriate and practical control systems and that there is no other control equipment or methods of control that would be more effective for reducing their emissions taking into consideration cost, feasibility, and uncertainties.

*E. What other actions are we proposing?*

In addition to the proposed actions described above, we are proposing additional revisions to the NESHAP. We are proposing revisions to the SSM provisions of the MACT rule in order to ensure that they are consistent with the decision in *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008), in which the court vacated two provisions that exempted sources from the requirement to comply with otherwise applicable CAA section 112(d) emission standards during periods of SSM. We are also proposing various other changes, including an alternative standard for malfunction events for the CRB and the addition of electronic reporting. Our analyses and proposed changes related to these issues are discussed below.

1. SSM

In its 2008 decision in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), the court vacated portions of two provisions in the EPA's CAA section 112 regulations governing the emissions of HAP during periods of SSM. Specifically, the court vacated the SSM exemption contained in 40 CFR 63.6(f)(1) and (h)(1), holding that under section 302(k) of the CAA, emissions standards or limitations must be continuous in nature and that the SSM exemption violates the CAA's requirement that some CAA section 112 standards apply continuously.

Consistent with *Sierra Club* v. *EPA,* we are proposing the elimination of the SSM exemptions in this NESHAP and we are proposing that emissions standards will apply at all times. As described below, we are proposing new work practice standards pursuant to CAA section 112(h) that will apply to CRB malfunctions. For all other sources, scenarios, and HAP, we are simply removing the SSM exemptions such that the current emissions limits will apply at all times. We are also proposing several revisions to Table 5 (the General Provisions Applicability Table) which are explained in more detail below. For example, we are proposing to eliminate the incorporation of the General Provisions' requirement that sources develop an SSM plan. We also are proposing to eliminate and revise certain recordkeeping and reporting requirements related to the SSM exemption as described below.

The EPA has attempted to ensure that the provisions we are proposing to eliminate are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether we have successfully done so.

In proposing the standards in this rule, the EPA has considered startup and shutdown periods and, for the reasons explained below, is not proposing alternate standards for those periods. The primary magnesium refining production process is continuous, with control equipment operating at all times. The industry has not identified (and there are no data indicating) any specific problems with removing the provisions for startup and shutdown. However, we solicit comment on whether any situations exist where separate standards, such as work practices, would be more appropriate during periods of startup and shutdown rather than the current standard.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. Malfunctions, in contrast, are neither predictable nor routine. Instead they are, by definition, sudden, infrequent, and not reasonably preventable failures of emissions control, process, or monitoring equipment. (40 CFR 63.2) (definition of malfunction). The EPA interprets CAA section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of CAA section 112 standards and this reading has been upheld as reasonable by the court in *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016). Under section 112, emissions standards for new sources must be no less stringent than the level ''achieved'' by the best controlled similar source and for existing sources generally must be no less stringent than the average emission limitation ''achieved'' by the best performing 12 percent of sources in the category (or the average emission limitation achieved by the best performing sources where, as here, there are fewer than 30 sources in the source category). There is nothing in CAA section 112 that directs the Agency to consider malfunctions in determining the level ''achieved'' by the best performing sources when setting emission standards. As the court has recognized, the phrase ''average emissions limitation achieved by the best performing 12 percent of sources ''says nothing about how the performance of the best units is to be calculated.'' *Nat'l Ass'n of Clean Water Agencies* v. *EPA,* 734 F.3d 1115, 1141 (D.C. Cir. 2013). While the EPA accounts for variability in setting emissions standards, nothing in CAA section 112 requires the Agency to consider malfunctions as part of that analysis. The EPA is not required to

treat a malfunction in the same manner as the type of variation in performance that occurs during routine operations of a source. A malfunction is a failure of the source to perform in a ''normal or usual manner'' and no statutory language compels the EPA to consider such events in setting CAA section 112 standards.

As the court recognized in *U.S. Sugar Corp.,* accounting for malfunctions in setting standards would be difficult, if not impossible, given the myriad different types of malfunctions that can occur across all sources in the category and given the difficulties associated with predicting or accounting for the frequency, degree, and duration of various malfunctions that might occur. *Id.* at 608 (''the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances.''). As such, the performance of units that are malfunctioning is not ''reasonably'' foreseeable. See, *e.g., Sierra Club* v. *EPA,* 167 F.3d 658, 662 (D.C. Cir. 1999) (''The EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem. We generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study.' ''). See also, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978) (''In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by case enforcement discretion, not for specification in advance by regulation.''). In addition, emissions during a malfunction event can be significantly higher than emissions at any other time of source operation. For example, if an air pollution control device with 99 percent removal goes offline as a result of a malfunction (as might happen if, for example, the bags in a baghouse catch fire) and the emission unit is a steady state type unit that would take days to shut down, the source would go from 99 percent control to zero control until the control device was repaired. The source's emissions during the malfunction would be 100 times higher than during normal operations. As such, the emissions over a 4-day malfunction period would exceed the annual emissions of the source during normal operations. As this example illustrates, accounting for malfunctions could lead to standards that are not reflective of (and significantly less stringent than) levels that are achieved by a well performing non-malfunctioning source. It is reasonable to interpret CAA section 112 to avoid such a result. The EPA's approach to malfunctions is consistent with CAA section 112 and is a reasonable interpretation of the statute.

Although no statutory language compels the EPA to set separate standards for malfunctions, the EPA has the discretion to do so where feasible. For example, in the Petroleum Refinery Sector RTR, the EPA established a work practice standard for unique types of malfunction that result in releases from pressure relief devices or emergency flaring events because the EPA had information to determine that such work practices reflected the level of control that applies to the best performers. 80 FR 75178, 75211 through 14 (December 1, 2015). The EPA will consider whether circumstances warrant setting standards for a particular type of malfunction and, if so, whether the EPA has sufficient information to identify the relevant best performing sources and establish a standard for such malfunctions. (We also encourage commenters to provide any such information.)

Given the EPA's discretion to set separate standards for malfunctions, we are proposing a standard for this source category to address the CRB emission point. Based on our knowledge of the processes and engineering judgement, we expect that the standard for normal operations for the melt/reactor (100 lbs/hr) cannot be met during malfunctions of the CRB (unavoidable and unanticipated breakdowns), unless the melt/reactor is stopped, which the facility has indicated cannot be done instantaneously due to the molten process. The CRB is the primary chlorine control device for the melt/reactor system. The CRB converts the chlorine gas stream from the melt/reactor to HCl. A high percentage of the HCl is then captured through a series of wet scrubbers. If the CRB is offline, the chlorine emissions continue to pass through the wet scrubbers; however, without the conversion to HCl, removal is significantly reduced. Therefore, the EPA anticipates that malfunctions of the CRB will result in violations of the current chlorine standard (*i.e.,* 100 lbs/hr) during a significant portion of the malfunction events if the melt reactor process continues to operate. To address this issue, the EPA is proposing work practice standards in Table 4 to 40 CFR part 63, subpart TTTTT to apply during CRB malfunctions to ensure that a CAA section 112 standard applies continuously. Based on discussions with the facility, CRB malfunctions are infrequent, unpredictable, and highly variable in nature. Furthermore, these events are typically short, requiring a few hours for the facility to replace or repair the malfunctioning equipment. Because of this, it is not technically feasible to measure emissions during the brief periods when these situations occur (*i.e.,* unpredictable, highly variable, and short in duration).

As noted in CAA section 112(h)(1), ''if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f).'' CAA section 112(h)(2) defines the phrase ''not feasible to prescribe or enforce an emission standard'' as any situation in which the Administrator determines that either ''a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law'' or ''the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.''

Based on the information described above, the EPA is proposing work practice standards pursuant to CAA section 112(h) that will apply to the melt/reactor and the CRB during periods when a malfunction occurs to the CRB. We are proposing the following work practices for these periods that include the following requirements: (1) During unplanned/unavoidable CRB malfunction events, the facility must shutdown the reactor as soon as practicable but not later than 15 minutes after such event occurs and keep the reactor offline during the CRB repair process; and (2) operators must perform a root cause analysis/corrective action. This includes conducting a root cause analysis to determine the source, nature, and cause of each malfunction event and identifying corrective measures to prevent future such malfunction events as soon as practicable, but no later than 45 days after a malfunction event.

Corrective actions must be implemented as soon as practicable, but no later than 45 days after a malfunction event or as soon thereafter as practicable. If there is a second release event in a 12-month period with the same root cause on the same equipment, it would be a deviation of the work practice standard. However, as an alternative to this work practice standard, we propose that facility would be allowed to keep melt reactor operating if they reroute the emissions to an equally effective back-up control device configuration, such as a back-up CRB and wet scrubber.

With regard to other emissions sources (*e.g.,* spray dryers, magnesium chloride storage bins, launder off-gas systems), the EPA anticipates that it is unlikely that a malfunction will result in a violation of the standard because the air pollution control equipment or other measures used to limit the emissions from these processes would still be operational. If the malfunction occurs in the pollution control equipment for these other processes, the operators should discontinue process operations until such time that the air pollution control systems are operable in order to comply with the requirements to minimize emissions and operate according to good air pollution practices. In general, process operations should be able to be shut down quickly enough to avoid a violation of an emissions limitation. Nevertheless, we expect there could be situations where a malfunction in the control equipment could result in a violation of the standard depending on how quickly emissions decline upon process shut down. In this case, owners or operators must report the deviation, the quantity of HAP emitted over the emissions limit, the cause of the deviation, and the corrective action taken to limit the emissions during the event.

In the unlikely event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, the EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. The EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, sudden, infrequent, not reasonably preventable, and was not instead caused, in part, by poor maintenance or careless operation. 40 CFR 63.2 (definition of malfunction).

If the EPA determines in a particular case that an enforcement action against a source for violation of an emission standard is warranted, the source can raise any and all defenses in that enforcement action and the federal district court will determine what, if any, relief is appropriate. The same is true for citizen enforcement actions. Similarly, the presiding officer in an administrative proceeding can consider any defense raised and determine whether administrative penalties are appropriate.

In summary, the EPA interpretation of the CAA and, in particular, CAA section 112, is reasonable and encourages practices that will avoid malfunctions and judicial procedures for addressing exceedances of the standards fully recognize that violations may occur despite good faith efforts to comply and can accommodate those situations. *U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 606–610 (2016).

We are also proposing several revisions to the General Provisions Applicability Table (Table 5) which are explained in more detail below as follows. We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.6(e)(1)(i) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.6(e)(1)(i) describes the general duty to minimize emissions. Some of the language in that section is no longer necessary or appropriate in light of the elimination of the SSM exemption. We are proposing instead to add general duty regulatory text at 40 CFR 63.9910(b) that reflects the general duty to minimize emissions while eliminating the reference to periods covered by an SSM exemption. The current language in 40 CFR 63.6(e)(1)(i) characterizes what the general duty entails during periods of SSM. With the elimination of the SSM exemption, there is no need to differentiate between normal operations and SSM events in describing the general duty. Therefore, the language the EPA is proposing for 40 CFR 63.9910(b) does not include that language from 40 CFR 63.6(e)(1).

We are also proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.6(e)(1)(ii) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.6(e)(1)(ii) imposes requirements that are not necessary with the elimination of the SSM exemption or are redundant with the general duty requirement being added at 40 CFR 63.9910(b).

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.6(e)(3) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Generally, these paragraphs require development of an SSM plan and specify SSM recordkeeping and reporting requirements related to the SSM plan. As noted, the EPA is proposing to remove the SSM exemptions. Therefore, affected units will be subject to an emission standard during such events. The applicability of a standard during such events will ensure that sources have ample incentive to plan for and achieve compliance and, thus, the SSM plan requirements are no longer necessary.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.6(f)(1) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' The current language of 40 CFR 63.6(f)(1) exempts sources from nonopacity standards during periods of SSM. As discussed above, the court in *Sierra Club* v. *EPA* vacated the exemptions contained in this provision and held that the CAA requires that some CAA section 112 standards apply continuously. Consistent with *Sierra Club* v. *EPA,* the EPA is proposing to revise standards in this rule to apply at all times and proposing a new work practice standard for CRB malfunction events.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.7(e)(1) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.7(e)(1) describes performance testing requirements. The EPA is instead proposing to add a performance testing requirement at 40 CFR 63.9913(a). The performance testing requirements we are proposing to add differ from the General Provisions performance testing provisions in several respects. The regulatory text removes the cross-reference to 40 CFR 63.7(e)(1) and does not include the language in 40 CFR 63.7(e)(1) that restated the SSM exemption and language that precluded startup and shutdown periods from being considered ''representative'' for purposes of performance testing. The proposed performance testing provisions will not allow performance testing during malfunctions. As in 40 CFR 63.7(e)(1), performance tests conducted under this subpart should not be conducted during malfunctions because conditions during malfunctions are often not representative of normal operating conditions. The EPA is proposing to add language that requires the owner or operator to record the process information that is necessary to document operating conditions during

the test and include in such record an explanation to support that such conditions represent normal operation. Section 63.7(e) requires that the owner or operator make available to the Administrator such records ''as may be necessary to determine the condition of the performance test'' available to the Administrator upon request but does not specifically require the information to be recorded. The regulatory text the EPA is proposing to add to this provision builds on that requirement and makes explicit the requirement to record the information.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.8(c)(1)(i) and (iii) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' The cross-references to the general duty and SSM plan requirements in those subparagraphs are not necessary in light of other requirements of 40 CFR 63.8 that require good air pollution control practices (40 CFR 63.8(c)(1)) and that set out the requirements of a quality control program for monitoring equipment (40 CFR 63.8(d)).

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(b)(2)(i) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.10(b)(2)(i) describes the recordkeeping requirements during startup and shutdown. These recording provisions are no longer necessary because the EPA is proposing that recordkeeping and reporting applicable to normal operations will apply to startup and shutdown. In the absence of special provisions applicable to startup and shutdown, such as a startup and shutdown plan, there is no reason to retain additional recordkeeping for startup and shutdown periods.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(b)(2)(ii) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.10(b)(2)(ii) describes the recordkeeping requirements during a malfunction. The EPA is proposing to add such requirements to 40 CFR 63.9932. The regulatory text we are proposing to add differs from the General Provisions it is replacing in that the General Provisions requires the creation and retention of a record of the occurrence and duration of each malfunction of process, air pollution control, and monitoring equipment. The EPA is proposing that this requirement apply to any failure to meet an applicable standard and is requiring that the source record the date, time, and duration of the failure rather than the ''occurrence.'' The EPA is also proposing to add to 40 CFR 63.9932 a requirement that sources keep records that include a list of the affected source or equipment and actions taken to minimize emissions, an estimate of the quantity of each regulated pollutant emitted over the standard for which the source failed to meet the standard, and a description of the method used to estimate the emissions. Examples of such methods would include product loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing to require that sources keep records of this information to ensure that there is adequate information to allow the EPA to determine the severity of any failure to meet a standard, and to provide data that may document how the source met the general duty to minimize emissions when the source has failed to meet an applicable standard.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(b)(2)(iv) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' When applicable, the provision requires sources to record actions taken during SSM events when actions were inconsistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required. The requirement previously applicable under 40 CFR 63.10(b)(2)(iv)(B) to record actions to minimize emissions and record corrective actions is now applicable by reference to 40 CFR 63.9932.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(b)(2)(v) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' When applicable, the provision requires sources to record actions taken during SSM events to show that actions taken were consistent with their SSM plan. The requirement is no longer appropriate because SSM plans will no longer be required.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(c)(15) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' The EPA is proposing that 40 CFR 63.10(c)(15) no longer applies. When applicable, the provision allows an owner or operator to use the affected source's SSM plan or records kept to satisfy the recordkeeping requirements of the SSM plan, specified in 40 CFR 63.6(e), to also satisfy the requirements of 40 CFR 63.10(c)(10) through (12). The EPA is proposing to eliminate this requirement because SSM plans would no longer be required, and, therefore, 40 CFR 63.10(c)(15) no longer serves any useful purpose for affected units.

We are proposing to revise the General Provisions Applicability Table (Table 5) entry for 40 CFR 63.10(d)(5) by changing the ''yes'' in the column titled ''Applies to Subpart TTTTT'' to a ''no.'' Section 63.10(d)(5) describes the reporting requirements for startups, shutdowns, and malfunctions. To replace the General Provisions reporting requirement, the EPA is proposing to add reporting requirements to 40 CFR 63.9931(b)(4). The replacement language differs from the General Provisions requirement in that it eliminates periodic SSM reports as a stand-alone report. We are proposing language that requires sources that fail to meet an applicable standard at any time to report the information concerning such events in the semi-annual compliance report already required under this rule. We are proposing that the report must contain the number, date, time, duration, and the cause of such events (including unknown cause, if applicable), a list of the affected source or equipment, an estimate of the quantity of each regulated pollutant emitted over any emission limit, and a description of the method used to estimate the emissions. Examples of such methods would include product-loss calculations, mass balance calculations, measurements when available, or engineering judgment based on known process parameters. The EPA is proposing this requirement to ensure that there is adequate information to determine compliance, to allow the EPA to determine the severity of the failure to meet an applicable standard, and to provide data that may document how the source met the general duty to minimize emissions during a failure to meet an applicable standard.

We will no longer require owners or operators to determine whether actions taken to correct a malfunction are consistent with an SSM plan, because SSM plans would no longer be required. The proposed amendments, therefore, eliminate the cross-reference to 40 CFR 63.10(d)(5)(i) that contains the description of the previously required SSM report format and submittal schedule from this section. These specifications are no longer necessary because the events will be reported in otherwise required reports with similar format and submittal requirements.

The proposed amendments eliminate the cross-reference to 40 CFR 63.10(d)(5)(ii), which requires an

immediate report for SSM when a source failed to meet an applicable standard but did not follow the SSM plan. We will no longer require owners and operators to report when actions taken during a startup, shutdown, or malfunction were not consistent with an SSM plan, because SSM plans would no longer be required.

2. Electronic Reporting

The EPA is proposing that owners and operators of primary magnesium refining facilities submit electronic copies of required performance test reports and performance evaluation reports through the EPA's Central Data Exchange (CDX) using the Compliance and Emissions Data Reporting Interface (CEDRI). A description of the electronic data submission process is provided in the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* available in the docket for this action. The proposed rule requires that performance test results collected using test methods that are supported by the EPA's Electronic Reporting Tool (ERT) as listed on the ERT website [21] at the time of the test be submitted in the format generated through the use of the ERT or an electronic file consistent with the xml schema on the ERT website, and other performance test results be submitted in portable document format (PDF) using the attachment module of the ERT.

Additionally, the EPA has identified two broad circumstances in which electronic reporting extensions may be provided. These circumstances are (1) outages of the EPA's CDX or CEDRI which preclude an owner or operator from accessing the system and submitting required reports and (2) *force majeure* events, which are defined as events that will be or have been caused by circumstances beyond the control of the affected facility, its contractors, or any entity controlled by the affected facility that prevent an owner or operator from complying with the requirement to submit a report electronically. Examples of *force majeure* events are acts of nature, acts of war or terrorism, or equipment failure or safety hazards beyond the control of the facility. The EPA is providing these potential extensions to protect owners and operators from noncompliance in cases where they cannot successfully submit a report by the reporting deadline for reasons outside of their control. In both circumstances, the decision to accept the claim of needing additional time to report is within the discretion of the Administrator, and reporting should occur as soon as possible.

The electronic submittal of the reports addressed in this proposed rulemaking will increase the usefulness of the data contained in those reports, is in keeping with current trends in data availability and transparency, will further assist in the protection of public health and the environment, will improve compliance by facilitating the ability of regulated facilities to demonstrate compliance with requirements, and by facilitating the ability of delegated state, local, tribal, and territorial air agencies and the EPA to assess and determine compliance, and will ultimately reduce burden on regulated facilities, delegated air agencies, and the EPA. Electronic reporting also eliminates paper-based, manual processes, thereby saving time and resources, simplifying data entry, eliminating redundancies, minimizing data reporting errors, and providing data quickly and accurately to the affected facilities, air agencies, the EPA, and the public. Moreover, electronic reporting is consistent with the EPA's plan [22] to implement Executive Order 13563 and is in keeping with the EPA's agency-wide policy [23] developed in response to the White House's Digital Government Strategy.[24] For more information on the benefits of electronic reporting, see the memorandum, *Electronic Reporting Requirements for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules,* referenced earlier in this section.

*F. What compliance dates are we proposing?*

The EPA is proposing two separate compliance dates for affected facilities, based on the different amendments in the rulemaking. For the proposed amendments regarding the MACT standard for the CBS, the work practice standard for CRB malfunctions, the elimination of SSM exemptions, and electronic reporting requirements, we are proposing that affected facilities that have constructed or reconstructed on or before January 8, 2021, must comply by the effective date of the final rule. For the proposed requirement to add pH as an additional control device operational parameter, we propose that the affected facilities that have constructed or reconstructed on or before January 8, 2021, must comply no later than 180 days after the effective date of the final rule. For affected facilities that commence construction or reconstruction after January 8, 2021, owners or operators must comply with all requirements of the subpart, including all the amendments being proposed, no later than the effective date of the final rule or upon startup, whichever is later.

Based on our understanding of the facility operations and experience with similar industries, we believe that the effective date of the final rule is appropriate for the proposed MACT CBS standard, CRB work practice standard, elimination of SSM exemptions, and electronic reporting requirement. Regarding these new proposed CBS and CRB requirements, the facility already routinely performs these operations. The CRB work practice for malfunctions require minimal additional effort to implement (*i.e.* shutting down the melt/reactor process). Furthermore, it is current facility policy to perform a root cause analysis on any CRB malfunction events. The CBS control device operational requirements are largely being met during current plant operations. Regarding the compliance testing requirements, depending on the configuration of the stack, adjustments may need to be made in order to perform the required performance tests, such as the installation of inlet and outlet sampling ports at the CBS control device stack. However, provisions in 40 CFR 63.9911, regarding performance tests and initial compliance demonstrations, allow up to 180 days after the compliance date to conduct such tests, which we believe is sufficient time for the facility to demonstrate compliance with the proposed CBS standard. The electronic reporting burden is minimal as it eliminates paper-based, manual processes, thereby saving time and resources as well as simplifying data entry. We do not expect that the proposed SSM revisions will require any new control systems and very few, if any, operational changes. The primary magnesium refining is a continuous operation, with minimal startup and shutdown, and control devices operating at all times. Additionally,

[21] *https://www.epa.gov/electronic-reporting-air-emissions/electronic-reporting-tool-ert.*

[22] EPA's Final Plan for Periodic Retrospective Reviews, August 2011. Available at: *https://www.regulations.gov/document?D=EPA-HQ-OA-2011-0156-0154.*

[23] E-Reporting Policy Statement for EPA Regulations, September 2013. Available at: *https://www.epa.gov/sites/production/files/2016-03/documents/epa-ereporting-policy-statement-2013-09-30.pdf.*

[24] Digital Government: Building a 21st Century Platform to Better Serve the American People, May 2012. Available at: *https://obamawhitehouse.archives.gov/sites/default/files/omb/egov/digital-government/digital-government.html.*

much of the revisions are eliminating additional records and reports related to SSM. These changes can be implemented quickly by the owner or operator at no cost (and likely some cost savings) and if these records are still collected after the final rule is promulgated, the facility will still be in compliance with the proposed requirements. Therefore, based on the reasoning above, we are proposing that affected facilities will need to comply with these amendments by the effective date of the final rule. For affected facilities that commence construction or reconstruction after January 8, 2021, owners or operators must comply with all requirements of the subpart, including all the amendments being proposed, no later than the effective date of the final rule or upon startup, whichever is later.

The EPA is also proposing to amend the emission limitations and operating parameters set forth in 40 CFR 63.9890(b) to include pH as an additional operational parameter for all control devices used to meet the acid gas emission limits of this subpart. The facility currently monitors and maintains the hourly average pressure drops and liquid flow rates for all control devices; however, the additional requirement to monitor pH would require the installation and implementation of continuous pH monitors. Therefore, in order to provide time for implementation, we are proposing that it is necessary to provide 180 days after the effective date of the final rule for all affected facilities that have constructed or reconstructed on or before January 8, 2021, to comply with the new pH operational parameters. For affected facilities that commence construction or reconstruction after January 8, 2021, we are proposing owners or operators comply with the new pH operational parameters by the effective date of the final rule (or upon startup, whichever is later).

We solicit comment on the proposed compliance periods, and we specifically request submission of information from sources in this source category regarding specific actions that would need to be undertaken to comply with the proposed amended requirements and the time needed to make the adjustments for compliance with any of the revised requirements.

## V. Summary of Cost, Environmental, and Economic Impacts

### *A. What are the affected sources?*

The Primary Magnesium Refining source category comprises one plant, US Magnesium, located in Rowley, Utah. US Magnesium was the sole facility when the original NESHAP was promulgated in 2011; this has not changed since then nor are there new facilities anticipated.

### *B. What are the air quality impacts?*

We are proposing to establish an emission standard requiring MACT level control of chlorine emissions from the CBS that requires the facility to operate the associated control device and demonstrate 95 percent control efficiency of chlorine emissions. Since the facility already routinely operates the CBS control device, we expect minimal associated emissions reductions. However, this will ensure that the emissions remain controlled and minimized moving forward. The proposed amendments also include removal of the SSM exemptions and the addition of a work practice standard for malfunction events related to the melt/reactor system. Although we are unable to quantify the emission reduction associated with these changes, we expect that emissions will be reduced by requiring the facility to meet the applicable standard during periods of SSM and that the work practice standard will minimize malfunction related emissions.

### *C. What are the cost impacts?*

The proposed amendments include a work practice standard for malfunctions of the CRB and a MACT level chlorine emission standard for the CBS. The costs associated with the proposed amendments are expected to be minimal. The CRB work practice standard will require labor related with the root cause analysis condition. However, it is current facility policy to conduct such analyses following a malfunction related event; therefore, we expect no additional associated costs to comply with the proposed work practice standard. The proposed emission standard for the CBS will have costs related to recordkeeping and repeat performance testing. The additional inlet and outlet performance test is expected to cost an estimated $30,000 every 2.5 years. There will likely also be some initial costs to drill and establish inlet and outlet ports on the current stack, which currently has no ports. We expect no further costs associated with the CBS standard (*e.g.,* add-on controls or operation costs) since the facility already has a CBS control device and routinely operates it. With regard to the proposed electronic reporting requirements, which will eliminate paper-based manual processes, we expect a small initial unquantified cost to transition to electronic reporting, but that these costs will be off-set with savings over time such that ultimately there will be an unquantified reduction in costs to the affected facility.

### *D. What are the economic impacts?*

Economic impact analyses focus on changes in market prices and output levels that result from compliance costs imposed as a result of this action. Because the costs associated with the proposed revisions are minimal, no significant economic impacts from the proposed amendments are anticipated.

### *E. What are the benefits?*

Although the EPA does not anticipate any significant reductions in HAP emissions as a result of the proposed amendments, we believe that the action, if finalized as proposed, would result in some unquantified reductions in chlorine emissions—albeit minimal—and improvements to the rule and the further protection of public health and the environment. Furthermore, pursuant to CAA section 112(d)(2) and (3), by establishing a MACT standard for chlorine emissions from the CBS, we are ensuring that the associated control device is operational during any emission release and meets demonstratable performance criteria. Additionally, the proposed amendments requiring electronic submittal of initial notifications, performance test results, and semiannual reports will increase the usefulness of the data, are in keeping with current trends of data availability, will further assist in the protection of public health and the environment, and will ultimately result in less burden on the regulated community. See section IV.D.3 of this preamble for more information.

## VI. Request for Comments

We solicit comments on this proposed action. In addition to general comments on this proposed action, we are also interested in additional data that may improve the risk assessments and other analyses. We are specifically interested in receiving any improvements to the data used in the site-specific emissions profiles used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Section VII of this preamble provides more information on submitting data.

## VII. Submitting Data Corrections

The site-specific emissions profiles used in the source category risk and demographic analyses and instructions are available for download on the RTR

website at *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.* The data files include detailed information for each HAP emissions release point for the facilities in the source category.

If you believe that the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any ''improved'' data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR website, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter email address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID No. EPA–HQ–OAR–2020–0535 (through the method described in the **ADDRESSES** section of this preamble).

5. If you are providing comments on a single facility or multiple facilities, you need only submit one file for all facilities. The file should contain all suggested changes for all sources at that facility (or facilities). We request that all data revision comments be submitted in the form of updated Microsoft® Excel files that are generated by the Microsoft® Access file. These files are provided on the project website at *https://www.epa.gov/stationary-sources-air-pollution/primary-magnesium-refining-national-emissions-standards-hazardous/.*

## VIII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was, therefore, not submitted to OMB for review.

### *B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs*

This action is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

### *C. Paperwork Reduction Act (PRA)*

The information collection activities in this proposed rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2098.09. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

These amendments require electronic reporting; remove the SSM exemptions; and impose other revisions that affect reporting and recordkeeping for primary magnesium refining facilities. This information is collected to assure compliance with 40 CFR part 63, subpart TTTTT.

*Respondents/affected entities:* Owners and operators of Primary Magnesium Refining Facilities.

*Respondent's obligation to respond:* Mandatory (40 CFR part 63, subpart TTTTT).

*Estimated number of respondents:* One.

*Frequency of response:* Semiannually.

*Total estimated burden:* 625 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $73,100 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to *OIRA_submission@omb.eop.gov,* Attention: Desk Officer for the EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than February 8, 2021. The EPA will respond to any ICR-related comments in the final rule.

### *D. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Based on the Small Business Administration size category for this source category, no small entities are subject to this action.

### *E. Unfunded Mandates Reform Act (UMRA)*

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

### *F. Executive Order 13132: Federalism*

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

### *G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. No tribal governments own facilities subject to this proposed action. Thus, Executive Order 13175 does not apply to this action. However, since a magnesium facility is located within 50 miles of tribal lands, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, we will offer tribal consultation for this rulemaking.

### *H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action's health and risk assessments are contained in section IV of this preamble and in the *Primary Magnesium Refining Risk Report,* which is available in the docket.

### *I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211, because it is not a

significant regulatory action under Executive Order 12866.

*J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51*

This action involves technical standards. Therefore, the EPA conducted searches for National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining Residual Risk and Technology Review through the Enhanced NSSN Database managed by the American National Standards Institute (ANSI). We also contacted voluntary consensus standards (VCS) organizations and accessed and searched their databases. Searches were conducted for EPA Methods 1, 2, 2F, 2G, 3, 3A, 3B, 4, 5, 5D, 23, 26, 26A, of 40 CFR part 60, appendix A, and EPA Methods 201 and 201A of 40 CFR part 51, appendix M. No applicable VCS were identified for EPA Methods 1, 2, 2F, 2G, 5D, 23, 201 and 201A.

During the search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to the EPA's reference method, the EPA considered it as a potential equivalent method. All potential standards were reviewed to determine the practicality of the VCS for this rule. This review requires significant method validation data which meets the requirements of EPA Method 301 for accepting alternative methods or scientific, engineering, and policy equivalence to procedures in EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

Two VCS were identified as an acceptable alternative to EPA test methods for the purposes of this rule. The VCS, ANSI/ASME PTC 19–10–1981 Part 10 (2010), ''Flue and Exhaust Gas Analyses,'' is an acceptable alternative to EPA Method 3B manual portion only and not the instrumental portion. The VCS, ASTM D6735–01(2009), ''Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources Impinger Method,'' is an acceptable alternative to EPA Method 26 and 26A. The search identified 18 VCS that were potentially applicable for these rules in lieu of EPA reference methods. After reviewing the available standards, the EPA determined that 18 candidate VCS (ASTM D3154–00 (2014), ASTM D3464–96 (2014), ASTM 3796–09 (2016), ISO 10780:1994 (2016), ASME B133.9–1994 (2001), ISO 10396:(2007), ISO 12039:2001(2012), ASTM D5835–95 (2013), ASTM D6522–11, CAN/CSA Z223.2–M86 (R1999), ISO 9096:1992 (2003), ANSI/ASME PTC–38–1980 (1985), ASTM D3685/D3685M–98–13, CAN/CSA Z223.1–M1977, ISO 10397:1993, ASTM D6331 (2014), EN 1948–3 (1996), EN 1911:2010) identified for measuring emissions of pollutants or their surrogates subject to emission standards in the rule would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations. Additional information for the VCS search and determinations can be found in the memorandum, *Voluntary Consensus Standard Results for National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining Residual Risk and Technology Review,* which is available in the docket for this action. Under 40 CFR 63.7(f) and 40 CFR 63.8(f) of subpart A of the General Provisions, a source may apply to the EPA to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule or any amendments.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This action's health and risk assessments are contained in section IV of this preamble. The documentation for this decision is contained in section IV.A.1 of this preamble and in the *Primary Magnesium Refining Risk Report,* which is available in Docket ID No. EPA–HQ–OAR–2020–0535.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

**Andrew Wheeler,**

*Administrator.*

[FR Doc. 2021–00176 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–50–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 219**

**[Docket No. FRA–2019–0071, Notice No. 1]**

**RIN 2130–AC80**

## Control of Alcohol and Drug Use: Coverage of Mechanical Employees and Miscellaneous Amendments

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In response to a Congressional mandate in the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act), FRA is proposing to expand the scope of its alcohol and drug regulation to cover mechanical (MECH) employees who test or inspect railroad rolling equipment. FRA is also proposing miscellaneous, clarifying amendments to its alcohol and drug regulation.

**DATES:** Written comments on this proposed rule must be received on or before March 9, 2021. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

**ADDRESSES:** *Comments:* Comments related to Docket No. FRA–2019–0071 may be submitted by going to *http://www.regulations.gov* and following the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. 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 in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents, petitions for reconsideration, or comments received, go to *http://www.regulations.gov* and follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Gerald Powers, Drug and Alcohol Program Manager, Office of Railroad Safety—Office of Technical Oversight, telephone: 202–493–6313; email:

*gerald.powers@dot.gov;* Sam Noe, Drug and Alcohol Specialist, Office of Technical Oversight, telephone 615–719–2951, email: *sam.noe@dot.gov;* or Patricia V. Sun, Attorney Adviser, Office of the Chief Counsel, telephone: 202–493–6060, email: *patricia.sun@dot.gov.*

**SUPPLEMENTARY INFORMATION:**

**Table of Contents for Supplementary Information**



## I. Executive Summary

In 2018, Congress enacted the SUPPORT Act.[1] Section 8102 of the SUPPORT Act mandates that the Secretary of Transportation publish a rule amending the existing alcohol and drug regulations applicable to railroad employees (49 CFR part 219) to cover ''all employees of railroad carriers who perform mechanical activities.'' Further, that section requires the Secretary of Transportation to ''define the term 'mechanical activities' by regulation.''

This proposed rule, which responds to that mandate, proposes to add MECH employees to the scope of part 219, and makes miscellaneous clarifying amendments. With certain exceptions, FRA proposes to define a MECH employee as an employee of a railroad, or a railroad contractor or subcontractor, who tests or inspects railroad rolling equipment. As proposed, individuals who perform those duties typically performed by railroad carmen would be included within the definition of MECH employee.

Under existing part 219, with the exception of maintenance-of-way (MOW) employees, employees in non-covered service crafts (*i.e.,* employees not subject to the hours of service laws in 49 U.S.C. chapter 211, which would include those employees defined in the notice of proposed rulemaking (NPRM) as MECH employees)[2] are subject to FRA-mandated alcohol and drug testing only if they are fatally injured as a result of a ''fatal train incident'' under § 219.203(a)(4). In such situations, the remains of a fatally injured employee (whether the employee was a covered-service or non-covered service employee) are subject to post-mortem post-accident toxicological (PAT) testing.

Since 2015, two employees who would be considered MECH employees under this NPRM have died in such incidents, and post-mortem PAT testing results of both employees were positive. One employee was fatally injured in a yard incident and tested positive for delta 9-tetrahydrocannabinol (THC, the primary psychoactive constituent of marijuana) in whole blood and liver in FRA post-mortem post-accident testing. Based on the identified concentrations of THC found, and those of the carboxy metabolite (THCA) identified in urine, whole blood, and liver, the employee's last use of the drug likely occurred shortly before his death. The second employee was fatally injured by a remote control locomotive, and PAT testing found that he had a blood alcohol concentration (BAC) of 0.218, over five times the 0.04 BAC limit for an FRA alcohol positive.

Prior to Congress' mandate in section 8102 of the SUPPORT Act, the National Transportation Safety Board (NTSB) recommended that FRA expand the scope of part 219 to cover all employees and agents performing safety-sensitive functions as defined in §§ 209.301 and 209.303.[3] In response to NTSB's recommendation, in 2016, FRA expanded the scope of part 219 to cover MOW employees (non-covered service employees), but FRA found that expanding part 219 to all employees performing safety-sensitive functions was not justified.[4] FRA's 2016 addition of MOW employees to the scope of part 219 was the first time non-covered service employees were covered by part 219 for other than post-mortem PAT testing. With this NPRM, FRA is proposing to apply part 219 to MECH employees, another category of non-covered service employees who perform safety-sensitive functions. FRA estimates that this proposed rule would affect approximately 25,500 MECH employees.

In a 2018 petition for rulemaking, the Association of American Railroads (AAR) also requested that FRA make MECH employees, like covered service employees and MOW employees, fully subject to part 219. In support of its request, the AAR cited the success of DOT random testing programs in deterring drug abuse and alcohol misuse, and concerns about increased opioid use and State legalization of marijuana use. The AAR estimated that only 30 percent of MECH employees are currently covered by some form of DOT testing (*e.g.,* in addition to performing functions as mechanical employees, they perform covered service for a railroad or hold Commercial Driver's Licenses and are subject to testing under the Federal Motor Carrier Safety Administration's drug and alcohol regulation). The AAR stated that the implementation costs of adding approximately 29,550 MECH employees to part 219 would ''be borne entirely by the railroads who are the entities requesting this expansion of regulation.''

In response to the SUPPORT Act's mandate, FRA is proposing to make MECH employees subject to part 219 in the same manner as MOW employees. Like this proposed rule, the MOW rule also responded to a Congressional mandate[5] and an NTSB recommendation (R–08–07). FRA received and addressed 16 comments to the 2014 NPRM implementing the MOW employee mandate[6] before publishing a final rule expanding the scope of part 219 to cover MOW employees.[7] In lieu of repeating the MOW rule's discussion, FRA is providing a summary of its proposed MECH employee requirements and referring interested parties to the MOW final rule, which contains discussion of the same provisions as applied to MOW employees.

In addition to changes to part 219 directly related to the addition of MECH employees, FRA also proposes other amendments to part 219. To lessen the burden on small railroads, FRA proposes to amend part 219 to exempt small railroads from subpart K (Referral Programs) because small railroads may lack the expertise and resources necessary to maintain referral programs.

[1] Public Law 115–271.

[2] Throughout this NPRM, the term ''covered service employees'' means employees subject to the hours of service laws of 49 U.S.C. ch. 211.

[3] R–08–07, *https://www.ntsb.gov/safety/safety-recs/recletters/R08_05_07.pdf.*

[4] 81 FR 37894 (June 10, 1996).

[5] Sec. 412 of the Rail Safety Improvement Act (RSIA) (Pub. L. 110–432, October 16, 2008).

[6] 79 FR 48380 (July 28, 2014).

[7] 81 FR 37894 (June 10, 2016).

FRA is also proposing to clarify part 219's reasonable cause testing requirements to make clear that for reasonable cause testing based on a rule violation, a railroad that elects to test under FRA authority may only use rule violations listed in § 219.403(b) as a basis for testing.

Further, in May 2019, FRA removed the penalty schedules for its rules from the Code of Federal Regulations and republished them on FRA's website. In part 219, the penalty schedule was formerly in appendix A. FRA now also proposes to remove appendix B, which designates the name and contact information of FRA's PAT testing laboratory, and appendix C, which contains instructions for post-mortem collection of PAT testing specimens. Copies of the information contained in both appendices are included in FRA's PAT testing shipping kits, and can also be found at the FRA website and post-accident testing app. FRA is therefore proposing a global deletion of references to both appendices B and C throughout part 219, along with the removal of both appendices.

## II. Mechanical Employees, Contractors, and Subcontractors

### *A. Background*

As the SUPPORT Act mandates, this NPRM proposes to make MECH employees subject to all part 219 prohibitions and testing requirements (pre-employment, random, PAT, reasonable suspicion, return-to-duty, and follow-up). Under the proposal, railroads, contractors, and subcontractors would be subject to the same reporting, recordkeeping, and referral requirements for MECH employees as they are for covered service and MOW employees.

As noted above, before the addition of MOW employees, part 219 addressed only covered service employees. To incorporate MOW employees, FRA adopted the term ''regulated employee,'' and defined the term to include both covered service employees and MOW employees subject to part 219. FRA is proposing to amend the term ''regulated employee'' to include MECH employees and to make additional amendments throughout the rule text, in order to incorporate MECH employees into part 219.

### *B. The Small Railroad Exception and Employees, Contractor Employees, and Subcontractor Employees Who Perform MECH Activities*

Currently, part 219 excepts small railroads (defined as railroads with 15 or fewer covered service employees and having minimal joint operations with other railroads) from both reasonable cause and random testing.[8] As with MOW employees, FRA would not include MECH employees in a railroad's count of employees for purposes of the small railroad exception. FRA would continue to count only covered service employees to determine whether a railroad qualifies as a small railroad.

Consistent with part 219's treatment of MOW employees, as proposed, a contractor would have its required level of part 219 compliance determined by the size of the railroad(s) for which it performs MECH activities, not its size as a contractor. A contractor who performs MECH activities exclusively for small railroads that are excepted from full compliance with part 219 would also be excepted from full compliance, while a contractor who performs MECH activities for at least one railroad required to be in full compliance with part 219, would also be required to be in full compliance with part 219.

### *C. Railroad, Contractor, and Subcontractor Responsibility for Compliance*

As proposed, FRA would require each railroad to submit for FRA approval a revised random testing plan under subpart G of part 219 that would include MECH employees, as FRA required for MOW employees. A railroad would also be responsible for ensuring that its MECH contractor and subcontractor employees are subject to random testing. A railroad could do so either by including these contractor and subcontractor employees in its own random testing plan, or by requiring contractors and subcontractors to submit their own random testing plans to FRA for acceptance using the Model Railroad Contractor Compliance Plan available on the FRA Drug and Alcohol Program web page.[9] In either case, contractors and subcontractors are also responsible for ensuring that their employees who perform MECH activities comply with the rule's random testing requirements.

### *D. Pre-Employment Drug Testing of Mechanical Employees*

As FRA did for MOW employees, FRA is proposing to exempt all current MECH employees from the pre-employment drug testing requirements of subpart F of part 219. Under FRA's proposal, only those MECH employees hired by a railroad, or railroad contractor or subcontractor, after the effective date of the final rule would be required to have a negative DOT pre-employment drug test before performing regulated service for the first time. This exemption would apply only so long as the MECH employee continues to perform work for the same DOT-regulated employer. An initially exempted MECH employee would be required to have a negative DOT pre-employment drug test result before performing regulated service for a different or additional DOT-regulated employer.

Interested parties should note that FRA's proposal to exempt current MECH employees from FRA pre-employment drug testing would not exempt these employees from DOT's background check requirement. DOT's background check requirement is a separate requirement under 49 CFR 40.25 and requires an employer to check an employee's previous two years of DOT drug and alcohol testing results within 30 days of when the employee performs safety-sensitive duties for that employer for the first time. For part 219 purposes, FRA has designated regulated service as a DOT safety-sensitive function which requires a § 40.25 background check.[10] Accordingly, a DOT-regulated employer would still be required to conduct a background check under § 40.25 on all of its MECH employees, including those who are initially exempted from pre-employment drug testing. Further, a MECH employee who has had a DOT violation may not perform safety-sensitive service until the employee has successfully completed the return-to-duty process.

Consistent with part 219's treatment of MOW employees, as proposed, FRA would not require a contractor or subcontractor employee who performs MECH activities for multiple railroads to have a negative Federal pre-employment drug test result for each railroad, provided that the contractor or subcontractor employee has a negative Federal pre-employment drug test result on file with the contractor who is his or her direct employer.

### *E. Initial Mechanical Employee Random Testing Rates*

FRA would set the initial minimum annual random testing rates for MECH employees at 50 percent for drugs and 25 percent for alcohol, the same levels it initially set for MOW employees when they first became subject to FRA testing.[11] As it did for MOW employees, FRA would create an independent

[8] § 219.3(c).

[9] *https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol.*

[10] § 219.5.

[11] § 219.625(c).

Management Information System (MIS) database of industry-wide MECH employee positive and violation rates, to set the future minimum annual random testing rates for these employees. An employer required to submit an annual MIS report may place its MECH employees in a commingled pool so long as the employer reports its results under the correct safety-sensitive category.

**III. Section-by-Section Analysis**

*Authority*

FRA would amend the authority citation for part 219 to add a reference to section 8102 of the SUPPORT Act, which mandates the expansion of part 219 to cover ''all employees of railroad carriers who perform mechanical activities.''

*Subpart A—General*

*Section 219.3 Application*

Paragraph (b)

FRA proposes to remove and reserve paragraph (b) in its entirety. Currently, paragraph (b)(1) applies to railroads and paragraphs (b)(2) and (3) apply to contractors. Existing paragraph (b)(1) is redundant with § 219.800(a)'s annual report requirements for railroads. In addition, to consolidate its railroad and contractor annual report requirements, FRA proposes to move the reporting requirements for contractors in existing paragraphs (b)(2) and (3) to new paragraph (g) of § 219.800 in subpart I. *See* the Section-by-Section Analysis discussion of § 219.800 below.

Paragraph (c)

As noted in II.B above, FRA would continue to except small railroads, defined as railroads with 15 or fewer covered service employees with minimal joint operations, from reasonable cause and random testing requirements (subparts E and G). FRA would continue to count only covered service employees (not MECH or MOW employees) to determine whether a railroad is a small railroad for purposes of this exception.

To lessen the burden on small railroads, FRA also proposes to amend this paragraph to exempt small railroads from subpart K (Referral Programs) because small railroads may lack the expertise and resources necessary to maintain referral programs.

*Section 219.5 Definitions*

FRA is proposing to amend the definitions section of part 219 to add several new definitions and to revise and clarify certain existing definitions.

Category of Regulated Employee

FRA would amend this definition to include the categories of covered service, maintenance-of-way, and mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs covered service, maintenance-of-way activities, and/or mechanical activities, he or she would belong in the category of regulated employee that corresponds with the majority of the employee's regulated service.

Employee

The term ''employee'' is currently defined to include ''any individual (including a volunteer or a probationary employee) performing activities for a railroad or a contractor to a railroad.'' FRA proposes to amend this definition to include any individual performing activities for a subcontractor to a railroad.

Mechanical or MECH Employee

FRA proposes to define a mechanical (MECH) employee generally as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components. FRA's proposed MECH employee definition focuses on the testing and inspection of railroad rolling equipment required by FRA regulation, because these MECH activities directly affect railroad safety. Accordingly, FRA proposes to except employees who perform activities that have a negligible effect on rail safety from this definition. Specifically, a MECH employee would not include an employee who performs only one or more of the following duties:

- Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;
- Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;
- Checking lading for pilferage or vandalism; or
- Loading, unloading, or shifting car loads.

To avoid duplication with the application of requirements to covered service employees, FRA also proposes to exclude from the definition an employee who is a member of a train and engine crew assigned to perform tests or inspections on railroad rolling equipment that is part of a train or yard movement the employee has been called to operate.

Notably, by focusing the definition of MECH employee on the testing and inspection of railroad rolling equipment required by FRA regulation, employees who only repair railroad rolling equipment are specifically excluded from the definition.

FRA also makes clear that a MECH employee would not include any individual involved only in the original manufacturing, or in testing or inspection of railroad rolling equipment or its components on the manufacturer's behalf, and who does not perform any FRA-mandated final tests or inspections on behalf of a railroad. However, regardless of an individual's employer (original equipment manufacturer, railroad, or contractor or subcontractor to a railroad), an individual who performs an FRA-mandated inspection or test (*i.e.,* an inspection or test required by parts 215, 221, 229, 230, 232 or 238) of railroad rolling equipment or any of its components on a railroad's behalf would be considered a MECH employee. For example, if a company manufactures railroad rolling equipment and sells it to a railroad, but does not inspect or test that equipment once it is delivered to the railroad, the employees of that company involved in the equipment's manufacturing, product testing, and inspection prior to delivery would not be MECH employees for purposes of this rule. If, however, a company manufactures railroad rolling equipment (*e.g.,* a locomotive), sells that equipment to a railroad, and the railroad then contracts with the manufacturing company to perform any FRA-required tests or inspections (*e.g.,* the required 92-day periodic inspection and tests under § 229.23 of this chapter) the employees of the manufacturer performing those required tests and/or inspections would be considered MECH employees under this rule.

Regulated Employee

Currently, this definition includes a covered service employee or MOW employee who performs regulated service for an entity subject to the requirements of this part. FRA would expand this definition to include a MECH employee (as defined in this section) who performs regulated service (as defined in this section).

Regulated Service

Currently, ''regulated service'' means activities a covered service employee or MOW employee performs that makes such an employee subject to this part. FRA would expand this definition to

include activities performed by a MECH employee (as defined in this section).

Rolling Equipment

FRA proposes to add a definition of railroad rolling equipment as locomotives, railroad cars, and one or more locomotives coupled to one or more cars, based on the definition of rolling equipment provided in FRA's Railroad Operating Practices regulation (49 CFR 218.5).

Side Collision

The term ''side collision'' is currently defined to mean ''a collision at a turnout where one consist strikes the side of another consist.'' FRA is proposing to clarify that the term also includes collisions at switches or highway-rail grade crossings. FRA intends this proposed revision as a clarification only and does not believe the proposed revision is a substantive change from the existing definition.

*Section 219.10 Penalties*

FRA proposes to substitute the term ''regulated employee'' for ''employee'' to clarify that this section would apply to MOW, MECH, and covered service employees.

*Section 219.11 General Conditions for Chemical Tests*

Paragraph (g)

As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves.

*Section 219.23 Railroad Policies*

This section sets forth requirements for a railroad's Federal alcohol and drug testing policy, including requirements for railroads to provide employees educational materials explaining the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements.

Paragraph (a)

FRA would substitute the term ''regulated employee'' for ''employee,'' to clarify that the requirements of this section apply to MOW, MECH, and covered service employees.

Paragraph (c)

FRA proposes to revise paragraph (c)(2) to require railroads to make hard copies of the required educational materials in this section available to each MECH employee for a minimum of three years after the effective date of the final rule. When FRA added MOW employees to the scope of part 219, it required railroads to make the same hard copy distribution to those employees for the same three-year period to introduce them to part 219. Because that three-year period for MOW employees will end after June 12, 2020, existing paragraph (c)(2) will become unnecessary. FRA is therefore proposing to revise paragraph (c)(2) to address the addition of MECH employees and remove the reference to MOW employees.

Paragraph (d)(2)

FRA would amend this paragraph to identify specifically MECH employees as subject to the provisions in this part.

*Subpart C—Post-Accident Toxicological Testing*

*Section 219.203 Responsibilities of Railroads and Employees*

Paragraph (a)

As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves. FRA would remove ''and appendix C to this part'' at the end of this paragraph.

Paragraph (d)

Currently, if a railroad does not complete specimen collection within four hours of a PAT testing event, the railroad must notify the FRA Drug and Alcohol Program Manager and submit a concise written explanation for the delay within 30 days after the expiration of the month during which the accident or incident occurred. FRA is proposing to remove the requirement to provide a written explanation for the delay. FRA has found that the immediate, telephonic notification and related discussion between the railroad and FRA about the testing provide sufficient information to explain the testing delay. Further, § 219.209(b) would continue to require each railroad to provide both immediate, telephonic notification and a follow-up, written report to FRA when, for whatever reason, a specimen cannot be collected and provided to FRA as required by this subpart.

*Section 219.205 Specimen Collection and Handling*

This section contains several references to both appendices B and C. As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves. FRA is proposing to remove references to these appendices in paragraphs (a), (c)(1), (c)(2), (d), and (e).

*Section 219.206 FRA Access to Breath Test Results*

This section contains a reference to appendix C. As mentioned above, FRA is proposing to remove references to appendix C throughout the rule, along with the appendix itself.

*Section 219.207 Fatality*

This section contains the requirements for PAT testing in the event of an employee fatality in an accident or incident described in § 219.101.

Paragraph (c)

Paragraph (c) lists the individuals who are authorized to collect post-mortem body fluid and tissue samples from a deceased employee for FRA PAT testing. FRA proposes to remove ''Aviation Medical Examiners'' (AMEs) from the list of authorized professionals. AMEs appointed by the FAA primarily conduct airman medical examinations to support FAA medical certification requirements. In selecting an AME, the Federal Air Surgeon or an authorized representative, considers a number of factors regarding the applicant's medical qualifications but does not specifically consider whether the applicant has post-mortem expertise or expertise in collecting samples from fatally injured persons, unlike the other professionals listed in this paragraph, namely, coroners, medical examiners, and pathologists.[12]

Paragraph (d)

This section contains a reference to appendix C. As mentioned above, FRA is proposing to remove references to appendix C throughout the rule, along with the appendix itself.

*Section 219.211 Analysis and Follow-Up*

In addition to allowing reports and requests to be submitted to FRA by email as well as hard copy, FRA would simplify and clarify the language in this section. No substantive changes are intended other than the proposed amendments discussed below.

Paragraph (a)

This section contains a reference to appendix B. As mentioned above, FRA is proposing to remove references to appendix B throughout the rule, along with the appendix itself. FRA proposes to remove the reference to appendix B in this paragraph and make conforming changes.

[12] *See* 14 CFR 183.11(a); FAA Order 8000.95, Vol. 2, Ch. 2, para. 3.

Paragraph (c)

With regard to surviving employees, existing paragraph (c) requires a PAT test reported as positive for alcohol or a controlled substance to be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. Currently, this paragraph requires the MRO to report the results of each review ''in writing'' to FRA's Associate Administrator for Railroad Safety and specifies that the envelope in which each report is provided must be marked as confidential. As proposed, FRA would allow an MRO to submit the report either by hard copy to FRA's Drug and Alcohol Program Manager, or by email to an email box specifically set up for receipt of MRO reports (*FRA-MROletters.email@dot.gov*). Access to this firewall-protected email box would be limited to FRA headquarters drug and alcohol staff.

Paragraph (e)

Currently, an employee may submit a response by hard copy to the FRA Drug and Alcohol Program Manager within 45 days of receipt of his or her PAT test results prior to the preparation of any final report of investigation concerning the accident or incident. Within the 45-day limit, FRA would also allow an employee to email the response to *FRA-DrugAlcoholProgram.email@dot.gov.*

Paragraph (i)

Currently, an employee may request a retest of his or her PAT test specimen within 60 days of receipt of the applicable toxicology report. FRA would allow an employee to submit a request for a retest either by hard copy to the FRA Drug and Alcohol Program Manager or by email to *FRA-DrugAlcoholProgram.email@dot.gov.* The employee's request would still have to be submitted within the 60-day time limit and specify the railroad, accident date, and location.

FRA is also proposing to conform this paragraph to reflect FRA's standard procedures for handling employee requests for retests of PAT testing specimens. FRA's PAT testing program pre-dates DOT's Workplace Testing Procedures (49 CFR part 40), is excepted from its requirements, and tests for more substances and specimen types than other DOT tests conducted under part 40.[13] FRA post-accident testing tests blood, as well as urine and breath specimens, from surviving employees, and vitreous fluid, tissue, and spinal fluid specimens, from fatally-injured employees.

Currently, paragraph (i) authorizes a PAT testing retest to be performed by FRA's PAT laboratory or by a different laboratory certified by the Department of Health and Human Services (HHS). FRA proposes to remove the language authorizing an HHS-certified laboratory to conduct a PAT retest, because HHS certification only qualifies a laboratory to conduct part 40 urine tests. A referee laboratory must, however, have the capacity to test the same type of post-accident specimen type(s) for the same analyte(s) identified in the employee's test result.

FRA would also make several clarifying changes to conform this paragraph to its PAT testing procedures. FRA would change the term ''split specimen'' to ''specimen,'' because FRA does not collect split specimens for PAT testing. When an employee requests a PAT retest, FRA sends an aliquot of the employee's PAT testing specimen to the referee laboratory for retesting. FRA also proposes to replace the term ''compound'' with the more specific term ''analyte,'' and to replace the term ''fluid'' with ''specimen,'' as FRA PAT testing may test specimens that are not fluids.[14] To address the potential for some analytes to deteriorate during storage, FRA currently states that it will report and consider corroborative of the original PAT test result, a retest result that detects levels of the compound that are ''technically appropriate.'' For greater precision, FRA would amend this paragraph to state that a retest would corroborate a PAT test result if the retest's result is above the laboratory's Limit of Detection (LOD).[15] Finally, FRA would remove the sentence stating that the employee bears the costs of the retest, because historically FRA has paid these costs.

*Subpart E—Reasonable Cause Testing*

*Section 219.403 Requirements for Reasonable Cause Testing*

This section authorizes railroads to conduct FRA reasonable cause testing as a result of a regulated employee's involvement in certain accidents or incidents, or a regulated employee's direct involvement in certain rule violations or ''other errors.'' FRA proposes revisions to the introductory paragraph of this section to make clear that for reasonable cause testing based on a rule violation, a railroad that elects to test under FRA authority may only use rule violations listed in paragraph (b) as bases for testing.

Paragraph (b)

Existing paragraph (b) sets forth the rule violations that may constitute reasonable cause for the administration of alcohol and/or drug tests under this part. FRA proposes to remove ''or other errors'' from this paragraph to clarify that a railroad that has chosen to conduct reasonable cause testing for rule violations under FRA authority may do so only for a rule violation specified in paragraph (b).

FRA would also expand the list of rule violations in paragraph (b) by adding rule violations involving common mechanical activities such as setting derails, performing brake tests, and initiating appropriate blue flag protection. In addition, FRA would add a rule violation for positive train control (PTC) enforcement to address PTC requirements that became applicable after the publication of the MOW rule.

Specifically, the additional rule violations would be:

- Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction, or other directive with respect to movement of railroad on-track equipment that involves a failure to take appropriate action, resulting in the enforcement of a PTC system;
- Failure to comply with blue signal protection of workers in accordance with § 218.23 through § 218.30 of this chapter;
- Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;
- Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or
- Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

*Subpart F—Pre-Employment Drug Tests*

*Section 219.501 Pre-Employment Drug Testing*

Paragraph (e)

FRA is proposing to clarify that: (1) Covered employees performing regulated service for small railroads are exempted from pre-employment drug testing only if they were performing regulated service for the railroad before June 12, 2017; and (2) MOW employees

[13] 49 CFR 40.1(c).

[14] *See* § 219.11(f).

[15] *See* § 40.3.

are exempted from pre-employment drug testing only if they were performing ''regulated service'' for a railroad before June 12, 2017, and not just ''duties'' that may not have qualified as ''regulated service.'' Both clarifying amendments are consistent with discussion in the MOW final rule preamble, which explained that FRA was exempting employees who, before June 12, 2017, were performing MOW activities for a railroad or covered service for a small railroad.[16]

FRA is also proposing to exempt from pre-employment drug testing MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before (EFFECTIVE DATE OF FINAL RULE).

An exempted employee would be required to have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and after (EFFECTIVE DATE OF FINAL RULE) for MECH employees.

Paragraph (f)

To clarify how the proposed revisions in this section fit with the existing requirements of part 40, as also discussed in II.D above, FRA proposes to add paragraph (f) to clarify that § 40.25 of DOT's Workplace Testing Procedures (49 CFR part 40) applies to a MOW or MECH employee who was or would be exempted from FRA pre-employment drug testing. To comply with § 40.25, a railroad must still conduct a drug and alcohol records check of an exempted MOW or MECH employee's previous two years of employment within 30 days of when the employee performs regulated service for the first time. FRA does not intend this as a substantive change to the current requirement and is proposing this revision merely as a clarification of existing requirements.

*Subpart G—Random Drug and Alcohol Testing Programs*

*Section 219.605 Submission and Approval of Random Testing Plans*

Paragraph (a)

Existing paragraph (a) requires railroads to submit random testing plans to FRA in writing for FRA approval. FRA would allow a railroad to submit its random testing plan by email or letter. A railroad that chooses to submit its random testing plan by email should send it to the FRA Drug and Alcohol Program Manager at *FRA-DrugAlcoholProgram.email@dot.gov.* Regardless of the manner of submission, the plan must include the name of the railroad or contractor in the subject line.

Paragraph (e)

FRA proposes to amend this paragraph to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service or MOW activities. Accordingly, each railroad or contractor or subcontractor to a railroad must submit for FRA approval or acceptance a random testing plan ensuring that each MECH employee reasonably anticipates that he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing MECH activities. FRA has developed model random testing plans for MOW employees and contractors that could also serve as templates for MECH employees and contractors.

*Section 219.607 Requirements for Random Testing Plans*

Paragraph (c)

FRA proposes to revise paragraph (c) of this section to reflect the application of railroad random testing plans to MECH employees. Specifically, new paragraph (c)(3) would require railroad random testing plans to identify the total number of mechanical employees, including mechanical contractor employees and volunteers. Existing paragraph (c)(3) would be redesignated as paragraph (c)(4), and the remainder of paragraph (c) would be redesignated in conformance. FRA is also proposing minor clarifications to newly redesignated paragraphs (c)(7), (9) and (14) (existing paragraphs (c)(6), (8), and (13)).

*Section 219.615 Random Testing Collections*

Paragraph (e)

FRA proposes to revise paragraph (e)(3) to state that a railroad must inform ''each regulated employee'' that he or she has been selected for random testing at the time the employee is notified—rather than inform ''an regulated employee,'' as paragraph (e)(3) currently reads. FRA does not intend this as a substantive change to the current requirement and is proposing this revision merely as a clarification and grammatical correction of an existing requirement.

*Section 219.617 Participation in Random Alcohol and Drug Testing*

Paragraph (a)

FRA proposes to substitute the term ''regulated employee'' for ''employee'' in paragraph (a)(3), to clarify that the requirements of this section would apply to MOW, MECH, and covered service employees.

*Section 219.625 FRA Administrator's Determination of Random Alcohol and Drug Testing Rates*

Paragraph (c)(1)

As stated above, FRA is proposing to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service. Currently, this paragraph authorizes the Administrator to amend the minimum annual random testing rates, which are initially set at 50 percent for drugs and 25 percent for alcohol, for a new category of regulated employee after the compilation of 18 months of Management Information System (MIS) data. FRA found, however, that MOW contractors were still submitting random testing plans for its approval 18 months after the effective date of the MOW rule. To allow sufficient time for the implementation of random testing by MECH contractors, FRA is proposing to revise this paragraph to require two consecutive calendar years of MIS data before the initial minimum annual random testing rates for regulated employees could be raised or lowered. This would be consistent with the MIS data requirements that FRA had set for adjustment of the minimum annual random testing rates for covered employees.

*Subpart I—Annual Report*

*Section 219.800 Annual Reports*

Paragraph (a)

A railroad required to file an MIS report must summarize both its alcohol misuse and drug abuse results for the previous calendar year. As a clarifying change, FRA would re-insert ''and drug abuse,'' which had been inadvertently omitted from this paragraph, to state that the summary includes both alcohol misuse and drug abuse information.

Paragraph (f)

FRA would revise this paragraph to require a railroad to submit its annual MIS report with separate sections for its covered service employees, MOW employees, and MECH employees.

[16] 81 FR 37911 (June 10, 2016).

Paragraph (g)

As noted in the discussion of § 219.3 above, for ease of reference, FRA would move § 219.3(b)'s annual MIS reporting requirements for contractors to this subpart to consolidate and clarify its railroad and contractor MIS reporting requirements.

Appendices B and C to Part 219

As discussed above in the Executive Summary, FRA is proposing to remove appendices B and C to this part, because these appendices duplicate information that can be found in FRA's PAT testing shipping kits or on the FRA website and post-accident testing app. For ease of reference, each FRA PAT testing shipping kit includes the address of FRA's PAT testing laboratory, and each FRA fatality PAT testing shipping kit contains instructions for the post-mortem collection of body fluid and tissue specimens.

## IV. Regulatory Impact and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This proposed rule is a non-significant regulatory action within the meaning of Executive Order 12866 (E.O. 12866) and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. FRA made this determination by finding that this proposed regulatory action would not exceed the $100 million annual threshold defined by E.O. 12866. Details on the estimated cost savings of this proposed rule can be found in the proposed rule's Regulatory Evaluation, which FRA has prepared and placed in the docket (FRA–2019–0071). The Regulatory Evaluation details the estimated costs and benefits of those entities who are expected to be impacted by the rule, are likely to see over a 10-year period.

FRA is proposing to expand the definition of regulated employee to include mechanical employees in part 219, as mandated by section 8102 of the Support Act.[17] The proposed rule also includes non-quantified miscellaneous amendments that would reduce reporting burdens, enhance a railroad's authority to conduct reasonable cause testing, and add clarity to part 219.

The proposed rule generates costs related to provisions on random testing, reasonable cause/reasonable suspicion testing, pre-employment drug testing, peer support, and co-worker referral policies and reporting. As shown in Table ES.1, over the 10-year period of analysis the proposed rule would result in a total discounted cost of $13.9 million (PV 7%).

TABLE ES.1—TOTAL COSTS

| Costs | Costs ($) | | | Annualized ($) | |
|---|---|---|---|---|---|
| | Undiscounted | PV 3% | PV 7% | PV 3% | PV 7% |
| Pre-employment testing | 2,653,000 | 2,331,000 | 1,994,000 | 273,000 | 284,000 |
| Random testing | 13,111,000 | 11,813,000 | 10,438,000 | 1,385,000 | 1,486,000 |
| Reasonable cause/suspicion testing | 465,000 | 409,000 | 350,000 | 48,000 | 50,000 |
| Government administrative | 1,525,000 | 1,340,000 | 1,146,000 | 157,000 | 134,000 |
| Total costs | 17,754,000 | 15,893,000 | 13,928,000 | 1,863,000 | 1,954,000 |

The benefits of the proposed rule would come from reducing the number of mechanical employees who have a substance use disorder (SUD). FRA determined that testing programs would provide a deterrent effect, which would provide a reduction in the number of existing mechanical employees with an SUD. The deterrent effect would induce mechanical employees with an SUD to self-correct their behavior and no longer misuse alcohol or abuse drugs. Pre-employment drug testing would prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing would allow railroads to identify mechanical employees with SUDs so that they can enter rehabilitation.

Over a 10-year period of analysis, this analysis estimates the proposed rule's benefit by multiplying the reduction in the number of employee work years that mechanical employees with an SUD are employed (21,977 employee work years) by the annual cost of having a mechanical employee with a SUD ($3,200) on the payroll. As shown in Table ES.2, the proposed rule would result in total benefits of $52.8 million (PV 7%).

TABLE ES.2—TOTAL BENEFITS

| Benefits | Benefits ($) | | | Annualized ($) | |
|---|---|---|---|---|---|
| | Undiscounted | PV 3% | PV 7% | PV 3% | PV 7% |
| Deterrent effect | 63,904,000 | 56,147,000 | 48,025,000 | 6,582,000 | 6,838,000 |
| Pre-employment | 2,365,000 | 2,050,000 | 1,721,000 | 240,000 | 245,000 |
| Random testing | 3,651,000 | 3,237,000 | 2,797,000 | 379,000 | 398,000 |
| Reasonable cause/suspicion | 406,000 | 353,000 | 296,000 | 41,000 | 42,000 |
| Total benefits | 70,326,000 | 61,787,000 | 52,839,000 | 7,242,000 | 7,523,000 |

### *B. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980[18] and E.O. 13272[19] require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

[17] Public Law 115–271.

[18] 5 U.S.C. 601 *et seq.*

[19] 67 FR 53461 (Aug. 16, 2020).

FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA seeks comment on the potential small business impacts of the requirements in this NPRM. FRA prepared an IRFA, which is included as an appendix to the accompanying Regulatory Evaluation and available in the docket for the rulemaking (FRA–2019–0071), to aid the public in commenting on the potential small business impacts of the requirements in this NPRM.

*C. Paperwork Reduction Act*

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.[20] The sections that contain the new information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

| CFR section/subject[21] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent[22] |
|---|---|---|---|---|---|
| 219.4—Petition for recognition of a foreign railroad's workplace testing program. | 1 railroad | 1 petition | 40 hours | 40 | $3,040 |
| —Comments on petitions | 1 railroad | 2 comments + 2 copies. | 15 minutes + 15 minutes. | 1 | 76 |
| 219.7—Waivers | 734 railroads[23] | 3 waiver letters | 90 minutes | 5 | 380 |
| 219.23(a)—Notification to employees for testing. | 171,410 employees[24]. | 75,154 notices | 3 seconds + 30 seconds. | 204 | 15,504 |
| 219.12(d)—RR Documentation on need to place employee on duty for follow-up tests. | 734 railroads | 6 documents | 30 minutes | 3 | 228 |
| 219.23(c) and (e)—Educational materials | 734 railroads | 744 modified/revised educational documents. | 1 hour | 744 | 56,544 |
| —Copies of educational materials to employees. | 171,410 employees | 22,901 copies of educational material documents. | 2 minutes | 763 | 57,988 |
| 219.25(a)—Previous employer drug and alcohol checks—Employee testing records from previous employers and employee release of information (49 CFR Part 40.25(a) and (f)). | 25,410 MECH employees. | 10,164 reports | 8 minutes | 1,355 | 102,980 |
| 219.104(b)—Removal of employee from regulated service—Verbal notice + follow-up written letter. | 734 railroads | 550 verbal notices + 550 letters. | 30 seconds + 2 minutes. | 23 | 1,748 |
| 219.105—RR's duty to prevent violations—Documents provided to FRA after agency request regarding RR's alcohol and/or drug use education/prevention program. | 734 railroads | 3 document copies | 5 minutes | .3 | 23 |
| —RR Supervisor Rule G observations and records of regulated employees. | 734 railroads | 342,820 observation records. | 2 seconds | 190 | 14,440 |
| 219.201(c)—Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing. | 734 railroads | 2 reports | 30 minutes | 1 | 76 |
| 219.203/207—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours. | 734 railroads | 80 notifications | 2 minutes | 2.7 | 205 |
| —Recall of employees for testing and Narrative Report Completion. | 734 railroads | 4 reports | 30 minutes | 2 | 152 |
| —RR reference to part 219 requirements and FRA's post-accident toxicological kit instructions in seeking to obtain facility cooperation. | 734 railroads | 98 references | 5 minutes | 8 | 608 |
| —RR notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent. | 734 railroads | 2 phone calls | 10 minutes | .3 | 23 |
| —RR notification to local authority | 734 railroads | 5 phone calls | 10 minutes | 0.8 | 61 |
| 219.205—Post Accident Toxicological Testing Forms—Completion of FRA F 6180.73. | 734 railroads | 105 forms | 10 minutes | 18 | 1,368 |
| —Specimen handling/collection—Completion of Form FRA F 6180.74 by train crew members after accident. | 171,410 employees | 223 forms | 15 minutes | 56 | 4,256 |
| —Completion of Form FRA 6180.75 | 734 railroads | 7 forms | 20 minutes | 2 | 152 |
| —Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery. | 734 railroads | 105 chain of custody documents. | 2 minutes | 4 | 304 |

[20] 44 U.S.C. 3501 *et seq.*

| CFR section/subject [21] | Respondent universe | Total annual responses | Average time per response | Total annual burden hours | Total annual dollar cost equivalent [22] |
|---|---|---|---|---|---|
| —RR/medical facility record of kit error | 734 railroads | 10 written records | 2 minutes | .3 | 23 |
| 219.209(a)—Notification to NRC and FRA of accident/incident where samples were obtained. | 734 railroads | 105 phone reports | 2 minutes | 4 | 304 |
| 219.211(b)—Results of post-accident toxicological testing to RR MRO and RR employee. | 734 railroads | 7 reports | 15 minutes | 2 | 152 |
| —MRO report to FR of positive test for alcohol/drugs of surviving employee. | 734 railroads | 6 reports | 15 minutes | 2 | 152 |
| 219.303—RR written documentation of observed signs/symptoms for reasonable suspicion determination. | 734 railroads | 34 written documents. | 5 minutes | 3 | 228 |
| 219.305—RR written record stating reasons test was not promptly administered. | 734 railroads | 11 records | 2 minutes | .4 | 30 |
| 219.405—RR documentation describing basis of reasonable cause testing. | 734 railroads | 2,365 written documents. | 5 minutes | 197 | 14,972 |
| 219.407(b)—Prompt specimen collection time limitation exceeded—Record. | 734 railroads | 17 records | 15 minutes | 4 | 304 |
| 219.501(e)—RR documentation of negative pre-employment drug tests. | 734 railroads | 6,500 lists | 30 seconds | 54 | 4,104 |
| 219.605(a)—Submission of random testing plan: New RRs. | 734 railroads | 12 plans | 1 hour | 12 | 912 |
| —Amendments to currently-approved FRA random testing plan. | 734 railroads | 450 amendments | 1 hour | 450 | 34,200 |
| —Resubmitted random testing plans after notice of FRA disapproval of plan or amendment. | 734 railroads | 57 resubmitted plans. | 30 minutes | 29 | 2,204 |
| —Non-substantive amendment to an approved plan. | 734 railroads | 300 amendments | 15 minutes | 75 | 5,700 |
| 219.615—Incomplete random testing collections—Documentation. | 734 railroads | 2,333 documents | 30 seconds | 19 | 1,444 |
| 219.617—Employee Exclusion from random alcohol/drug testing after providing verifiable evidence from credible outside professional. | 734 railroads | 6 documents | 1 hour | 6 | 456 |
| 219.623—Random testing records | 734 railroads | 52,153 records | 1 minutes | 869 | 66,044 |
| 219.800(b)—Annual reports—Management Information System (MIS) form for MECH employees (49 CFR Part 40.26—MIS form submission). | 38 railroads + 17 contractors | 55 MIS reports | 90 minutes | 83 | 6,308 |
| 219.1001—Co-worker referral of employee who is unsafe to work with/in violation of Part 219 or railroad's drug/alcohol rules. | 734 railroads | 24 referrals | 5 minutes | 2 | 152 |
| Total | 734 railroads + 171,410 employees. | 517,976 responses | N/A | 5,235 | 397,845 |

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information.

Under 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

For information, a copy of the paperwork package submitted to OMB, or to submit comments on the collection of information requirements, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division at *Hodan.Wells@dot.gov.*

OMB must make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

[21] The proposed burdens under §§ 219.25(a) and 219.800(b), once approved, will fall under DOT's Part 40 information collection (OMB No. 2105–0529).

[22] Throughout the tables in this document, the dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges. Also, totals may not add due to rounding.

[23] For purposes of this table, the respondent universe of 734 railroads represents the estimated 30 contractor companies that would be newly subject to part 219 because they perform MECH activities on behalf of the 734 railroads.

[24] The respondent universe of 171,410 employees includes an estimated 25,410 MECH employees who would be newly subject to part 219.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule, and will announce the OMB control number, when assigned, by separate notice in the **Federal Register**.

*D. Environmental Impact*

Consistent with the National Environmental Policy Act [25] (NEPA), the Council of Environmental Quality's NEPA implementing regulations,[26] and FRA's NEPA implementing regulations,[27] FRA has evaluated this proposed rule and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.[28] Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), ''[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

The purpose of this rulemaking is to propose expanding the scope of FRA's alcohol and drug regulation to cover MECH employees who test or inspect railroad rolling equipment. This proposed rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. Instead, the proposed rule would likely result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.[29] FRA has concluded that no such unusual circumstances exist with respect to this proposed regulation and the proposal meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.[30] FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).[31]

*E. Executive Order 12898 (Environmental Justice)*

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) [32] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

*F. Federalism Implications*

Executive Order 13132, ''Federalism,'' [33] requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, an Agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed the proposed rule under the principles and criteria contained in Executive Order 13132. This proposed rule complies with a statutory mandate and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that the proposed rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 would not apply. However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this proposed rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement for this proposed rule is not required.

*G. Unfunded Mandates Reform Act of 1995*

Pursuant to section 201 of the Unfunded Mandates Reform Act of

[25] 42 U.S.C. 4321 *et seq.*

[26] 40 CFR parts 1500–1508.

[27] 23 CFR part 771.

[28] *See* 40 CFR 1508.4.

[29] 23 CFR 771.116(b).

[30] *See* 16 U.S.C. 470.

[31] *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

[32] 91 FR 27534 (May 10, 2012).

[33] 64 FR 43255 (Aug. 10, 1999),

1995,[34] each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act [35] further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

*H. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' [36] FRA has evaluated this proposed rule in accordance with Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of the Executive Order.

Executive Order 13783, ''Promoting Energy Independence and Economic Growth,'' requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.[37] FRA determined this proposed rule would not burden the development or use of domestically produced energy resources.

*I. Tribal Consultation*

FRA has evaluated this proposed rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. This proposed rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

*J. Privacy Act Statement*

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, FRA encourages commenters to provide their names, or the name of their organization; although submission of names is optional. Whether or not commenters identify themselves, FRA will fully consider all timely comments. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

**List of Subjects in 49 CFR Part 219**

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons stated above, FRA proposes to amend part 219 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

## PART 219—CONTROL OF ALCOHOL AND DRUG USE—[AMENDED]

■ 1. Revise the authority citation for part 219 to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Pub. L. 110–432, 122 Stat. 4889; Sec. 8108, Div. A, Pub. L. 115–271, 132 Stat. 3894; and 49 CFR 1.89.

### Subpart A—General

■ 2. In § 219.3, remove and reserve paragraph (b), and revise and republish paragraph (c) to read as follows:

**§ 219.3 Application.**

* * * * *

(b) [Reserved]

(c) *Small railroad exception.* (1) Subparts E, G, and K of this part do not apply to small railroads, and a small railroad may not perform the Federal requirements authorized by those subparts. For purposes of this part, a small railroad means a railroad that:

(i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW or MECH activities, as defined in § 219.5, does not count towards a railroad's total number of covered service employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW or MECH activities exclusively for small railroads also qualifies for the small railroad exception (*i.e.,* is excepted from the requirements of subparts E, G, and K of this part). A contractor is not excepted if it performs MOW or MECH activities for at least one railroad that is required to be in full compliance with this part.

(4) If a contractor is subject to all of part 219 of this chapter because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

■ 3. In § 219.5, add definitions of ''Mechanical employee or MECH employee'' and ''Rolling equipment,'' and revise the definitions of ''Category of regulated employee,'' ''Employee,'' ''Regulated employee,'' ''Regulated service,'' and ''Side collision'' to read in alphabetical order as follows:

**§ 219.5 Definitions.**

* * * * *

*Category of regulated employee* means a broad class of covered service, maintenance-of-way, or mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, or covered service and mechanical activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising the majority of his or her regulated service.

* * * * *

*Employee* means any individual, (including a volunteer or a probationary employee) performing activities for a railroad, a contractor to a railroad, or a subcontractor to a railroad.

* * * * *

*Mechanical employee* or *MECH employee* means—

[34] Public Law 104–4, 2 U.S.C. 1531.

[35] 2 U.S.C. 1532.

[36] 66 FR 28355 (May 22, 2001).

[37] 82 FR 16093 (Mar. 31, 2017).

(1) Any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components, except for:

(i) An employee who is a member of a train crew assigned to test or inspect railroad rolling equipment that is part of a train or yard movement the employee has been called to operate; or

(ii) An employee who only performs one or more of the following duties:

(A) Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;

(B) Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;

(C) Checking lading for pilferage or vandalism; or

(D) Loading, unloading, or shifting car loads.

(2) An employee who only performs work related to the original manufacturing, testing, or inspection of railroad rolling equipment, or its components, on the manufacturer's behalf, is not a mechanical employee or MECH employee.

* * * * *

*Regulated employee* means a covered service employee, maintenance-of-way employee, or mechanical employee (as defined in this section) who performs regulated service for a railroad subject to the requirements of this part.

*Regulated service* means activities a covered service employee, maintenance-of-way employee, or mechanical employee (as defined in this section) performs that makes such an employee subject to this part.

* * * * *

*Rolling equipment* means locomotives, railroad cars, and one or more locomotives coupled to one or more railroad cars.

* * * * *

*Side collision* means a collision when one consist strikes the side of another consist at a turnout, including a collision at a switch or a highway-rail crossing at grade.

* * * * *

■ 4. Revise and republish § 219.10 to read as follows:

**§ 219.10 Penalties.**

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $892 and not more than $29,192 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $116,766 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, *e.g.,* § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of a regulated employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See FRA's website at *www.fra.dot.gov* for a statement of agency civil penalty policy.

■ 5. In § 219.11, revise paragraph (g) to read as follows:

**§ 219.11 General conditions for chemical tests.**

* * * * *

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C.

* * * * *

■ 6. In § 219.23, revise the first sentence of paragraph (a) introductory text, and revise paragraphs (c)(2) and (d)(2) to read as follows:

**§ 219.23 Railroad policies.**

(a) Whenever a breath or body fluid test is required of a regulated employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority.

* * *

* * * * *

(c) * * *

(2) For a minimum of three years after (EFFECTIVE DATE OF FINAL RULE), also ensuring that a hard copy of these materials is provided to each mechanical employee.

(d) * * *

(2) The specific classes or crafts of employee who are subject to the provisions of this part, such as engineers, conductors, MOW employees, MECH employees, signal maintainers, or train dispatchers;

* * * * *

## Subpart C—Post-Accident Toxicological Testing

■ 7. In § 219.203, revise paragraph (a) introductory text and paragraph (d)(1) to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part.

* * * * *

(d) * * *

(1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202–493–6313 and provide detailed information regarding the failure (either verbally or via a voicemail).

* * * * *

■ 8. In § 219.205, revise paragraphs (a) and (c)(1), the first sentence of paragraph (c)(2), paragraph (d), and the first sentence of paragraph (e) to read as follows:

**§ 219.205 Specimen collection and handling.**

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart and the instructions provided inside the FRA post-accident toxicological shipping kit.

* * * * *

(c) * * *

(1) FRA makes available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be

placed in the shipping kit and prepared for shipment according to the instructions provided in the kit.

(2) Standard shipping kits may be ordered by requesting an order form from FRA's Drug and Alcohol Program Manager at 202–493–6313. * * *

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to FRA's post-accident toxicological testing laboratory. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical facility to its delivery for transportation.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than FRA's post-accident toxicology testing laboratory may open it. * * *

■ 9. Revise § 219.206 to read as follows:

**§ 219.206 FRA access to breath test results.**

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart.

■ 10. In § 219.207, revise paragraphs (c) and (d) to read as follows:

**§ 219.207 Fatality.**

* * * * *

(c) A coroner, medical examiner, pathologist, or other qualified professional is authorized to remove the required body fluid and tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and in so acting, such person is the delegate of the FRA Administrator under sections 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 71 of Title 28, United States Code). A qualified professional may rely upon the representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) The instructions included inside the shipping kits specify body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

■ 11. In § 219.211, revise paragraphs (a), (c), (e), and (i) to read as follows:

**§ 219.211 Analysis and follow-up.**

(a) Specimens are analyzed for alcohol, controlled substances, and non-controlled substances specified by FRA under protocols specified by FRA. These substances may be tested for in any form, whether naturally or synthetically derived. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

* * * * *

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance must be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The MRO must promptly report the results of each review by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed reports must be sent to *FRA-MROletters.email@dot.gov*. The report must reference the employing railroad, accident/incident date, and location; and state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the MRO may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the MRO's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

* * * * *

(e) An employee may respond within 45 days of receipt of his or her test results prior to the preparation of any final investigative report concerning the accident or incident by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed responses should be sent to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's response must state the accident date, railroad, and location; the position the employee held on the date of the accident/incident; and any information the employee requests be withheld from public disclosure. FRA will decide whether to honor the employee's request to withhold information.

* * * * *

(i) An employee may, within 60 days of receipt of the toxicology report, request a retest of his or her PAT testing specimen by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed requests must be sent to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's request must specify the railroad, accident date, and location. Upon receipt of the employee's request, FRA will identify and select a qualified referee laboratory that has available an appropriate, validated assay for the specimen type and analyte(s) declared positive. Because some analytes may deteriorate during storage, if the referee laboratory detects levels above its Limit of Detection (as defined in 49 CFR 40.3), FRA will report the retest result as corroborative of the original PAT test result.

## Subpart E—Reasonable Cause Testing

■ 12. In § 219.403, revise the introductory text, revise and republish paragraph (b)(1), revise paragraphs (b)(17) and (18), and add paragraphs (b)(19) through (22) to read as follows:

**§ 219.403 Requirements for reasonable cause testing.**

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart. For reasonable cause testing based on a rule violation as authorized in paragraph (b) of this section, a railroad that elects to test under FRA authority may only use the rule violations listed in paragraph (b) of this section as bases for reasonable cause testing.

* * * * *

(b) * * *

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable,

signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization;

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); or

(v) Failure to take appropriate action, resulting in the enforcement of a positive train control system.

* * * * *

(17) Improper use of individual train detection in a manual interlocking or control point;

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee;

(19) Failure to display blue signals in accordance with § 218.25 through § 218.30 of this chapter;

(20) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, or Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;

(21) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or

(22) Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

## Subpart F—Pre-Employment Tests

■ 13. In § 219.501, revise paragraph (e) and add paragraph (f) to read as follows:

### § 219.501 Pre-employment drug testing.

* * * * *

(e)(1) The pre-employment drug testing requirements of this section do not apply to:

(i) Covered service employees of railroads qualifying for the small railroad exception (see § 219.3(c)) who were performing regulated service for the qualifying railroad, or a contractor or subcontractor of a qualifying railroad, before June 12, 2017;

(ii) Maintenance-of-way employees who were performing regulated service for a railroad, or a contractor or subcontractor of a railroad, before June 12, 2017; or

(iii) MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before (Effective Date of Final Rule).

(2) An exempted employee under paragraph (e)(1) of this section must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and after (Effective Date of Final Rule) for MECH employees.

(f) A railroad, or contractor or subcontractor of a railroad, must comply with 49 CFR 40.25 by performing a records check on any of its MOW or MECH employees who have been exempted from pre-employment testing before the employee first performs regulated service. An employee may not perform regulated service after 30 days from the date on which the employee first performed regulated service, unless this information has been obtained or a good faith effort to obtain this information has been made and documented.

## Subpart G—Random Alcohol and Drug Testing Programs

■ 14. In § 219.605, revise and republish paragraph (a) and paragraph (e) to read as follows:

### § 219.605 Submission and approval of random testing plans.

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 to the FRA Drug and Alcohol Program Manager, at *FRA-DrugAlcoholProgram.email@dot.gov* or 1200 New Jersey Ave. SE, Washington, DC 20590. The submission must include the name of the railroad or contractor in the subject line. A railroad commencing start-up operations must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

* * * * *

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before (EFFECTIVE DATE OF FINAL RULE), unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.,* mechanical employees) for FRA approval at least 30 days before (EFFECTIVE DATE OF FINAL RULE).

■ 15. Revise § 219.607 by redesignating paragraphs (c)(3) through (14) as (c)(4) through (15), adding new paragraph (c)(3), and revising newly redesignated paragraphs (c)(7), (9), and (14) to read as follows:

### § 219.607 Requirements for random testing plans.

* * * * *

(c) * * *

(3) Total number of mechanical employees, including mechanical contractor employees and volunteers;

* * * * *

(7) Name, address, and contact information for any service providers, including the railroad's Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and Consortium/Third Party Administrators (C/TPAs) or collection site management companies. Individual collection sites do not have to be identified;

* * * * *

(9) Target random testing rates meeting or exceeding the minimum annual random testing rates;

* * * * *

(14) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad's FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active; and

* * * * *

■ 16. In § 219.615, revise the first sentence of paragraph (e)(3) to read as follows:

**§ 219.615 Random testing collections.**

* * * * *

(e) * * *

(3) A railroad must inform each regulated employee that he or she has been selected for random testing at the time the employee is notified. * * *

* * * * *

■ 17. In § 219.617, revise the first sentence of paragraph (a)(3) to read as follows:

**§ 219.617 Participation in random alcohol and drug testing.**

(a) * * *

(3) A railroad may excuse a regulated employee who has been notified of his or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (*e.g.,* birth, death, or medical emergency) supersedes the requirement to complete the test. * * *

* * * * *

■ 18. In § 219.625, revise paragraph (c)(1) to read as follows:

**§ 219.625 FRA Administrator's Determination of Random Alcohol and Drug Testing Rates**

* * * * *

(c) * * *

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least two consecutive calendar years of MIS data have been compiled for the category of regulated employee.

* * * * *

## Subpart I—Annual Report

■ 19. In § 219.800, revise the first sentence of paragraph (a) and paragraph (f), and add paragraph (g) to read as follows:

**§ 219.800 Annual reports.**

(a) Each railroad that has a total of 400,000 or more employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States), must submit to* FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse and drug abuse prevention program. * * *

* * * * *

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered service employees, MOW employees, and MECH employees.

(g)(1) This subpart does not apply to any contractor that performs regulated service exclusively for railroads with fewer than 400,000 total employee annual work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) When a contractor performs regulated service for at least one railroad with 400,000 or more total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, this subpart applies as follows:

(i) A railroad with 400,000 or more total employee annual work hours must comply with this subpart regarding any contractor employees it integrates into its own alcohol and drug program under this part; and

(ii) If a contractor establishes an independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with this subpart if it has 200 or more regulated employees.

## Appendix B to Part 219—[Removed]

■ 20. Remove appendix B to part 219.

## Appendix C to Part 219—[Removed]

■ 21. Remove appendix C to part 219.

Issued in Washington, DC

**Quintin C. Kendall,**

*Deputy Administrator.*

[FR Doc. 2020–25868 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Parts 223 and 226

**[Docket No.: 201228–0358]**

**RIN 0648–BJ65**

## Endangered and Threatened Species; Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal

**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 the Beringia distinct population segment (DPS) of the Pacific bearded seal subspecies *Erignathus barbatus nauticus* under the Endangered Species Act (ESA). The proposed designation comprises an area of marine habitat in the Bering, Chukchi, and Beaufort seas. We seek comments on all aspects of the proposed critical habitat designation and will consider information received before issuing a final designation.

**DATES:** Comments must be received by March 9, 2020. Public hearings on the proposed rule will be held in Alaska. The dates and times of these hearings will be provided in a subsequent **Federal Register** notice.

**ADDRESSES:** You may submit data, information, or comments on this document, identified by NOAA–NMFS–2020–0029, and on the associated Draft Impact Analysis Report (*i.e.,* report titled ''Draft RIR/ESA Section 4(b)(2) Preparatory Assessment/IRFA of Critical Habitat Designation for the Beringia Distinct Population Segment of the Bearded Seal'') by either of the following methods:

- *Electronic Submission:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0029,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: James Bruschi, P.O. Box 21668, Juneau, AK 99082–1668.

*Instructions:* NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the Draft Impact Analysis Report for this proposed rule and a complete list of references cited in this proposed rule are available on the Federal eRulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0029.*

**FOR FURTHER INFORMATION CONTACT:** Tammy Olson, NMFS Alaska Region, (907) 271–5006; Jon Kurland, NMFS

Alaska Region, (907) 586–7638; or Heather Austin, NMFS Office of Protected Resources, (301) 427–8422.

**SUPPLEMENTARY INFORMATION:** Section 3(5)(A) of the ESA defines critical habitat as (1) 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 essential to the conservation of the species and 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 by the Secretary of Commerce (Secretary) that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation is defined in section 3(3) of the ESA as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary (16 U.S.C. 1532(3)). Section 3(5)(C) of the ESA provides that, except 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. Also, by regulation, critical habitat shall not be designated within foreign countries or in other areas outside U.S. jurisdiction (50 CFR 424.12(g)).

Section 4(b)(2) of the ESA requires the Secretary 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. This section also grants the 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. However, the Secretary may not exclude areas if such exclusion will result in the extinction of the species (16 U.S.C. 1533(b)(2)).

Once critical habitat is designated, section 7(a)(2) of the ESA requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify that habitat (16 U.S.C. 1536(a)(2)). This requirement is additional to the section 7(a)(2) requirement that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of ESA-listed species. Specifying the geographic location of critical habitat also facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA. *See* 16 U.S.C. 1536(a)(1). Critical habitat requirements do not apply to citizens engaged in actions on private land that do not involve a Federal agency.

This proposed rule describes our proposed designation of critical habitat for the Beringia distinct population segment (DPS) of the Pacific bearded seal subspecies *Erignathus barbatus nauticus,* including supporting information on the distribution and habitat use of the Beringia DPS, and the methods used to develop the proposed designation.

## Background

On December 28, 2012, we published a final rule to list the Beringia DPS of the Pacific bearded seal subspecies as threatened under the ESA (77 FR 76740). Section 4(b)(6)(C) of the ESA requires the Secretary to designate critical habitat concurrently with making a determination to list a species as threatened or endangered unless it is not determinable at that time, in which case the Secretary may extend the deadline for this designation by one year. At the time of listing, we announced our intention to designate critical habitat for the Beringia DPS in a separate rulemaking, as it was not then determinable. Concurrently, we solicited information to assist us in (1) identifying the physical or biological features essential to the conservation of the Beringia DPS, and (2) assessing the economic consequences of designating critical habitat for this species.

Subsequently, on July 25, 2014, the listing of the Beringia DPS as a threatened species was vacated by the U.S. District Court for the District of Alaska (*Alaska Oil & Gas Ass'n* v. *Pritzker,* Case Nos. 4:13–cv–18–RRB, 4:13–cv–21–RRB, 4:13–cv–22–RRB, 2014 WL 3726121 (D. Alaska July 25, 2014)). This decision was reversed by the U.S. Court of Appeals for the Ninth Circuit on October 24, 2016 (*Alaska Oil & Gas Ass'n* v. *Ross,* 840 F.3d 671 (9th Cir. 2016), *cert. denied,* 138 S. Ct. 924 (2018)), and the listing was reinstated on February 22, 2017. On June 13, 2019, the Center for Biological Diversity filed a complaint in the U.S. District Court for the District of Alaska alleging that NMFS had failed to timely designate critical habitat for the Beringia DPS of the bearded seal. Under a court-approved stipulated settlement agreement between the parties (which was subsequently amended to extend the dates specified in the original order), NMFS agreed to submit a proposed determination concerning the designation of critical habitat for the Beringia DPS to the **Federal Register** by March 15, 2021, and (to the extent a proposed rule has been published) a final rule by March 15, 2022.

## Description and Natural History

The bearded seal is the largest of the northern ice-associated seals. Adults average 2.1 to 2.4 meters (m) in length and weigh up to 360 kilograms (Chapskii 1938, McLaren 1958, Johnson *et al.* 1966, Burns 1967, Benjaminsen 1973, Burns 1981). In general, bearded seals reach sexual maturity at ages 5 to 6 for females and 6 to 7 for males (McLaren 1958, Tikhomirov 1966, Burns 1967, Burns and Frost 1979, Smith 1981, Andersen *et al.* 1999). The life span of bearded seals is about 20 to 25 years (Kovacs 2002).

## General Seasonal Distribution and Habitat Use

Bearded seals of the Beringia DPS inhabit seasonally ice-covered waters of the Bering, Chukchi, Beaufort, and East Siberian seas. They primarily feed on organisms on or near the seafloor (benthic) that are more numerous in shallow water where light can reach the sea bottom. Thus, their effective habitat is generally restricted to areas where seasonal ice occurs over relatively shallow waters, typically less than 200 meters (m), where they can reach the ocean floor to forage (Burns and Frost 1979, Burns 1981, Nelson *et al.* 1984, Fedoseev 2000). Still, bearded seal dive depths have been recorded to greater than 488 m (Gjertz *et al.* 2000). Cameron *et al.* (2010) defined the core distribution of the bearded seal as those areas of known extent that are in water less than 500 m deep.

Sea ice provides bearded seals some protection from predators and serves as a platform out of the water for whelping and nursing of pups, pup maturation, and molting (shedding and regrowing hair and outer skin layers), as well as for resting (Cameron *et al.* 2010). Bearded seals can be found in a broad range of different ice types (Fay 1974, Burns and Frost 1979, Burns 1981, Nelson *et al.* 1984), but they favor drifting pack ice with natural openings and areas of open water, such as leads, fractures, and polynyas, for breathing, hauling out on the ice, and access to the water for foraging (Heptner *et al.* 1976, Burns and Frost 1979, Nelson *et al.* 1984, Kingsley *et al.* 1985, Cleator and Stirling 1990). Although bearded seals prefer sea ice with natural access to the water, observations indicate the seals are able to make breathing holes in thinner ice

(Burns 1967, Burns and Frost 1979, Burns 1981, Nelson *et al.* 1984). They tend to avoid areas of continuous, thick, landfast (shorefast) ice and are rarely seen in the vicinity of unbroken, heavy, drifting ice or large areas of multi-year ice (Heptner *et al.* 1976, Burns and Frost 1979, Nelson *et al.* 1984, Kingsley *et al.* 1985, Cleator and Stirling 1990).

Adult bearded seals have rarely been seen hauled out on land in Alaska (Burns 1981, Nelson 1981, Smith 1981). However, juvenile bearded seals have been observed hauled out on land along lagoons and rivers in some areas of Alaska, including at Nunivak Island (Huntington *et al.* 2017c), in Norton Bay (Huntington 2000, Huntington *et al.* 2015b, 2015a), on the Chukchi Sea coast near Shishmaref and Wainwright (Nelson 1981, Huntington *et al.* 2016a), and on sandy islands near Utqiaġvik (Cameron *et al.* 2010). Satellite tracking data also indicate that during the open-water period (July to October), tagged juvenile bearded seals sometimes hauled out on land in Kotzebue Sound and Norton Sound (Quakenbush *et al.* 2019). There is some evidence that bearded seals might not require the presence of sea ice for hauling out other than during the critical life history periods related to reproduction and molting. Some bearded seals tagged in Alaska have remained in the water for weeks or months at a time during the open-water period and into early winter (Frost *et al.* 2008, Boveng and Cameron 2013, Quakenbush *et al.* 2019).

The region that includes the Bering and Chukchi seas is the largest area of continuous habitat for bearded seals (Burns 1981, Nelson *et al.* 1984). The Bering-Chukchi Platform is a shallow intercontinental shelf that encompasses about half of the Bering Sea, spans the Bering Strait, and covers nearly all of the Chukchi Sea. Bearded seals can reach the bottom everywhere along the shallow shelf, so it provides them favorable foraging habitat (Burns 1967). The Bering and Chukchi seas are generally covered by sea ice in late winter and spring and are then mostly ice-free in late summer and fall, a process that helps to drive a seasonal pattern in the movements and distribution of bearded seals in this region (Johnson *et al.* 1966, Burns 1967, Heptner *et al.* 1976, Burns and Frost 1979, Burns 1981, Nelson *et al.* 1984). In spring, as the sea ice begins to melt, many of the bearded seals that overwintered in the Bering Sea migrate northward with the receding ice through the Bering Strait and into the Chukchi and Beaufort seas and spend the summer and early fall foraging in these waters, while an unknown proportion of these seals, in particular juveniles, may remain in the Bering Sea. Some bearded seals (largely juveniles), have been observed in small coastal bays, lagoons, and estuaries, near river mouths, and up some rivers, in particular during late summer and fall (Burns 1981, Nelson 1981, Huntington *et al.* 2015b, 2015c, 2015a, 2016a, 2016b, 2016c, Northwest Arctic Borough 2016, Huntington *et al.* 2017a, 2017c, 2017b, Quakenbush *et al.* 2019). As the ice forms in the fall and winter, many bearded seals move south with the advancing ice edge through the Bering Strait into the Bering Sea where they spend the winter (Burns 1967, Heptner *et al.* 1976, Burns and Frost 1979, Burns 1981). Bearded seal vocalizations were recorded throughout winter and spring in the northeastern Chukchi Sea and western Beaufort Sea, indicating that some bearded seals overwinter in these seas (Hannay *et al.* 2013, MacIntyre *et al.* 2013, Jones *et al.* 2014, MacIntyre *et al.* 2015, Frouin-Mouy *et al.* 2016). Intermittent coastal leads deep in the ice pack of these seas provide at least marginal habitat for low densities of females to whelp in the spring (Burns and Frost 1979, Cameron *et al.* 2010).

Of the bearded seals tagged in Alaska to date, few have been adults, and the majority were tagged in Norton Sound and Kotzebue Sound. Tracking data for most tagged seals have shown an overall pattern of movement northward in summer with receding sea ice and southward in fall as sea ice advances (Frost *et al.* 2008, Boveng and Cameron 2013, Breed *et al.* 2018, Cameron *et al.* 2018, Quakenbush *et al.* 2019). Quakenbush *et al.* (2019) found that the extent of these movements for seals tracked during their study depended on where the seals were tagged. Two juveniles tagged in the western Beaufort Sea did not travel south of ~70° N (in the Chukchi Sea), whereas juveniles tagged in Norton Sound made more extensive latitudinal movements (Quakenbush *et al.* 2019). Similarly, an adult male tagged in the western Beaufort Sea in the fall of 2019 remained there over winter (Alaska Department of Fish and Game and North Slope Borough, 2020, unpublished data).

*Reproduction*

During the winter and spring, pregnant female bearded seals find broken pack ice over shallow areas on which to whelp, nurse pups, and molt (Fay 1974, Heptner *et al.* 1976, Burns 1981, Lydersen and Kovacs 1999, Kovacs 2002). Females with pups are generally solitary, tending not to aggregate (Heptner *et al.* 1976, Kovacs *et al.* 1996). After giving birth on the ice, female bearded seals feed throughout the lactation period of about 24 days, continuously replenishing fat reserves lost while nursing pups (Holsvik 1998, Lydersen and Kovacs 1999, Krafft *et al.* 2000). Pups nurse on the ice (Lydersen *et al.* 1994, Lydersen and Kovacs 1999, Kovacs *et al.* 2019), and by the time they are a few days old, they spend half their time in the water (Lydersen *et al.* 1994, Gjertz *et al.* 2000, Watanabe *et al.* 2009). Pups develop diving, swimming, and foraging skills over the nursing period and beyond (Lydersen *et al.* 1994, Gjertz *et al.* 2000, Watanabe *et al.* 2009, Hamilton *et al.* 2019). In the Bering Sea, newborn pups have been observed from mid-March to early May (Cameron *et al.* 2010). A peak in births in the Bering Strait and central Chukchi Sea is estimated to occur in late April (Johnson *et al.* 1966, Tikhomirov 1966, Heptner *et al.* 1976, Burns 1981, Cameron *et al.* 2010).

Bearded seals vocalize intensively during the breeding season, which Cameron *et al.* (2010) estimated extends from April into June (Cameron *et al.* 2010). Passive acoustic monitoring studies in the northern Bering, Chukchi, and Beaufort seas off Alaska have recorded a variable progressive increase in bearded seal call activity over winter, with peak rates occurring from about mid-March or April to late June in the Chukchi and Beaufort seas (Hannay *et al.* 2013, MacIntyre *et al.* 2013, Jones *et al.* 2014, MacIntyre *et al.* 2015, Frouin-Mouy *et al.* 2016), and from about mid-March to the middle or end of May in the northern Bering Sea (MacIntyre *et al.* 2015, Chou *et al.* 2019). In general, the predominant calls produced by males during the breeding season are frequency-modulated vocalizations termed trills, which range from approximately 0.1 kHz to 11.3 kHz (Stirling *et al.* 1983, Cleator *et al.* 1989, Budelsky 1992, Van Parijs *et al.* 2001, Risch *et al.* 2007, Jones *et al.* 2014, Frouin-Mouy *et al.* 2016, Parisi *et al.* 2017). Trills are typically long in duration, can propagate over large distances, and show marked individual and geographic variation (Cleator *et al.* 1989, Van Parijs *et al.* 2001, Van Parijs 2003, Van Parijs *et al.* 2003, 2004, Van Parijs and Clark 2006). Some male bearded seals maintain a single small aquatic territory during the breeding season, while others roam across larger areas (Van Parijs *et al.* 2003, 2004, Van Parijs and Clark 2006). It was estimated that bearded seals produce sound pressure levels of up to 178 $dB_{rms}$ re 1 µPa (Cummings *et al.* 1983 cited in Richardson *et al.* 1995). Male

vocalizations during the breeding season function to maintain aquatic territories and/or advertise breeding condition (Ray *et al.* 1969, Cleator *et al.* 1989, Van Parijs *et al.* 2003, Van Parijs and Clark 2006, Risch *et al.* 2007).

Surveys indicate that in the Bering Sea during spring, bearded seals use nearly the entire extent of pack ice over the continental shelf. The highest densities of bearded seals in early spring have typically been observed between St. Lawrence and St. Matthew Islands, with lower densities reported southeast of St. Matthew Island and in the southern Gulf of Anadyr (Krylov *et al.* 1964, Kosygin 1966b, Braham *et al.* 1981, Cameron and Boveng 2007, Cameron *et al.* 2008). In early spring of some years, high densities of bearded seals have also been observed north and west of St. Lawrence Island (Braham *et al.* 1977, Fedoseev *et al.* 1988, Cameron *et al.* 2008). The age-sex composition of these aggregations was not documented, so it is not known if these are whelping areas. However, spring aerial surveys of the Bering Sea conducted in 2012 and 2013 documented numerous bearded seals, including pups, in Norton Sound and the Chirikov Basin north of St. Lawrence Island, extending to well south of St. Matthew and Nunivak Islands (NMFS Marine Mammal Laboratory, unpublished data). The subsistence harvest of bearded seal pups by hunters in Quinhagak also suggests that some bearded seals may whelp south of Nunivak Island (Coffing *et al.* 1998). Existing information on the spring distribution of bearded seals is otherwise limited. Aerial surveys conducted in parts of the Chukchi Sea during April and May of 2016 documented numerous bearded seals, including some pups, in the Hope Basin south of Point Hope, and less frequent sightings of bearded seals (which included a few pups) north of Point Hope (NMFS Marine Mammal Laboratory, unpublished data). Bearded seals were also more commonly observed south of Point Hope during aerial surveys flown primarily along the coast of the northeastern Chukchi Sea in late May to early June of 1999 and 2000 (Bengtson *et al.* 2005). However, the age-sex composition of bearded seals observed was not reported and this survey was timed toward the molting period.

*Molting*

Adult and juvenile bearded seals molt annually, a process that for adults typically begins shortly after mating, as it does with other mature phocid or ''true'' seals (Chapskii 1938, Ling 1970, Ling 1972, King 1983, Yochem and Stewart 2002). Juvenile bearded seals have been reported to molt earlier than adults (Krylov *et al.* 1964, Heptner *et al.* 1976, Fedoseev 2000). Bearded seals haul out of the water onto the ice more frequently during molting (Burns 1981, Fedoseev 2000), a behavior that facilitates higher skin temperatures and may accelerate shedding and regrowth of hair and epidermis (Héroux 1960, Feltz and Fay 1966, Fay 1982). The molting period of bearded seals in the Bering, Chukchi, and Beaufort seas off Alaska has not been specifically investigated, but has been described as protracted, occurring between April and August with a peak in May and June (Tikhomirov 1964, Kosygin 1966a, Burns 1981). This observed timing of molting coincides with the period in which bearded seals that overwintered in the Bering Sea migrate long distances to summering grounds in the Chukchi and Beaufort seas. Measures of body condition and blubber thickness are at their annual minimums following the molt (Burns and Frost 1979, Smith 1981, Andersen *et al.* 1999).

*Diet*

Bearded seals feed primarily on benthic organisms, including a variety of invertebrates dwelling on the surface of the seabed (epifauna) and in the seabed substrate (infauna), and some fishes found on or near the sea bottom (demersal). They are also able to switch their diet to include schooling pelagic (non-demersal) fishes when advantageous (Finley and Evans 1983, Antonelis *et al.* 1994). A wide variety of prey species have been reported for bearded seals of the Beringia DPS, though the bulk of their diet appears to consist of relatively few major prey types. Bearded seals primarily feed on bivalve mollusks and crustaceans like crabs and shrimps, while fishes such as sculpins, cods, and flatfishes can also be a significant component of their diet (Kenyon 1962, Johnson *et al.* 1966, Burns 1967, Kosygin 1971, Burns and Frost 1979, Lowry *et al.* 1979, 1980, Antonelis *et al.* 1994, Hjelset *et al.* 1999, Fedoseev 2000, Dehn *et al.* 2007, Quakenbush *et al.* 2011, Crawford *et al.* 2015, Bryan 2017).

Specific bearded seal prey species differ somewhat between geographic locations. This variability is likely a result of differences in prey assemblages in each region (Burns and Frost 1979, Lowry *et al.* 1980, Dehn *et al.* 2007). Diet composition of bearded seals has been observed to change seasonally (Johnson *et al.* 1966, Burns and Frost 1979, Quakenbush *et al.* 2011), and has also been reported to vary interannually as well as longer-term (Lowry *et al.* 1980, Quakenbush *et al.* 2011, Carroll *et al.* 2013, Crawford *et al.* 2015). No differences have been shown in the feeding habitats of male and female bearded seals (Kelly 1988); however, prey composition of the bearded seal's diet has shown some variation with age (Burns and Frost 1979, Lowry *et al.* 1980, Quakenbush *et al.* 2011, Crawford *et al.* 2015).

**Critical Habitat Identification**

In the following sections, we describe the relevant definitions and requirements in the ESA and implementing regulations at 50 CFR part 424, and the key information and criteria used to prepare this proposed critical habitat designation. In accordance with section 4(b)(2) of the ESA, this proposed critical habitat designation is based on the best scientific data available. Our primary sources of information include the status review report for the bearded seal (Cameron *et al.* 2010), our proposed and final rules to list the Beringia and Okhotsk DPSs of the bearded seal as threatened under the ESA (75 FR 77496, December 10, 2010; 77 FR 76740, December 28, 2012), articles in peer-reviewed journals, other scientific reports, and relevant Geographic Information System (GIS) and satellite data (*e.g.,* shoreline data, U.S. maritime limits and boundaries data, sea ice extent) for geographic area calculations and mapping.

To identify specific areas that may qualify as critical habitat for bearded seals of the Beringia DPS, in accordance with 50 CFR 424.12(b), we followed a five-step process: (1) Identify 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) determine the specific areas within the geographical area occupied by the species that contain one or more of the physical or biological features essential to the conservation of the species; (4) determine which of these essential features may require special management considerations or protection; and (5) determine whether a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. Our evaluation and conclusions are described in detail in the following sections.

**Geographical Area Occupied by the Species**

The phrase ''geographical areas occupied by the species,'' which appears in the statutory definition of critical habitat, is defined by regulation

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

Based on existing literature, including available information on sightings and movements of bearded seals of the Beringia DPS, the range of the Beringia DPS was identified in the final ESA listing rule (77 FR 76740; December 28, 2012) as the Arctic Ocean and adjacent seas in the Pacific Ocean between 145° E long. and 130° W long., except west of 157° E long., or west of the Kamchatka Peninsula, where the Okhotsk DPS of the bearded seal is found. As noted previously, we cannot designate areas outside U.S. jurisdiction as critical habitat. Thus, the geographical area under consideration for this designation is limited to areas under the jurisdiction of the United States that the Beringia DPS occupied at the time of listing. This area extends to the outer boundary of the U.S. Exclusive Economic Zone (EEZ) in the Chukchi and Beaufort seas and south over the continental shelf in the Bering Sea (Cameron *et al.* 2010).

**Physical and Biological Features Essential to the Conservation of the Species**

The statutory definition of occupied critical habitat refers to ''physical or biological features essential to the conservation of the species,'' but the ESA does not specifically define or further describe these features. Implementing regulations at 50 CFR 424.02, however, define such features as those that occur in specific areas and that are essential to support the life-history needs of the species. The regulations provide additional details and examples of such features.

Based on the best scientific information available regarding the natural history of bearded seals and the habitat features that are essential to support the species' life-history needs, we have identified the following physical or biological features that are essential to the conservation of the Beringia DPS of the bearded seal within U.S. waters occupied by the species.

(1) *Sea ice habitat suitable for whelping and nursing, which is defined as areas with waters 200 m or less in depth containing pack ice of at least 25 percent concentration and providing bearded seals access to those waters from the ice.*

Sea ice habitat suitable for bearded seal whelping and nursing is essential to the conservation of the Beringia DPS because the seals rely on sea ice as a dry platform for whelping, nursing, and rearing pups in proximity to benthic foraging habitats. Further, hauling out on the ice reduces thermoregulatory demands, and is thus especially important for growing pups, which have a disproportionately large skin surface and rate of heat loss in the water (Harding *et al.* 2005, Jansen *et al.* 2010). If suitable ice cover is absent from shallow-water feeding areas during whelping and nursing, maternal females would be forced to seek sea ice over deeper waters, with less access to benthic food, or may haul out on shore, with potential increased risk of disturbance, predation, intra- and interspecific competition, and disease transmission. However, we are not aware of any occurrence of bearded seals whelping or nursing pups on land. Rearing pups in poorer foraging grounds would also require mothers to forage for longer periods to replenish energy reserves lost while nursing and/or compromise their own body condition, both of which could impact the transfer of energy to offspring and the survival of pups, mothers, or both. In addition, learning to forage in sub-optimal habitat could impair a pup's ability to learn effective foraging skills, and hence, impact its long-term survival.

To identify ice concentrations (percentage of ocean surface covered by sea ice) that we consider essential for bearded seal whelping and nursing, we relied upon three studies in the Bering Sea that estimated ice concentrations selected by bearded seals in the spring, based on aerial survey observations of bearded seals hauled out on ice. Simpkins *et al.* (2003) found that between St. Lawrence and St. Mathew Islands in March, bearded seals selected areas with ice concentrations of 70 to 90 percent. Another study conducted in a broader area of the Bering Sea south of St. Lawrence Island in April and May found the highest probability of bearded seal occurrence was in ice concentrations of 75 to 100 percent, but only the 0 to 25 percent ice class had substantially lower probability of occurrence (Ver Hoef *et al.* 2014). Informed by these two studies, Cameron *et al.* (2010) defined the minimum ice concentration sufficient for bearded seal whelping and nursing as 25 percent. Subsequently, a third paper by Conn *et al.* (2014), which established analytical methods to estimate the abundance of ice-associated seals from survey data collected across the U.S. Bering Sea in April and May, showed that in April bearded seals occupied ice concentrations exceeding 95 percent. Bearded seal abundance peaked in ice concentrations between about 50 and 75 percent, and abundance was lowest in ice concentrations largely below 25 percent. Based on the information from these studies, we concluded that sea ice habitat suitable for bearded seal whelping and nursing is of at least 25 percent ice concentration.

Cameron *et al.* (2010) defined the core distribution of bearded seals as those areas of the known extent of the species' distribution that are in waters less than 500 m deep. However, as discussed above, the bearded seals' effective habitat is generally restricted to areas where seasonal sea ice occurs over relatively shallow waters, typically less than 200 m. Moreover, in the U.S. portion of its range, the Beringia DPS occurs largely in waters less than 200 m deep. Also, bearded seals favor ice with access to the water, and tend to avoid continuous areas of landfast ice and unbroken drifting ice. Therefore, we conclude that sea ice habitat essential for bearded seal whelping and nursing occurs in areas with waters 200 m or less in depth containing pack ice (*i.e.,* sea ice other than fast ice; pack ice is also termed drift ice) of at least 25 percent concentration and providing bearded seals access to those waters from the ice.

(2) *Sea ice habitat suitable as a platform for molting, which is defined as areas with waters 200 m or less in depth containing pack ice of at least 15 percent concentration and providing bearded seals access to those waters from the ice.*

Sea ice habitat suitable for molting is essential to the conservation of the Beringia DPS because molting is a biologically important, energy-intensive process that could incur increased energetic costs if it occurs in water or could involve increased risk of predation (due to the absence of readily accessible escape routes to avoid predators, *i.e.,* natural opening in the sea ice), intra- and inter-specific competition, and the potential for disease transmission if it occurs on land. In light of the studies referenced above by Simpkins *et al.* (2003) and Ver Hoef *et al.* (2014) documenting spring ice concentrations selected by bearded seals, and based on the assumption that sea ice requirements for molting in May and June are less stringent than those for whelping and nursing pups, Cameron *et al.* (2010) concluded that 15 percent ice concentration would be minimally sufficient for molting. As discussed above, the U.S. range of the Beringia

DPS is largely in waters 200 m or less in depth, and the preferred depth range of bearded seals is less than 200 m. Further, bearded seals favor ice with access to the water, and tend to avoid continuous areas of landfast ice and unbroken drifting ice. Therefore, we conclude that sea ice essential for molting occurs in areas with waters 200 m or less in depth containing pack ice of at least 15 percent concentration and providing bearded seals access to those waters from the ice.

(3) *Primary prey resources to support bearded seals in waters 200 m or less in depth: benthic organisms, including epifaunal and infaunal invertebrates, and demersal and schooling pelagic fishes.*

Primary prey resources are essential to the conservation of the Beringia DPS because bearded seals likely rely on these resources the most to meet their annual energy budgets. As discussed above, bearded seals have a diverse diet with a large variety of prey items throughout their range, and are considered benthic specialists. Quakenbush *et al.* (2011) found that a diverse assemblage of invertebrates (63 taxa) and fish (20 taxa), associated with both benthic and pelagic habitats, was consumed by bearded seals in the Bering and Chukchi seas. The broad number of prey species consumed by these seals makes specification of particular essential prey species impracticable. Major prey types reported for bearded seals in the Bering, Chukchi, and western Beaufort seas include epifaunal crustaceans like crabs and shrimps as well as infaunal invertebrates like clams and marine worms, but fishes such as sculpins, Arctic cod (*Boreogadus saida*), and saffron cod (*Eleginus gracilis*) can also be a significant component (Johnson *et al.* 1966, Burns 1967, Kosygin 1971, Burns and Frost 1979, Lowry *et al.* 1979, 1980, Antonelis *et al.* 1994, Dehn *et al.* 2007, Quakenbush *et al.* 2011, Crawford *et al.* 2015). For example, near St. Matthew Island, Antonelis *et al.* (1994) found capelin (*Mallotus villosus*) was the most frequently consumed prey species during early spring (identified in more than 80 percent of bearded seal stomachs examined). Quakenbush *et al.* (2011) reported that in the Bering and Chukchi seas, the diet of bearded seals shifted toward an increased proportion and diversity of fish between the 1961 to 1979 period and the 2000s (1998 to 2009). In the 2000s, frequently consumed fish prey (considered here to be fish prey identified in at least 25 percent of bearded seal stomachs examined) included sculpin (Cottidae), cod (primarily Arctic cod and saffron cod), and flatfish (primarily yellowfin sole (*Limanda aspera*), longhead dab (*Limanda proboscidea*), and Alaska plaice (*Pleuronectes quadrituberculatus*)), with the frequency of occurrence of particular species differing between the two seas (Quakenbush *et al.* 2011; Table 3). As discussed above, the U.S. range of the Beringia DPS is largely in waters 200 m or less in depth and the preferred depth range of bearded seals is less than 200 m. Therefore, we conclude that the primary resources essential to the conservation of the Beringia DPS are benthic organisms, including epifaunal and infaunal invertebrates, and demersal and schooling pelagic fishes found in water depths of 200 m or less.

(4) *Acoustic conditions that allow for effective communication by bearded seals for breeding purposes within waters used by breeding bearded seals.*

Acoustic conditions that allow for effective bearded seal communications for breeding purposes are essential to the conservation of the Beringia DPS because underwater acoustic communication plays an important role in bearded seal reproductive behavior. Male bearded seals vocalize intensively during the breeding season to advertise breeding condition and/or proclaim a territory (Ray *et al.* 1969, Cleator *et al.* 1989, Van Parijs *et al.* 2003, Van Parijs and Clark 2006, Risch *et al.* 2007). Waters with acoustic conditions that interfere with or disrupt bearded seal acoustic communication during the spring breeding season could compromise the effectiveness of these communications and potentially impair the life history functions they support. The studies cited above document the vocal activity of bearded seals during the breeding season, including bearded seal call characteristics and spatial and temporal patterns of vocalizations (see Description and Natural History section). We recognize the limited nature of these data, but they represent the best scientific information available, and we are not aware of any other data that would allow us to describe in greater detail the acoustic conditions necessary to avoid impairing effective bearded seal communication for breeding purposes. We therefore specifically seek additional data and comments concerning the proposed inclusion of this proposed essential feature, as well as the proposed regulatory text describing this essential feature (see Public Comments Solicited section). We also solicit additional data that would assist Federal action agencies and NMFS in determining characteristics of noise that result in adverse effects on this proposed essential feature, such as interference with bearded seal detection of acoustic communications for breeding purposes (*i.e.,* acoustic masking). In developing the final critical designation, we will re-evaluate the proposed acoustic essential feature based on the best scientific data available at that time, and will consider all public comments, as well as information from ongoing interagency discussions concerning this proposed essential feature.

**Specific Areas Containing the Essential Features**

To determine which areas qualify as critical habitat within the geographical area occupied by the species, we are required to identify ''specific areas'' that contain one or more of the physical or biological features essential to the conservation of the species (and that may require special management considerations or protection, as described below) (50 CFR 424.12(b)(1)(iii)). Delineation of the specific areas is done at a scale determined by the Secretary to be appropriate (50 CFR 424.12(b)(1)). Regulations at 50 CFR 424.12(c) also require that each critical habitat area be shown on a map.

In determining the scale and boundaries for the specific areas, we considered, among other things, the scales at which biological data are available and the availability of standardized geographical data necessary to map boundaries. Because the ESA implementing regulations allow for discretion in determining the appropriate scale at which specific areas are drawn (50 CFR 424.12(b)(1)), we are not required, nor was it possible, to determine that each square inch, acre, or even square mile independently meets the definition of ''critical habitat.'' A main goal in determining and mapping the boundaries of the specific areas is to provide a clear description and documentation of the areas containing the identified essential features. This is ultimately fundamental to ensuring that Federal action agencies are able to determine whether their particular actions may affect the critical habitat.

As we explain below, the essential features of bearded seal critical habitat, in particular the sea ice essential features, are dynamic and variable on both spatial and temporal scales. As climatic conditions change there may be increased variability in sea ice characteristics and spatial/temporal coverage, including with respect to the southern extent of sea ice in the spring and the timing and rate of the retreat of sea ice during spring and early summer. Bearded seal movements and habitat use

are strongly influenced by the seasonality of sea ice and the seals can range widely in response to the specific locations of the most suitable habitat conditions. We have therefore identified one specific area to propose as critical habitat in the Bering, Chukchi, and Beaufort seas based on the expected occurrence of the identified essential features.

We first focused on identifying where the essential features that support the species' life history functions of whelping, nursing, and molting (*i.e.,* specific areas that contain the sea ice essential features) occur. As discussed above, bearded seals generally maintain an association with drifting sea ice, and many seals migrate seasonally to maintain access to this ice. Bearded seal whelping and nursing take place in the Bering Sea while ice cover is at or near its peak extent. Bearded seal molting overlaps with the periods of whelping, nursing, pup maturation, and breeding, and continues into early summer as the pack ice retreats north through the Bering Strait and into the Chukchi and Beaufort seas. Therefore, we considered where the sea ice essential features occur in all three seas.

The dynamic nature of sea ice and the spatial and temporal variations in sea ice cover constrain our ability to map with precision the specific geographic locations where the sea ice essential features will occur. The specific geographic locations of essential sea ice habitat used by bearded seals vary from year to year, or even day to day, depending on many factors, including time of year, local weather, and oceanographic conditions (*e.g.,* Burns and Frost 1979, Frey *et al.* 2015, Gadamus *et al.* 2015). In addition, the duration that sea ice habitat essential for whelping and nursing, or for molting, is present in any given location can vary annually depending on the rate of ice melt and other factors. The temporal overlap of bearded seal molting with whelping and nursing, combined with the dynamic nature of sea ice, also makes it impracticable to separately identify specific areas where each of these essential features occur. However, it is unnecessary to distinguish between specific areas containing each sea ice essential feature because the ESA permits the designation of critical habitat where one or more essential features occur.

Bearded seals of the Beringia DPS can range widely, which, combined with the dynamic variations in sea ice conditions, results in individuals distributing broadly and using sea ice habitats within a range of suitable conditions. We integrated these physical and biological factors into our identification of specific areas where one or both sea ice essential features occur based on the information currently available on the seasonal distribution and movements of bearded seals during the annual period of reproduction and molting, the maximum depth where the sea ice essential features occur, and satellite-derived estimates of the position of the sea ice edge over time. Although this approach allowed us to identify specific areas that contain one or both of the sea ice essential features at certain times, the available data supported delineation of specific areas only at a coarse scale. Consequently, we delineated a single specific area that contains the sea ice features essential to the conservation of the Beringia DPS, as follows.

We first identified the southern boundary of this specific area. The information discussed above regarding the seasonal distribution and movements of bearded seals in the Bering Sea suggests that sea ice essential for whelping and nursing (and potentially for molting) extends south of St. Matthew and Nunivak Islands. But a more precise southern boundary for this habitat is unavailable because existing information is limited on the spatial distribution and whelping locations of bearded seals in the Bering Sea during spring, and the temporal and spatial distribution of sea ice cover, which influences bearded seal distributions, is variable between years.

We therefore turned to Sea Ice Index data maintained by the National Snow and Ice Data Center (NSIDC) for information on the estimated median position of the ice edge in the Bering Sea during April (Fetterer *et al.* 2017, Version 3.0; accessed November 2019), which is the peak month for bearded seal whelping activity (peak molting for adults occurs later in the spring). This estimated median ice edge is derived by the NSIDC from a time series of satellite records for the 30-year reference period from 1981 to 2010. To further inform our evaluation, we also examined the position of the median ice edge in April for the more recent 30-year period from 1990 to 2019, which was estimated using methods and data types similar to those used for the Sea Ice Index. We note that the two most recent years included in this 30-year period had record low ice extent in the Bering Sea (Stabeno and Bell 2019).

The April median ice edge for the 1981 to 2010 reference period from the Sea Ice Index is located approximately 170 kilometers (km) southwest of St. Matthew Island and 175 km south of Nunivak Island, and it extends eastward across lower Kuskokwim Bay to near Cape Newenham, a headland between Kuskokwim Bay and Bristol Bay. Because bearded seals use nearly the entire extent of pack ice over the Bering Sea shelf in spring, depending upon ice conditions in a given year, some bearded seals may use sea ice for whelping south of this median ice edge. But we concluded that the variability in the annual extent and timing of sea ice in this southernmost portion of the bearded seal's range in the Bering Sea (*e.g.,* Boveng *et al.* 2009, Stabeno *et al.* 2012, Frey *et al.* 2015) renders these waters unlikely to contain the sea ice essential features on a consistent basis in more than limited areas. The position of the April median ice edge for the more recent 1990 to 2019 period is generally similar to that of the Sea Ice Index, except that the ice edge has a wide inverted U-shape in Kuskokwim Bay, and as a result, there is roughly half as much area with sea ice there. Given the reduction in sea ice in Kuskokwim Bay between the reference period used for the Sea Ice Index and the more recent period, we also concluded that these waters appear unlikely to contain the sea ice essential features on a consistent basis in more than limited areas.

As such, we delineated the southern boundary to reflect the estimated position of the April median ice edge west of Kuskokwim Bay. To simplify the southern boundary for purposes of delineation on maps, we modified the ice edge contour line for the 1990 to 2019 period as follows: (1) Intermediate points along the contour line between its intersection point with the seaward limit of the U.S. EEZ (60°32′26″ N/179°9′53″ W) and the point where the contour line turns eastward (57°58′ N/170°25′ W) were removed to form the segment of the southern boundary that extends from the seaward limit of the U.S. EEZ southeastward approximately 575 km; (2) intermediate points along the contour line between the point where the contour line turns eastward and the approximate point on the west side of Kuskokwim Bay where the contour line turns northeastward (58°29′ N/164°46′ W) were removed to form a second segment of the southern boundary that extends eastward approximately 335 km; and (3) these two line segments were connected to the mainland by an approximately 200-km line segment that follows 164°46′ W longitude to near the west side of the mouth of the Kolovinerak River, about 50 km east of Nunivak Island. This editing produced a simplified southern boundary that retains the general shape

of the original ice edge contour line west of Kuskokwim Bay.

We then identified the northern boundary of the specific area that contains one or both of the sea ice essential features. As discussed above (see Description and Natural History section), limited spring aerial survey information, satellite tracking data for tagged bearded seals, and year-round passive acoustic recordings of bearded seal vocalizations suggest that some portion of the Beringia DPS overwinters in the Chukchi and Beaufort seas. In addition, many of the bearded seals that overwinter in the Bering Sea migrate northward with the receding ice edge in the spring and early summer into the Chukchi and Beaufort seas, coincident with the timing of molting. Therefore, consistent with the maximum depth identified for the sea ice essential features, we defined the northern boundary of the specific area containing the sea ice essential features as the 200-m isobath over the continental shelf break in the Chukchi and Beaufort seas (*i.e.,* the northern extent of waters 200 m or less in these seas), and the boundaries to the east and west as the outer extent of the U.S. EEZ. Sea ice concentrations suitable for whelping, nursing, and molting occur over waters extending up to and beyond these boundaries (see, *e.g.,* Fetterer *et al.* 2017, Sea Ice Index Version 3.0, accessed November 2019). The 200-m isobath portion of this boundary line abuts the United States-Canada border in the eastern Beaufort Sea. We note that Canada contests the limits of the U.S. EEZ in the eastern Beaufort Sea, asserting that the line delimiting the two countries' EEZs should follow the 141st meridian out to a distance of 200 nautical miles (as opposed to an equidistant line that extends seaward perpendicular to the coast at the U.S.-Canada land border). Given the overlap in the annual timing of the bearded seal breeding season with bearded seal whelping, nursing, and molting (see Description and Natural History section), we concluded that the specific area identified for the sea ice essential features also defines the specific area containing acoustic conditions that allow for effective communications by bearded seals for breeding purposes.

The shallow seasonally ice-covered waters of the Bering, Chukchi, and Beaufort seas support a high abundance of bearded seal benthic prey resources (*e.g.,* Grebmeier *et al.* 2006, *e.g.,* review of abundance and distribution of Beringia DPS prey in Cameron *et al.* 2010, Logerwell *et al.* 2011, McCormick-Ray *et al.* 2011, Rand and Logerwell 2011, Stevenson and Lauth 2012, Blanchard *et al.* 2013, Konar and Ravelo 2013, Grebmeier *et al.* 2015, Ravelo *et al.* 2015, Sigler *et al.* 2017, Grebmeier *et al.* 2018, Divine *et al.* 2019, Lauth *et al.* 2019). Studies that have inferred locations of foraging activity for bearded seals tagged in Alaska based on movement and dive data (Boveng and Cameron 2013, Gryba *et al.* 2019, Quakenbush *et al.* 2019) show some overlap in the areas used extensively by individual seals, but the spatial patterns of habitat use and locations of intensive use can also vary substantially among individuals (*e.g.,* Quakenbush *et al.* 2019). This information represents habitat use by primarily juvenile tagged bearded seals, and it is unknown how representative it is for older animals. The movements of bearded seals and their use of habitat for foraging are influenced by a variety of factors, including the seasonality of ice cover (McClintock *et al.* 2017, Breed *et al.* 2018, Cameron *et al.* 2018), the fact that seals forage throughout the year, and the fact that they are broadly distributed and can range widely. In addition, bearded seals have a diverse diet that can vary seasonally and geographically. We therefore concluded that the boundaries delineated above for the sea ice essential features are also appropriate for defining the specific area where the primary prey essential feature occurs, apart from the shoreward boundary as described below.

Satellite tracking information suggests that juvenile bearded seals may forage in the Bering Sea near the shelf break south of the southern boundary of the specific area identified above. In addition, Breed *et al.* (2018) and Cameron *et al.* (2018) found that from late fall to early spring, tagged juvenile bearded seals selected habitat at the southern ice edge, which depending on ice conditions may extend to near the shelf break during late winter and early spring. However, other tagged juveniles have frequently been observed to use ice far north of the ice edge during winter, and some individuals overwintered in the Chukchi and Beaufort seas (Quakenbush *et al.* 2019). In addition, Quakenbush *et al.* (2019) identified the ~100 m isobath in the Bering Sea as a notable high-use area for juvenile bearded seals during July to November based on satellite telemetry data (a portion of this habitat is located north of the proposed southern boundary), although the authors found that the specific locations used by tagged seals were highly individualistic. We therefore concluded that it is appropriate to delineate the southern boundary as described above.

Finally, we considered the shoreward extent of the essential features. Satellite tracking data indicate that some tagged juvenile bearded seals used shallow nearshore waters during the open-water period (Quakenbush *et al.* 2019), and as discussed above (see *General Seasonal Distribution and Habitat Use* section), bearded seals (primarily juveniles) have been observed feeding in small bays, lagoons, estuaries, and near river mouths during the open-water period, in particular during late summer and fall. Further, shallow nearshore waters provide habitat for primary prey resources essential to conservation of the Beringia DPS, such as saffron cod and Arctic cod (Barton 1978, Craig *et al.* 1982, Underwood *et al.* 1995, Wiswar *et al.* 1995, North Pacific Fishery Management Council 2009, Johnson *et al.* 2010, Logerwell *et al.* 2015, 83 FR 31340, July 5, 2018). We are therefore proposing to define the shoreward boundary of critical habitat as the line that marks mean lower low water (MLLW) based on occurrence of the primary prey essential feature. This specific area does not extend into tidally-influenced channels of tributary waters of the Bering, Chukchi, or Beaufort seas.

Data to determine the boundaries of the specific area containing the essential features are limited. We specifically seek additional data and comments on our proposed delineation of these boundaries (see Public Comments Solicited section).

**Special Management Considerations or Protection**

A specific area within the geographic area occupied by a species may only be designated as critical habitat if the area contains one or more essential physical or biological feature that may require special management considerations or protection (16 U.S.C. 1532(5)(A)(ii); 50 CFR 424.12(b)(iv)). ''Special management considerations or protection'' is defined as methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species (50 CFR 424.02). Courts have indicated that the ''may require'' standard requires that NMFS determine that special management considerations or protection of the essential features might be required either now or in the future (*i.e.,* such considerations or protection need not be immediately required). *See Cape Hatteras Access Pres. Alliance* v. *U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 123–24 (D.D.C. 2004); *Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.,* 268 F. Supp. 2d 1197, 1218 (E.D. Cal. 2003). The

relevant management need may be ''in the future based on possibility.'' *See Bear Valley Mut. Water Co.* v. *Salazar,* No. SACV 11–01263–JVS, 2012 WL 5353353, at *25 (C.D. Cal. Oct. 17, 2012); *see also Ctr. for Biological Diversity* v. *Norton,* 240 F. Supp. 2d 1090, 1098–99 (D. Ariz. 2003) (noting that the ''may require'' phrase can be rephrased and understood as ''can require'' or ''possibly requires'').

We have identified four primary sources of potential threats to each of the habitat features identified above as essential to the conservation of the Beringia DPS of the bearded seal: Climate change; oil and gas exploration, development, and production; marine shipping and transportation; and commercial fisheries. As further detailed below, both sea ice essential features, the primary prey essential feature, and the essential feature of acoustic conditions that allow for effective communications by bearded seals for breeding purposes may require special management considerations or protection as a result of impacts (either independently or in combination) from these sources. We note that our evaluation does not consider an exhaustive list of threats that could have impacts on the essential features, but rather considers the primary potential threats that we are aware of at this time that support our conclusion that special management considerations or protection of each of the essential features may be required. Further, we highlight particular threats associated with each source of impacts while recognizing that certain threats are associated with more than one source (*e.g.,* marine pollution and noise).

*Climate Change*

The principal threat to the persistence of the Beringia DPS of the bearded seal is the ongoing and anticipated decreases in the extent and timing of sea ice stemming from climate change. Climate-change-related threats to the Beringia DPS's habitat are discussed in detail in the bearded seal status review report (Cameron *et al.* 2010), as well as in our proposed and final rules to list the Beringia DPS of the bearded seal as threatened. Total Arctic sea ice extent has been showing a decline through all months of the satellite record since 1979 (Meier *et al.* 2014). Although there will continue to be considerable annual variability in the rate and timing of the breakup and retreat of sea ice, trends in climate change are moving toward ice that is more susceptible to melt (Markus *et al.* 2009), and areas of earlier spring ice retreat (Stammerjohn *et al.* 2012, Frey *et al.* 2015). Notably, February and March ice extent in the Bering Sea in 2018 and 2019 were the lowest on record (Stabeno and Bell 2019), and in the spring of 2019, melt onset in the Chukchi Sea occurred 20 to 35 days earlier than the 1981 to 2010 average (Perovich *et al.* 2019). Activities that release carbon dioxide and other heat-trapping greenhouse gases (GHGs) into the atmosphere, most notably those that involve fossil fuel combustion, are a major contributing factor to climate change and loss of sea ice (Intergovernmental Panel on Climate Change 2013, U.S. Global Climate Change Research Program 2017). Such activities may adversely affect the essential features of the habitat of the Beringia DPS by diminishing sea ice suitable for whelping, nursing, and molting, and by causing changes in the distribution, abundance, and/or species composition of prey resources (including the primary prey resources of the Beringia DPS). Declines in the extent and timing of sea ice cover may also lead to increased shipping activity (discussed below) and other changes in anthropogenic activities, with the potential for increased risks to the habitat features essential to the Beringia DPS. The best scientific data available do not allow us to identify a causal linkage between any particular single source of GHG emissions and identifiable effects on the physical and biological features essential to the conservation of the Beringia DPS (Cameron *et al.* 2010). Regardless, given that the quality and quantity of these essential features, in particular sea ice, may be diminished by the effects of climate change, we conclude that special management considerations or protection may be necessary, either now or in the future, although the exact focus and nature of that management is presently undeterminable.

*Oil and Gas Activity*

Oil and gas exploration, development, and production activities in the U.S. Arctic may include: Seismic surveys; exploratory, delineation, and production drilling operations; construction of artificial islands, causeways, shore-based facilities, and pipelines; and vessel and aircraft operations. These activities have the potential to affect the essential features of Beringia DPS critical habitat, primarily through pollution (particularly in the event of a large oil spill), noise, and physical alteration of the species' habitat.

Large oil spills (considered in this section to be spills of relatively great size, consistent with common usage of the term) are generally considered to be the greatest threat associated with oil and gas activities in the Arctic marine environment (Arctic Monitoring and Assessment Programme (AMAP) 2007). In contrast to spills on land, large spills at sea, especially when ice is present, are difficult to contain or clean up, and may spread over hundreds or thousands of square kilometers. Responding to a sizeable spill in the Arctic environment would be particularly challenging. Reaching a spill site and responding effectively would be especially difficult, if not impossible, in winter when weather can be severe and daylight extremely limited. Oil spills under ice or in ice-covered waters are the most challenging to deal with due to, among other factors, limitations on the effectiveness of current containment and recovery technologies when sea ice is present. The extreme depth and the pressure that oil was under during the 2010 oil blowout at the Deepwater Horizon well in the Gulf of Mexico may not exist in the shallow continental shelf waters of the Beaufort and Chukchi seas. Nevertheless, the difficulties experienced in stopping and containing the Deepwater Horizon blowout, where environmental conditions, available infrastructure, and response preparedness were comparatively good, point toward even greater challenges in containing and cleaning a large spill in a much more environmentally severe and geographically remote Arctic location.

Although planning, management, and use of best practices can help reduce risks and impacts, the history of oil and gas activities indicates that accidents cannot be eliminated (AMAP 2007). Data on large spills (*e.g.,* operational discharges, spills from pipelines, blowouts) in Arctic waters are limited because oil exploration and production there has been limited. The Bureau of Ocean Energy Management (BOEM) (BOEM 2011) estimated the chance of one or more oil spills greater than or equal to 1,000 barrels occurring if development were to take place in the Beaufort Sea or Chukchi Sea Planning Areas as 26 percent for the Beaufort Sea over the estimated 20 years of production and development, and 40 percent for the Chukchi Sea over the estimated 25 years of production and development.

Icebreaking vessels, which may be used for in-ice seismic surveys or to manage ice near exploratory drilling ships, also have the potential to affect the sea ice essential features of bearded seal habitat through physical alteration of the sea ice (also see *Marine Shipping and Transportation* section). Other examples of activities associated with

oil and gas exploration and development that may physically alter the essential sea ice features offshore through-ice activities such as trenching and installation of pipelines. Activities such as icebreaking, which can cause substantial increases in noise levels (Richardson *et al.* 1995), also have the potential to affect acoustic conditions that allow for effective communication by bearded seals for breeding purposes, although the extent to which such activities are localized near areas where bearded seal breeding is occurring and the acoustic characteristics of the area are among the factors that would determine the level of such effects. In addition, there is evidence that noise associated with activities such as seismic surveys can result in behavioral and other effects on fishes and invertebrate species (Carroll *et al.* 2017, Slabbekoorn *et al.* 2019), although the available data on such effects are currently limited, in particular for invertebrates (Hawkins *et al.* 2015, Hawkins and Popper 2017), and the nature of potential effects specifically on the primary prey resources of the Beringia DPS are unclear.

In summary, a large oil spill could render areas containing the identified essential features unsuitable for use by bearded seals of the Beringia DPS. In such an event, sea ice habitat suitable for whelping, nursing, and/or for basking and molting could be oiled. The primary prey resources could also become contaminated, experience mortality, or be otherwise adversely affected by spilled oil. In addition, disturbance effects (both physical disturbance and acoustic effects) could alter the quality of the essential features of bearded seal critical habitat, or render habitat unsuitable. We conclude that the essential features of the habitat of the Beringia DPS may require special management considerations or protection in the future to minimize the risks posed to these features by oil and gas exploration, development, and production.

*Marine Shipping and Transportation*

The reduction in Arctic sea ice that has occurred in recent years has renewed interest in using the Arctic Ocean as a potential waterway for coastal, regional, and trans-Arctic marine operations and in extension of the navigation season in surrounding seas (Brigham and Ellis 2004, Arctic Council 2009). Marine traffic along the western and northern coasts of Alaska includes tug, towing, and cargo vessels, tankers, research and government vessels, vessels associated with oil and gas exploration and development, fishing vessels, and cruise ships (Adams and Silber 2017, U.S. Committee on the Marine Transportation System 2019). Automatic Identification System data indicate that the number of unique vessels operating annually in U.S. waters north of the Bering Sea in 2015 to 2017 increased 128 percent over the number recorded in 2008 (U.S. Committee on the Marine Transportation System 2019). Climate models predict that the warming trend in the Arctic will accelerate, causing the ice to begin melting earlier in the spring and resume freezing later in the fall, resulting in an expansion of potential transit routes and a lengthening of the potential navigation season, and a continuing increase in vessel traffic (Khon *et al.* 2010, Smith and Stephenson 2013, Stephenson *et al.* 2013, Huntington *et al.* 2015d, Melia *et al.* 2016, Aksenov *et al.* 2017, Khon *et al.* 2017). For instance, analysis of four potential growth scenarios (ranging from reduced activity to accelerated growth) suggests from 2008 to 2030, the number of unique vessels operating in U.S. waters north of 60° N (*i.e.,* northern Bering sea and northward) may increase by 136 to 346 percent (U.S. Committee on the Marine Transportation System 2019).

The fact that nearly all vessel traffic in the Arctic, with the exception of icebreakers, purposefully avoids areas of ice, and primarily occurs during the ice-free or low-ice seasons, helps to mitigate the risks of shipping to the essential habitat features identified for bearded seals of the Beringia DPS. However, icebreakers pose greater risks to these features since they are capable of operating year-round in all but the heaviest ice conditions and are often used to escort other types of vessels (*e.g.,* tankers and bulk carriers) through ice-covered areas. Furthermore, new classes of ships are being designed that serve the dual roles of both tanker/carrier and icebreaker (Arctic Council 2009). Therefore, if icebreaking activities increase in the Arctic in the future, as expected, the likelihood of negative impacts (*e.g.,* habitat alteration and risk of oil spills) occurring in ice-covered areas where bearded seals reside will likely also increase. We are not aware of any data currently available on the effects of icebreaking on the habitat of bearded seals during the reproductive and molting periods. Although impacts of icebreaking are likely to vary between species depending on a variety of factors, we note that Wilson *et al.* (2017) demonstrated the potential for impacts of icebreaking on Caspian seal (*Pusa caspica*) mothers and pups including displacement, break-up of whelping and nursing habitat, and vessel collisions with mothers or pups. The authors noted that while pre-existing shipping channels were used by seals as artificial leads, which expanded access to whelping habitat, seals that whelp on the edge of such leads are vulnerable to vessel collision and repeated disturbance. As discussed above, in addition to physical effects on sea ice, icebreaking can cause substantial increases in noise levels, and thus has the potential to affect acoustic conditions that allow for effective communication by bearded seals during the breeding season.

In addition to the potential effects of icebreaking on the essential features, the maritime shipping industry transports various types of petroleum products, both as fuel and cargo. In particular, if increased shipping involves the tanker transport of crude oil or oil products, there would be an increased risk of spills (Arctic Climate Impact Assessment 2005, U.S. Arctic Research Commission 2012). Similar to oil and gas activities, the most significant threat posed by shipping activities is considered to be the accidental or illegal discharge of oil or other toxic substances carried by ships (Arctic Council 2009).

Vessel discharges associated with normal operations, including sewage, grey water, and oily wastes are expected to increase as a result of increasing marine shipping and transportation in Arctic waters (Arctic Council 2009, Parks *et al.* 2019), which could affect the primary prey of the Beringia DPS. Increases in marine shipping and transportation and other vessel traffic is also introducing greater levels of underwater noise (Arctic Council 2009, Moore *et al.* 2012), with the potential for behavioral and other effects in fishes and invertebrates (Slabbekoorn *et al.* 2010, Hawkins and Popper 2017, Popper and Hawkins 2019), although there are substantial gaps in the understanding of such effects, in particular for invertebrates (Hawkins *et al.* 2015, Hawkins and Popper 2017), and the nature of potential effects specifically on the primary prey of the Beringia DPS are unclear.

We conclude that the essential features of the habitat of the Beringia DPS may require special management considerations or protection in the future to minimize the risks posed by potential shipping and transportation activities because: (1) Physical alteration of sea ice by icebreaking activities could reduce the quantity and/or quality of the sea ice essential features; (2) in the

event of an oil spill, sea ice essential for whelping, nursing, and molting could become oiled; (3) the quantity and/or quality of the primary prey resources could be diminished as a result of spills, vessel discharges, and noise associated with shipping, transportation, and ice-breaking activities; and (4) acoustic conditions that allow for effective communication by bearded seals during the breeding season could be affected by noise associated with increases in shipping and transportation activities.

*Commercial Fisheries*

The specific area identified in this proposed rule as meeting the definition of critical habitat for the Beringia DPS overlaps with the Arctic Management Area and the Bering Sea and Aleutian Islands Management Area identified by the North Pacific Fishery Management Council. No commercial fishing is permitted within the Arctic Management Area due to insufficient data to support the sustainable management of a commercial fishery there. However, as additional information becomes available, commercial fishing may be allowed in this management area. For example, two bearded seal prey species—Arctic cod and saffron cod—have been identified as likely initial target species for commercial fishing in the Arctic Management Area in the future (North Pacific Fishery Management Council 2009).

In the northern portion of the Bering Sea and Aleutian Islands Management Area, commercial fisheries overlap with the southernmost portion of the proposed critical habitat. Portions of the proposed critical habitat also overlap with certain state commercial fisheries management areas. Commercial catches from waters in the proposed critical habitat area primarily include: Pacific halibut (*Hippoglossus stenolepis*), several other flatfish species, Pacific cod (*Gadus macrocephalus*), several crab species, walleye pollock (*Theragra chalcogramma*), and several salmon species.

Commercial fisheries may affect the primary prey resources identified as essential to the conservation of the Beringia DPS, through removal of prey biomass and potentially through modification of benthic habitat by fishing gear that contacts the seafloor. Given the potential changes in commercial fishing that may occur with the expected increasing length of the open-water season and range expansion of some economically valuable species responding to climate change (*e.g.,* Stevenson and Lauth 2019, Thorson *et al.* 2019, Spies *et al.* 2020), we conclude that the primary prey resources essential feature may require special management considerations or protection in the future to address potential adverse effects of commercial fishing on this feature.

**Unoccupied Areas**

Section 3(5)(A)(ii) of the ESA authorizes the designation of specific areas outside the geographical area occupied by the species, if those areas are determined to be essential for the conservation of the species. Our regulations at 50 CFR 424.12(b)(2) require that we first evaluate areas occupied by the species, and only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. Because bearded seals of the Beringia DPS are considered to occupy their entire historical range that falls within U.S. jurisdiction, we find that there are no unoccupied areas within U.S. jurisdiction that are essential to their conservation.

**Application of ESA Section 4(a)(3)(B)(i)**

Section 4(a)(3)(B)(i) of the ESA precludes designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) 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. *See* 16 U.S.C. 1533(a)(3)(B)(i); 50 CFR 424.12(h). Where these standards are met, the relevant area is ineligible for consideration as potential critical habitat. The regulations implementing the ESA set forth a number of factors to guide consideration of whether this standard is met, including the degree to which the plan will protect the habitat of the species (50 CFR 424.12(h)(4)). This process is separate and distinct from the analysis governed by section 4(b)(2) of the ESA, which directs us to consider the economic impact, the impact on national security, and any other relevant impact of designation, and affords the Secretary discretion to exclude particular areas if the benefits of exclusion outweigh the benefits of inclusion of such areas. *See* 16 U.S.C. 1533(b)(2).

Before publication of this proposed rule, we contacted DOD (Air Force and Navy) and requested information on any facilities or managed areas that are subject to an INRMP and are located within areas that could potentially be designated as critical habitat for the Beringia DPS. In response to our request, the Air Force provided information regarding twelve radar sites with an INRMP in place, 10 of which (7 active and 3 inactive) are located adjacent to the area under consideration for designation as critical habitat: Barter Island Long Range Radar Site (LRRS), Cape Lisburne LRRS, Cape Romanzof LRRS, Kotzebue LRRS, Oliktok LRRS, Point Barrow LRRS, Tin City LRRS, Bullen Point Short Range Radar Site (SRRS), Point Lay LRRS, and Point Lonely LRRS. The Air Force requested exemption of these radar sites pursuant to section 4(a)(3)(B)(i) of the ESA. Based on our review of the INRMP (draft 2020 update), the area being considered for designation as critical habitat, all of which occurs seaward of the MLLW line, does not overlap with DOD lands. Therefore, we conclude that there are no properties owned, controlled, or designated for use by DOD that are subject to ESA section 4(a)(3)(B)(i) for this proposed critical habitat designation, and thus the exemptions requested by the Air Force are not necessary because no critical habitat would be designated in those radar sites.

**Analysis of Impacts Under Section 4(b)(2) of the ESA**

Section 4(b)(2) of the ESA requires the Secretary to designate critical habitat for threatened and endangered species on the basis of the best scientific data available 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. Regulations at 50 CFR 424.19(b) also specify that the Secretary will consider the probable impacts of the designation at a scale that the Secretary determines to be appropriate, and that such impacts may be qualitatively or quantitatively described. The Secretary is also required to compare impacts with and without the designation (50 CFR 424.19(b)). In other words, we are required to assess the incremental impacts attributable to the critical habitat designation relative to a baseline that reflects existing regulatory impacts in the absence of the critical habitat.

Section 4(b)(2) also describes an optional process by which the Secretary may go beyond the mandatory consideration of impacts and weigh the benefits of excluding any particular area (that is, avoiding the economic, national security, or other relevant impacts) against the benefits of designating it

(primarily, the conservation value of the area). If the Secretary concludes that the benefits of excluding particular areas outweigh the benefits of designation, the Secretary may exclude the particular area(s) so long as the Secretary concludes on the basis of the best available scientific and commercial information that the exclusion will not result in extinction of the species (16 U.S.C. 1533(b)(2)). NMFS and the U.S. Fish and Wildlife Service have adopted a joint policy setting out non-binding guidance explaining generally how we exercise our discretion under 4(b)(2). *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (''4(b)(2) policy,'' 81 FR 7226, February 11, 2016).

While section 3(5) of the ESA defines critical habitat as ''specific areas,'' section 4(b)(2) requires the agency to consider the impacts of designating any ''particular area.'' Depending on the biology of the species, the characteristics of its habitat, and the nature of the impacts of designation, ''particular'' areas may be—but need not necessarily be—delineated so that they are the same as the already identified ''specific'' areas of potential critical habitat. For the reasons set forth below, we are not proposing to exercise the discretion delegated to us by the Secretary to exclude any particular areas from the proposed critical habitat designation.

The primary impacts of a critical habitat designation arise from the ESA section 7(a)(2) requirement that Federal agencies ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat (*i.e.,* adverse modification standard). Determining these impacts is complicated by the fact that section 7(a)(2) contains the overlapping requirement that Federal agencies ensure that their actions are not likely to jeopardize the species' continued existence. One incremental impact of critical habitat designation is the extent to which Federal agencies change their proposed actions to ensure they are not likely to adversely modify critical habitat, beyond any changes they would make to ensure actions are not likely to jeopardize the continued existence of the species. Additional impacts of critical habitat designation include any state and/or local protection that may be triggered as a direct result of designation (we did not identify any such impacts for this proposed designation), and benefits that may arise from education of the public to the importance of an area for species conservation.

In determining the impacts of designation, we focused on the incremental change in Federal agency actions as a result of critical habitat designation and the adverse modification standard (see *Ariz. Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160, 1172–74 (9th Cir. 2010) (holding that the U.S. Fish and Wildlife Service permissibly attributed the economic impacts of protecting the northern spotted owl as part of the baseline and was not required to factor those impacts into the economic analysis of the effects of the critical habitat designation)). We analyzed the impacts of this designation based on a comparison of conditions with and without the designation of critical habitat for the Beringia DPS. The ''without critical habitat'' scenario represents the baseline for the analysis. It includes process requirements and habitat protections already extended to bearded seals of the Beringia DPS under its ESA listing and under other Federal, state, and local regulations. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the Beringia DPS.

Our analysis for this proposed rule is described in detail in the associated Draft Impact Analysis Report that is available for public review and comment (see Public Comments Solicited). This analysis assesses the incremental costs and benefits that may arise due to the critical habitat designation, with economic costs estimated over the next 10 years. We chose the 10-year timeframe because it is lengthy enough to reflect the planning horizon for reasonably predicting future human activities, yet it is short enough to allow reasonable projections of changes in use patterns in an area, as well as of exogenous factors (*e.g.,* world supply and demand for petroleum, U.S. inflation rate trends) that may be influential. This timeframe is consistent with guidance provided in Office of Management and Budget (OMB) Circular A–4 (OMB 2003, 2011). We recognize that economic costs of the designation are likely to extend beyond the 10-year timeframe of the analysis, though we have no information indicating that such costs in subsequent years would be different from those projected for the first 10-year period. Although not quantified or analyzed in detail due to the high level of uncertainty regarding longer-term effects, the Draft Impact Analysis Report includes a discussion of the potential types of costs and benefits that may accrue beyond the 10-year time window of the analysis.

Below, we summarize our analysis of the impacts of designating the specific area identified in this proposed rule as meeting the definition of critical habitat for the Beringia DPS. Additional detail is provided in the Draft Impact Analysis Report prepared for this proposed rule.

*Benefits of Designation*

We expect that the Beringia DPS will increasingly experience the ongoing loss of sea ice and changes in ocean conditions associated with climate change, and the significance of other habitat threats will likely increase as a result. As noted above, the primary benefit of a critical habitat designation—and the only regulatory consequence—stems from the ESA section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to destroy or adversely modify the designated habitat. This benefit is in addition to the section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to jeopardize listed species' continued existence. Another benefit of critical habitat designation is that it provides specific notice of the areas and features essential to the conservation of the Beringia DPS. This information will focus future ESA section 7 consultations on key habitat attributes. By identifying the specific areas where the features essential to the conservation of the Beringia DPS occur, there may also be enhanced awareness by Federal agencies and the general public of activities that might affect those essential features. The designation of critical habitat can also inform Federal agencies regarding the habitat needs of the Beringia DPS, which may facilitate using their authorities to support the conservation of this species pursuant to ESA section 7(a)(1), including to design proposed projects in ways that minimize adverse effects to critical habitat.

In addition, the critical habitat designation may result in indirect benefits, as discussed in detail in the Draft Impact Analysis Report, including education and enhanced public awareness, which may help focus and contribute to conservation efforts for bearded seals of the Beringia DPS and their habitat. For example, by identifying areas and features essential to the conservation of the Beringia DPS, complementary protections may be developed under state or local regulations or voluntary conservation plans. These other forms of benefits may be economic in nature (whether market or non-market, consumptive, non-consumptive, or passive), educational, cultural, or sociological, or they may be expressed through beneficial changes in the ecological functioning of the species' habitat, which itself yields

ancillary welfare benefits (*e.g.,* improved quality of life) to the region's human population. For example, because the critical habitat designation is expected to result in enhanced conservation of the Beringia DPS over time, residents of the region who value these seals, such as subsistence users, are expected to experience indirect benefits. As another example, the geographic area identified in this proposed rule as meeting the definition of critical habitat for the Beringia DPS overlaps substantially with the range of the polar bear (*Ursus maritimus*) in the United States, and the bearded seal is a prey species of the polar bear, so the designation may also provide indirect conservation benefits to the polar bear. Indirect conservation benefits may also extend to other co-occurring species, such as the Pacific walrus (*Odobenus rosmarus divergens*), the Arctic ringed seal (*Pusa hispida hispida*), and other seal species.

It is not presently feasible to monetize, or even quantify, each component part of the benefits accruing from the designation of critical habitat for the Beringia DPS. Therefore, we augmented the quantitative measurements that are summarized here and discussed in detail in the Draft Impact Analysis Report with qualitative and descriptive assessments, as provided for under 50 CFR 424.19(b) and in guidance set out in OMB Circular A–4. Although we cannot monetize or quantify all of the incremental benefits of the critical habitat designation, we conclude that they are not inconsequential.

*Economic Impacts*

Direct economic costs of the critical habitat designation accrue primarily through implementation of section 7(a)(2) of the ESA in consultations with Federal agencies to ensure that their proposed actions are not likely to destroy or adversely modify critical habitat. Those economic impacts may include both administrative costs and costs associated with project modifications. At this time, on the basis of how protections are currently implemented for bearded seals of the Beringia DPS under the Marine Mammal Protection Act (MMPA) and as a threatened species under the ESA, we do not anticipate that additional requests for project modifications will result specifically from this designation of critical habitat. In other words, the critical habitat designation is not likely to result in more requested project modifications because our section 7 consultations on potential effects to bearded seals and our incidental take authorizations for Arctic activities under section 101(a) of the MMPA both typically address habitat-associated effects to the seals even in the absence of a critical habitat designation. As a result, the direct incremental costs of this critical habitat designation are expected to be limited to the additional administrative costs of considering Beringia DPS critical habitat in future section 7 consultations.

To identify the types of Federal activities that may affect critical habitat for the Beringia DPS, and therefore would be subject to the ESA section 7 adverse modification standard, we examined the record of section 7 consultations for 2013 to 2019 to identify Federal activities that occur within the specific area being considered as critical habitat for the Beringia DPS and that may affect the essential features of the critical habitat. These activities include oil and gas related activities, dredge mining, navigation dredging, in-water construction, commercial fishing, oil spill response, and certain military activities. We projected the occurrence of these activities over the timeframe of the analysis (the next 10 years) using the best available information on planned activities and the frequency of recent consultations for particular activity types. Notably, all of the projected future Federal actions that may trigger an ESA section 7 consultation due to the potential to affect one or more of the essential habitat features also have the potential to affect bearded seals of the Beringia DPS. In other words, none of the activities we identified would trigger a consultation solely on the basis of the critical habitat designation. We recognize there is inherent uncertainty involved in predicting future Federal actions that may affect the essential features of critical habitat for the Beringia DPS. We specifically seek comments and information regarding the types of activities that are likely be subject to section 7 consultation as a result of the proposed designation, and we will consider any relevant information received during the comment period in developing the economic analysis supporting the final rule (see Public Comment Solicited section).

We expect that the majority of future ESA section 7 consultations analyzing potential effects on the proposed essential habitat features will involve NMFS and BOEM authorizations and permitting of oil and gas related activities. In assessing costs associated with these consultations, we took a conservative approach by estimating that future formal and informal consultations addressing these activities would be more complex than for other activities, and would therefore incur higher third party (*i.e.,* applicant/permittee) incremental administrative costs per consultation to consider effects to Beringia DPS bearded seal critical habitat (see Draft Impact Analysis Report). These higher third party costs may not be realized in all cases because the administrative effort required for a specific consultation depends on factors such as the location, timing, nature, and scope of the potential effects of the proposed action on the essential features. There is also considerable uncertainty regarding the timing and extent of future oil and gas exploration and development in Alaska's Outer Continental Shelf (OCS) waters, as indicated by Shell's 2015 withdrawal from exploratory drilling in the Chukchi Sea and BOEM's 2017–2022 OCS Oil and Gas Leasing Program. Although NMFS completed formal consultations for oil and gas exploration activities in the Chukchi Sea in all but two years between 2006 and 2015, no such activities or related consultations with NMFS have occurred since that time.

As detailed in the Draft Impact Analysis Report, the total incremental costs associated with this critical habitat designation over the next 10 years, in discounted present value terms, are estimated to be $786,000 (discounted at 7 percent). In annual terms, the estimated range of discounted incremental costs is $57,000 to $105,000. About 80 percent of the incremental costs attributed to the critical habitat designation are expected to accrue from ESA section 7 consultations associated with oil and gas related activities in the Chukchi and Beaufort seas and adjacent onshore areas. Although not quantifiable at this time, the Draft Impact Analysis Report acknowledges that the oil and gas industry may also incur indirect costs associated with the critical habitat designation if future third-party litigation over specific consultations creates delays or other sources of regulatory uncertainty.

We have preliminarily concluded that the potential economic impacts associated with the critical habitat designation are modest both in absolute terms and relative to the level of economic activity expected to occur in the affected area, which is primarily associated with oil and gas activities that may occur in the Beaufort and Chukchi seas. As a result, and in light of the benefits of critical habitat designation discussed above and in the Draft Impact Analysis Report, we are not proposing to exercise our discretion to

exclude any particular area from the critical habitat designation by evaluating whether the benefits of excluding such area based on economic impacts outweighs the benefits of including such area.

*National Security Impacts*

Section 4(b)(2) of the ESA also requires consideration of national security impacts. As noted in the Application of ESA Section 4(a)(3)(B)(i) section above, before publication of this proposed rule, we contacted the DOD regarding any potential impacts of the designation of designating critical habitat for the Beringia DPS on military operations. In a letter dated June 3, 2013, the DOD Regional Environmental Coordinator indicated that no impacts on national security were foreseen from such a designation. More recently, by letter dated March 17, 2020, the Navy submitted a request for exclusion of a particular area north of the Beaufort Sea shelf from the designation of critical habitat based on national security impacts. This area does not overlap with the specific area identified in this proposed rule as meeting the definition of critical habitat for the Beringia DPS. In this letter, the Navy also provided information regarding its training and testing activities that currently occur or are planned to occur in U.S. waters inhabited by bearded seals. The Navy commented that based on the current and expected training and testing activities occurring in the Arctic region, it has determined that training and testing activities do not pose any substantial threat to the essential features of the habitat of the Beringia DPS.

In addition, by letter dated April 30, 2020, the Air Force provided information concerning its activities at radar sites located adjacent to the area under consideration for designation as critical habitat (relevant sites identified above in the Application of ESA Section 4(a)(3)(B)(i) section). The Air Force requested that we consider excluding critical habitat near these sites under section 4(b)(2) of the ESA due to impacts on national security. Although we are not proposing to exempt the radar sites pursuant to section 4(a)(3)(B)(i) of the ESA, as discussed above, here we consider whether to propose excluding critical habitat located adjacent to these sites under section 4(b)(2).

The Air Force noted that annual fuel and cargo resupply activities occur at these radar sites primarily in the summer, and installation beaches are used for offload. The Air Force indicated that coastal operations at these installations are limited, and when barge operations occur, protective measures are implemented per the Polar Bear and Pacific Walrus Avoidance Plan (preliminary final 2020) associated with the INRMP in place for these sites. The Air Force discussed that it also conducts sampling and monitoring at these sites as part of the department's Installation Restoration Program, and conducts larger scale contaminant or debris removal in some years that can require active disturbance of the shoreline. Coastal barge operations are a feature of both monitoring and removal actions.

Federal agencies have an existing obligation to consult with NMFS under section 7(a)(2) of the ESA to ensure the activities they fund or carry out are not likely to jeopardize the continued existence of the Beringia DPS of bearded seals, regardless of whether or where critical habitat is designated for the species. The information provided by the Navy does not point to any tangible consequences or restrictions that would impinge upon the Navy's training and testing activities, and suggests that the Navy would need to expend very minimal added time and effort to complete section 7 consultations to evaluate effects on critical habitat in addition to effects on the species. The activities described in the Air Force's exclusion request are localized and small in scale, and it is unlikely that modifications to these activities would be needed to address impacts to critical habitat beyond any modifications that may be necessary to address impacts to Beringia DPS bearded seals. We therefore anticipate that the time and costs associated with consideration of the effects of future Air Force actions on critical habitat of the Beringia DPS under section 7(a)(2) of the ESA would be limited if any, and the consequences for the Air Force's activities, even if we do not exempt or exclude the requested areas from critical habitat designation, would be negligible.

As a result, and in light of the benefits of critical habitat designation discussed above and in the Draft Impact Analysis Report, we have preliminarily concluded that the benefits of exclusion do not outweigh the benefits of designation and are therefore not proposing to exercise our discretionary authority to exclude these particular areas pursuant to section 4(b)(2) of the ESA based on national security impacts. We will continue to coordinate with DOD regarding the identification of potential national security impacts that could result from the critical habitat designation to further inform our determinations regarding exclusions from the designation under section 4(b)(2) based on national security impacts.

*Other Relevant Impacts*

Finally, under ESA section 4(b)(2) we consider any other relevant impacts of critical habitat designation to inform our decision as to whether to exclude any areas. For example, we may consider potential adverse effects on existing management or conservation plans that benefit listed species, and we may consider potential adverse effects on tribal lands or trust resources. In preparing this proposed designation, we have not identified any such management or conservation plans, tribal lands or resources, or anything else that would be adversely affected by the critical habitat designation. Some Alaska Native organizations and tribes have expressed concern that the critical habitat designation might restrict subsistence hunting of bearded seals or other marine mammals, such that important hunting areas should be considered for exclusion, but no restrictions on subsistence hunting are associated with this designation. Accordingly, we are not exercising our discretion to conduct an exclusion analysis pursuant to section 4(b)(2) of the ESA based on other relevant impacts.

**Proposed Critical Habitat Designation**

We propose to designate as critical habitat a specific area of marine habitat in Alaska and offshore Federal waters of the Bering, Chukchi, and Beaufort seas within the geographical area presently occupied by the Beringia DPS of the bearded seal. This critical habitat area contains physical or biological features essential to the conservation of bearded seals of the Beringia DPS that may require special management considerations or protection. We are not proposing to exclude any areas based on economic impacts, impacts to national security, or other relevant impacts of this proposed designation. We have not identified any unoccupied areas that are essential to the conservation of the Beringia DPS of the bearded seal, and thus we are not proposing any such areas for designation as critical habitat. In accordance with our regulations regarding critical habitat designation (50 CFR 424.12(c)), the map included in the proposed regulation, as clarified by the accompanying regulatory text, would constitute the official boundary of the proposed designation.

**Effects of Critical Habitat Designation**

Section 7(a)(2) of the ESA requires Federal agencies, including NMFS, to ensure that any action authorized,

funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. Federal agencies must consult with us on any agency action that may affect listed species or critical habitat. During interagency consultation, we evaluate the agency action to determine whether the action is likely to adversely affect listed species or critical habitat. The potential effects of a proposed action may depend on, among other factors, the specific timing and location of the action relative to the seasonal presence of essential features or seasonal use of critical habitat by listed species for essential life history functions. Although the requirement to consult on an action that may affect critical habitat applies regardless of the season, NMFS addresses spatial-temporal considerations when evaluating the potential impacts of a proposed action during the ESA section 7 consultation process. For example, if an action with short-term effects is proposed during a time of year that sea ice is not present, we may advise that consequences to critical habitat are unlikely. If we conclude in a biological opinion pursuant to section 7(a)(2) of the ESA that the agency action would likely result in the destruction or adverse modification of critical habitat, we would recommend reasonable and prudent alternatives to the action that avoid that result.

Reasonable and prudent alternatives are defined in 50 CFR 402.02 as 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. NMFS may also provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

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 (among other reasons for reinitiation). Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which consultation has been completed, if those actions may affect designated critical habitat for the Beringia DPS. Activities subject to the ESA section 7 consultation process include activities on Federal lands as well as activities requiring a permit or other authorization from a Federal agency (*e.g.,* a section 10(a)(1)(B) permit from NMFS), or some other Federal action, including funding (*e.g.,* Federal Highway Administration or Federal Emergency Management Agency funding). Consultation under section 7 of the ESA would not be required for Federal actions that do not affect listed species or designated critical habitat, and would not be required for actions on non-Federal and private lands that are not carried out, funded, or authorized by a Federal agency.

**Activities That May Be Affected by Critical Habitat Designation**

Section 4(b)(8) of the ESA requires, to the maximum extent practicable, in any proposed regulation to designate critical habitat, an evaluation and brief description of those activities that may adversely modify such habitat or that may be affected by such designation. A variety of activities may affect critical habitat designated for the Beringia DPS of the bearded seals and, if carried out, funded, or authorized by a Federal agency, may be subject to ESA section 7 consultation. Such activities include: In-water and coastal construction; activities that generate water pollution; dredging; commercial fishing; oil and gas exploration, development, and production; oil spill response; and certain military readiness activities. As explained above, at this time, on the basis of how protections are currently implemented for bearded seals of the Beringia DPS under the MMPA and as a threatened species under the ESA, we do not anticipate that additional requests for project modifications will result specifically from this proposed designation of critical habitat.

Private or non-Federal entities may also be affected by the proposed critical habitat designation if a Federal permit is required, Federal funding is received, or the entity is involved in or receives benefits from a Federal project. These activities would need to be evaluated with respect to their potential to destroy or adversely modify Beringia DPS critical habitat. As noted in the Public Comments Solicited section below, NMFS also requests information on the types of non-Federal activities that may be affected by this rulemaking.

**Public Comments Solicited**

To ensure the final action resulting from this proposal will be as accurate and effective as possible, we solicit comments and information from the public, other concerned government agencies, Alaska Native tribes and organizations, the scientific community, industry, non-governmental organizations, and any other interested parties concerning the proposed designation of critical habitat for the Beringia DPS of the bearded seal. In particular, we are interested in data and information regarding the following: (1) Habitat use of the Beringia DPS, including bearded seal use of rivers and streams near their confluence with the ocean; (2) the identification, location, and quality of physical or biological features essential to the conservation of the Beringia DPS, including in particular, the inclusion of ''Acoustic conditions that allow for effective communication by bearded seals for breeding purposes within waters used by breeding bearded seals'' as a feature essential to the conservation of the Beringia DPS, as well characteristics of noise that result in adverse effects on this essential feature, such as interference with bearded seal detection of acoustic communications for breeding purposes (*i.e.,* acoustic masking); (3) the delineation of the boundaries, including in particular the shoreward boundary, of where one or more of these features occur; (4) the potential impacts of designating the proposed critical habitat, including information on the types of Federal activities that may trigger an ESA section 7 consultation; (5) current or planned activities in the area proposed for designation and their possible impacts on the proposed critical habitat; (6) the potential effects of the designation on Alaska Native cultural practices and villages; (7) any foreseeable economic, national security, Tribal, or other relevant impacts resulting from the proposed designation; (8) whether any data used in the economic analysis needs to be updated; (9) foreseeable additional costs arising specifically from the designation of critical habitat for the Beringia DPS that have not been identified in the Draft Impact Analysis Report; (10) additional information regarding impacts on small businesses and federally recognized tribes not identified in the Draft Impact Analysis Report; and (11) whether any particular areas that we are proposing for critical habitat designation should be considered for exclusion under section

4(b)(2) of the ESA and why. For these described impacts or benefits, we request that the following specific information (if relevant) be provided to inform our ESA section 4(b)(2) analysis: (1) A map and description of the affected area; (2) a description of the activities that may be affected within the area; (3) a description of past, ongoing, or future conservation measures conducted within the area that may protect the habitat for Beringia DPS bearded seals; and (4) a point of contact.

You may submit your comments and information concerning this proposed rule by any one of the methods described under **ADDRESSES** above. The proposed rule and supporting documentation can be found on the Federal eRulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0029.* We will consider all comments and information received during the comment period for this proposed rule in preparing the final rule. Accordingly, the final decision may differ from this proposed rule.

**References Cited**

A complete list of all references cited in this proposed rule can be found on the Federal eRulemaking Portal and is available upon request from the NMFS office in Juneau, Alaska (see **ADDRESSES**).

**Classifications**

*National Environmental Policy Act*

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. *See Douglas Cnty.* v. *Babbitt,* 48 F.3d 1495, 1502–08 (9th Cir. 1995).

*Regulatory Flexibility Act*

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, 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 that describes the effects of the rule on small entities (*i.e.,* small businesses, small not-for-profit organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility act analysis (IRFA) that is included as part of the Draft Impact Analysis Report for this proposed rule. The IRFA estimates the potential number of small businesses that may be directly regulated by this proposed rule, and the impact (incremental costs) per small entity for a given activity type. Specifically, based on an examination of the North American Industry Classification System (NAICS), this analysis classifies the economic activities potentially directly regulated by the proposed action into industry sectors and provides an estimate of their number in each sector, based on the applicable NAICS codes. A summary of the IRFA follows.

A description of the action (*i.e.,* proposed designation of critical habitat), why it is being considered, and its legal basis are included in the preamble of this proposed rule. This proposed action does not impose new recordkeeping or reporting requirements on small entities. The analysis did not reveal any Federal rules that duplicate, overlap, or conflict with the proposed action. Existing Federal laws and regulations overlap with the proposed rule only to the extent that they provide protection to natural resources within the area proposed as critical habitat generally. However, no existing regulations specifically prohibit destruction or adverse modification of critical habitat for the Beringia DPS of the bearded seal.

This proposed critical habitat rule does not directly apply to any particular entity, small or large. The regulatory mechanism through which critical habitat protections are enforced is section 7 of the ESA, which directly regulates only those activities carried out, funded, or permitted by a Federal agency. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. In some cases, small entities may participate as third parties (*e.g.,* permittees, applicants, grantees) during ESA section 7 consultations (the primary parties being the Federal action agency and NMFS) and thus they may be indirectly affected by the critical habitat designation.

Based on the best information currently available, the Federal actions projected to occur within the time frame of the analysis (*i.e.,* the next 10 years) that may trigger an ESA section 7 consultation due to the potential to affect one or more of the essential habitat features also have the potential to affect Beringia DPS bearded seals. Thus, as discussed above, we expect that none of the activities we identified would trigger a consultation solely on the basis of this critical habitat designation; in addition, we do not anticipate that additional requests for project modifications will result specifically from this designation of critical habitat. As a result, the direct incremental costs of this critical habitat designation are expected to be limited to the additional administrative costs of considering bearded seal critical habitat in future section 7 consultations that would occur regardless based on the listing of Beringia DPS bearded seals.

As detailed in the Draft Impact Analysis Report, the oil and gas exploration, development, and production industries participate in activities that are likely to require consideration of critical habitat in ESA section 7 consultations. The Small Business Administration size standards used to define small businesses in these cases are: (1) An average of no more than 1,250 employees (crude petroleum and natural gas extraction industry); or (2) average annual receipts of no more than $41.5 million (support activities for oil and gas operations industry). Only two of the parties identified in the oil and gas category appear to qualify as small businesses based on these criteria. Based on past ESA section 7 consultations, the additional third party administrative costs in future consultations involving Beringia DPS critical habitat over the next 10 years are expected to be borne principally by large oil and gas operations. The estimated range of annual third party costs over this 10 year period is $32,000 to $59,000 (discounted at 7 percent), virtually all of which is expected to be associated with oil and gas activities. It is possible that a limited portion of these administrative costs may be borne by small entities (based on past consultations, an estimated maximum of two entities). Two government jurisdictions with ports appear to qualify as small government jurisdictions (serving populations of fewer than 50,000). The total third party costs that may be borne by these small government jurisdictions over 10 years are less than $1,000 (discounted at 7 percent) for the additional administrative effort to consider Beringia DPS critical habitat as part of a future ESA section 7 consultation involving one port.

As required by the RFA (as amended by the SBREFA), we considered alternatives to the proposed critical habitat designation for the Beringia DPS. We considered and rejected the alternative of not designating critical habitat for the Beringia DPS, because such an alternative does not meet our statutory requirements under the ESA. Under section 4(b)(2) of the ESA, NMFS must consider the economic impacts, impacts to national security, and other relevant impacts of designating any particular area as critical habitat. NMFS

has the discretion to exclude any area from 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 the Beringia DPS if an area were designated), as long as exclusion of the area will not result in extinction of the species. However, based on the best information currently available, we concluded that this rule would result in minimal impacts to small entities and the economic impacts associated with the critical habitat designation would be modest. Therefore, we are not proposing to exclude any areas from the critical habitat designation pursuant to section 4(b)(2) of the ESA. Instead, we selected the alternative of proposing to designate as critical habitat the entire specific area that contains at least one identified essential feature because it would result in a critical habitat designation that provides for the conservation of the species and is consistent with the ESA and joint NMFS and U.S. Fish and Wildlife Service regulations concerning critical habitat at 50 CFR part 424.

*Paperwork Reduction Act*

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. This proposed rule does not contain any new or revised collection of information. This rule, if adopted, would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(1) 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.'' The designation of critical habitat does not impose an enforceable duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect of this critical habitat designation is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly affected by the designation of critical habitat, but 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 affected because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandate Reform Act would not apply, nor would critical habitat shift to state governments the costs of the large entitlement programs listed above.

(2) This proposed rule will not significantly or uniquely affect small governments because it is not likely to produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. In addition, the designation of critical habitat imposes no obligations on local, state, or tribal governments. Therefore, a Small Government Agency Plan is not required.

*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 (Section 515 of Pub. L. 106–554).

On December 16, 2004, the OMB issued its Final Information Quality Bulletin for Peer Review (Bulletin) establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The primary purpose of the Bulletin, which was implemented under the Information Quality Act, is to improve the quality and credibility of scientific information disseminated by the Federal government by requiring peer review of ''influential scientific information'' and ''highly influential scientific information'' prior to public dissemination. Influential scientific information is defined as information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions. The Bulletin provides agencies broad discretion in determining the appropriate process and level of peer review. Stricter standards were established for the peer review of ''highly influential scientific assessments,'' defined as information whose dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the information is novel, controversial, or precedent-setting, or has significant interagency interest. The evaluation of critical habitat presented in this proposed rule and the information presented in the supporting Draft Impact Analysis Report are considered influential scientific information subject to peer review. To satisfy our requirements under the OMB Bulletin, we are obtaining independent peer review of the information used to prepare this proposed rule and will address all comments received in developing the final rule.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

As the entire proposed critical habitat area is located seaward of the line of MLLW and does not extend into tidally-influenced channels of tributary waters, no tribal-owned lands overlap with the proposed designation. However, we seek comments and information concerning tribal and Alaska Native corporation activities that are likely to be affected by the proposed designation (see Public Comments Solicited section). Although this proposed designation overlaps with areas used by

Alaska Natives for subsistence, cultural, and other purposes, no restrictions on subsistence hunting are associated with the critical habitat designation. We coordinate with Alaska Native hunters regarding management issues related to bearded seals through the Ice Seal Committee (ISC), a co-management organization under section 119 of the MMPA. We discussed the designation of critical habitat for the Beringia DPS of the bearded seal with the ISC and provided updates regarding the timeline for publication of this proposed rule. We will also contact potentially affected tribes and Alaska Native corporations by mail and offer them the opportunity to consult on the designation of critical habitat for the Beringia DPS and discuss any concerns they may have. If we receive any such requests in response to this proposed rule, we will respond to each request before issuing a final rule.

*Executive Order 12630, Takings*

Under E.O. 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 E.O. 12630, the proposed rule does not have significant takings implications. The designation of critical habitat directly affects only Federal agency actions (*i.e.,* those actions authorized, funded, or carried out by Federal agencies). Further, no areas of private property exist within the proposed critical habitat and hence none would be affected by this action. Therefore, a takings implication assessment is not required.

*Executive Order 12866, Regulatory Planning and Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

OMB has determined that this proposed rule is significant for purposes of E.O. 12866 review. A Draft Impact Analysis Report has been prepared that considers the economic costs and benefits of the proposed critical habitat designation and alternatives to this rulemaking as required under E.O. 12866. To review this report, see the **ADDRESSES** section above.

Based on the Draft Impact Analysis Report, the total estimated present value of the incremental impacts of the proposed critical habitat designation is approximately $786,000 over the next 10 years (discounted at 7 percent). Assuming a 7 percent discount rate, the range of annual impacts is estimated to be $57,000 to $105,000. Overall, economic impacts are expected to be small and Federal agencies are anticipated to bear at least 45 percent of these costs. While there are expected beneficial economic impacts of designating critical habitat for the Beringia DPS, there are insufficient data available to monetize those impacts (see *Benefits of Designation* section).

This proposed rulemaking is expected to be regulatory under E.O. 13771.

*Executive Order 13132, Federalism*

Executive Order 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Pursuant to E.O. 13132, we determined that this proposed rule does not have significant federalism effects and that a federalism assessment is not required. The designation of critical habitat directly affects only the responsibilities of Federal agencies. As a result, the proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. State or local governments may be indirectly affected by the proposed designation if they require Federal funds or formal approval or authorization from a Federal agency as a prerequisite to conducting an action. In these cases, the State or local government agency may participate in the ESA section 7 consultation as a third party. However, in keeping with Department of Commerce policies and consistent with ESA regulations at 50 CFR 424.16(c)(1)(ii), we will request information for this proposed rule from the appropriate state resource agencies in Alaska.

*Executive Order 13211, Energy Supply, Distribution, and Use*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking any significant energy action. Under E.O. 13211, a significant energy action means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this proposed critical habitat designation on the supply, distribution, or use of energy (see Draft Impact Analysis Report for this proposed rule). This proposed critical habitat designation overlaps with five BOEM planning areas for Outer Continental Shelf oil and gas leasing; however, the Beaufort and Chukchi Sea planning areas are the only areas with existing or planned leases.

Currently, the majority of oil and gas production occurs on land adjacent to the Beaufort Sea and the proposed critical habitat area. Any proposed offshore oil and gas projects would likely undergo an ESA section 7 consultation to ensure that the project would not likely destroy or adversely modify designated critical habitat. However, as discussed in the Draft Impact Analysis Report for this proposed rule, such consultations will not result in any new and significant effects on energy supply, distribution, or use. ESA section 7 consultations have occurred for numerous oil and gas projects within the area of the critical habitat designation (*e.g.,* regarding possible effects on endangered bowhead whales, a species without designated critical habitat) without adversely affecting energy supply, distribution, or use, and we would expect the same relative to critical habitat for the Beringia DPS of the bearded seal. We have, therefore, determined that the energy effects of this proposed rule are unlikely to exceed the impact thresholds identified in E.O. 13211, and that this rulemaking is not a significant energy action.

**List of Subjects**

*50 CFR Part 223*

Endangered and threatened species.

*50 CFR Part 226*

Endangered and threatened species.

Dated: December 28, 2020.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR parts 223 and 226 are proposed to be amended as follows:

## PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e), under Marine Mammals, by revising the entry for ''Seal, bearded (Beringia DPS)'' to read as follows:

**§ 223.102 Enumeration of threatened marine and anadromous species.**

* * * * *

(e) * * *

| Species [1] | | | Citation(s) for listing determination(s) | Critical habitat | ESA rules |
|---|---|---|---|---|---|
| Common name | Scientific name | Description of listed entity | | | |
| **Marine Mammals** | | | | | |
| * | * | * | * | * | * |
| Seal, bearded (Beringia DPS). | *Erignathus barbatus nauticus*. | Bearded seals originating from breeding areas in the Arctic Ocean and adjacent seas in the Pacific Ocean between 145° E. Long. (Novosibirskiye) and 130° W. Long., and east of 157° E. Long. or east of the Kamchatka Peninsula. | 77 FR 76740, Dec. 28, 2012. | 226.230 | NA. |
| * | * | * | * | * | * |

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722; February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612; November 20, 1991).

* * * * *

## PART 226—DESIGNATED CRITICAL HABITAT

■ 3. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

■ 4. Add § 226.230 to read as follows:

**§ 226.230 Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal Subspecies *Erignathus barbatus nauticus*.**

Critical habitat is designated for the Beringia distinct population segment of the bearded seal subspecies *Erignathus barbatus nauticus* (Beringia DPS) as depicted in this section. The map, clarified by the textual descriptions in this section, is the definitive source for determining the critical habitat boundaries.

(a) *Critical habitat boundaries.* Critical habitat for the Beringia DPS includes marine waters within one specific area in the Bering, Chukchi, and Beaufort seas, extending from the line of mean lower low water (MLLW) to an offshore limit with a maximum water depth of 200 m from the ocean surface within the U.S. Exclusive Economic Zone (EEZ). Critical habitat does not extend into tidally-influenced channels of tributary waters of the Bering, Chukchi, or Beaufort seas. The boundary extends offshore from the northern limit of the United States-Canada border to the 200-m isobath and then follows this isobath generally westward and northwestward to its intersection with the seaward limit of the U.S EEZ. The boundary then follows the limit of the U.S. EEZ southwestward and south to the intersection of the southern boundary of the critical habitat in the Bering Sea at 60°32′26″ N/179°9′53″ W. The southern boundary extends southeastward from this intersection point to 57°58′ N/170°25′ W, then eastward to 58°29′ N/164°46′ W, then follows longitude 164°46′ W to the line of MLLW near the mouth of the Kolovinerak River. Critical habitat does not include permanent manmade structures such as boat ramps, docks, and pilings that were in existence within the legal boundaries on or before the effective date of this rule.

(b) *Essential features.* The essential features for the conservation of the Beringia DPS are:

(1) Sea ice habitat suitable for whelping and nursing, which is defined as areas with waters 200 m or less in depth containing pack ice of at least 25 percent concentration and providing bearded seals access to those waters from the ice.

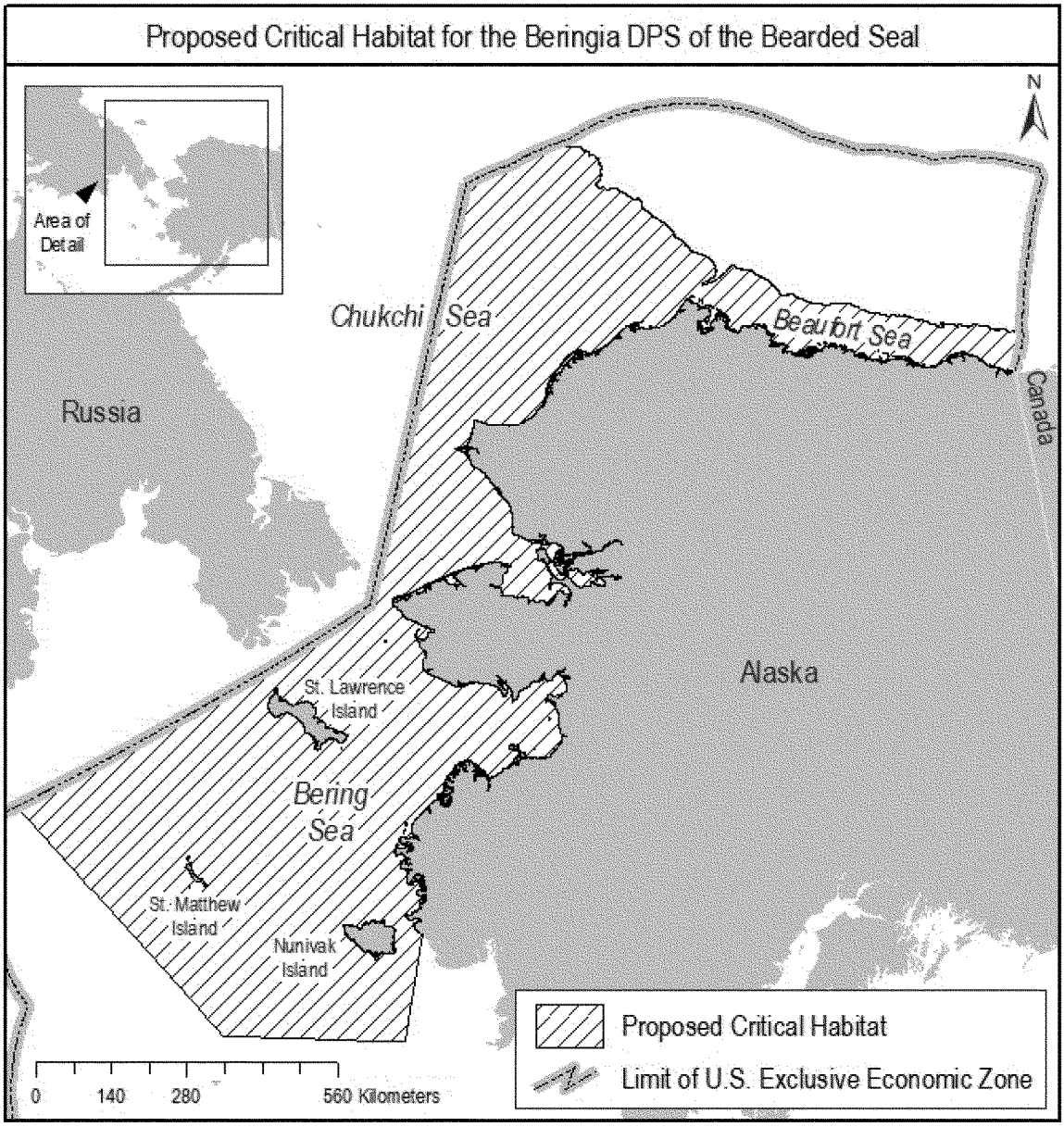
(2) Sea ice habitat suitable as a platform for molting, which is defined as areas with waters 200 m or less in depth containing pack ice of at least 15 percent concentration and providing bearded seals access to those waters from the ice.

(3) Primary prey resources to support bearded seals in waters 200 m or less in depth: Benthic organisms, including epifaunal and infaunal invertebrates, and demersal and schooling pelagic fishes.

(4) Acoustic conditions that allow for effective communication by bearded seals for breeding purposes within waters used by breeding bearded seals.

(c) *Map of Beringia DPS critical habitat.*

BILLING CODE 3510–22–P




[FR Doc. 2020–29006 Filed 1–7–21; 8:45 am]
**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Parts 223 and 226**

**[Docket No.: 201228–0357]**

**RIN 0648–BC56**

## Endangered and Threatened Species; Designation of Critical Habitat for the Arctic Subspecies of the Ringed Seal

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

**ACTION:** Revised proposed rule; reopening of comment period.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), announce revisions to our December 9, 2014, proposed designation of critical habitat for the Arctic subspecies of the ringed seal (*Pusa hispida hispida*) under the Endangered Species Act (ESA). The revised proposed designation comprises an area of marine habitat in the Bering, Chukchi, and Beaufort seas. Based on consideration of national security impacts, we also propose to exclude a particular area north of the Beaufort Sea shelf from the designation. We seek comments on all aspects of the revised proposed critical habitat designation and will consider information received before issuing a final designation.

**DATES:** Comments must be received by March 9, 2021. Public hearings on the revised proposed rule will be held in Alaska. The dates and times of these hearings will be provided in a subsequent **Federal Register** notice.

**ADDRESSES:** You may submit data, information, or comments on this document, identified by NOAA–NMFS–2013–0114, and on the associated Draft Impact Analysis Report (*i.e.,* report titled ''Draft RIR/ESA Section 4(b)(2) Preparatory Assessment/IRFA of Critical Habitat Designation for the Arctic Ringed Seal'') for the revised proposed rule by either of the following methods:

- *Electronic Submission:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/*

*#!docketDetail;D=NOAA-NMFS-2013-0114,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: James Bruschi, P.O. Box 21668, Juneau, AK 99082–1668.

*Instructions:* NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of the Draft Impact Analysis Report for this revised proposed rule and a complete list of references cited in this revised proposed rule are available on the Federal eRulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0114.*

**FOR FURTHER INFORMATION CONTACT:** Tammy Olson, NMFS Alaska Region, (907) 271–5006; Jon Kurland, NMFS Alaska Region, (907) 586–7638; or Heather Austin, NMFS Office of Protected Resources, (301) 427–8422.

**SUPPLEMENTARY INFORMATION:** Section 3(5)(A) of the ESA defines critical habitat as (1) 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 essential to the conservation of the species and 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 by the Secretary of Commerce (Secretary) that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation is defined in section 3(3) of the ESA as the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary (16 U.S.C. 1532(3)). Section 3(5)(C) of the ESA provides that, except 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. Also, by regulation, critical habitat shall not be designated within foreign countries or in other areas outside U.S. jurisdiction (50 CFR 424.12(g)).

Section 4(b)(2) of the ESA requires the Secretary 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. This section also grants the 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. However, the Secretary may not exclude areas if such exclusion will result in the extinction of the species (16 U.S.C. 1533(b)(2)).

Once critical habitat is designated, section 7(a)(2) of the ESA requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify that habitat (16 U.S.C. 1536(a)(2)). This requirement is additional to the section 7(a)(2) requirement that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of ESA-listed species. Specifying the geographic location of critical habitat also facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA. *See* 16 U.S.C. 1536(a)(1). Critical habitat requirements do not apply to citizens engaged in actions on private land that do not involve a Federal agency.

This revised proposed rule describes our revised proposed designation of critical habitat for the Arctic ringed seal, including supporting information on Arctic ringed seal distribution and habitat use, and the methods used to develop the revised proposed designation. The Arctic ringed seal is listed with the scientific name *Phoca* (=*Pusa*) *hispida hispida.* In this revised proposed rule, we use the genus name *Pusa* to reflect currently accepted use (*e.g.,* Committee on Taxonomy (Society for Marine Mammalogy) 2019, Integrated Taxonomic Information System (online database) 2019).

## Background

On December 28, 2012, we published a final rule to list the Arctic ringed seal as threatened under the ESA (77 FR 76706). Section 4(b)(6)(C) of the ESA requires the Secretary to designate critical habitat concurrently with making a determination to list a species as threatened or endangered unless it is not determinable at that time, in which case the Secretary may extend the deadline for this designation by one year. At the time of listing, we announced our intention to designate critical habitat for the Arctic ringed seal in a separate rulemaking, as its critical habitat was not then determinable. Concurrently, we solicited information to assist us in (1) identifying the physical or biological features essential to the conservation of Arctic ringed seals, and (2) assessing the economic consequences of designating critical habitat for this species. Subsequently we researched, reviewed, and compiled the best scientific data available to develop a critical habitat proposal for the Arctic ringed seal.

On December 3, 2014, we published a proposed rule to designate critical habitat for the Arctic ringed seal under the ESA (79 FR 71714). Due to a clerical error, that document contained mistakes, and we therefore published a corrected proposed rule on December 9, 2014 (79 FR 73010). We requested public comment on this proposed designation through March 9, 2015. In response to comments, we extended the public comment period through March 31, 2015 (80 FR 5498, February 2, 2015). We held five public hearings in Alaska on the proposed rule (80 FR 1618, January 13, 2015; 80 FR 5498, February 2, 2015).

Subsequently, on March 17, 2016, the listing of Arctic ringed seals as a threatened species was vacated by the U.S. District Court for the District of Alaska (*Alaska Oil & Gas Ass'n* v. *Nat'l Marine Fisheries Serv.,* Case Nos. 4:14-cv-29–RRB, 4:15-cv-2–RRB, 4:15-cv-5–RRB, 2016 WL 1125744 (D. Alaska Mar. 17, 2016)). This decision was reversed by the U.S. Court of Appeals for the Ninth Circuit on February 12, 2018 (*Alaska Oil & Gas Ass'n* v. *Ross,* 722 F. App'x 666 (9th Cir. 2018)), and the listing was reinstated on May 15, 2018.

On June 13, 2019, the Center for Biological Diversity filed a complaint in the U.S. District Court for the District of Alaska alleging that NMFS had failed to timely designate critical habitat for the Arctic ringed seal. Under a court-approved stipulated settlement agreement between the parties (which was subsequently amended to extend the dates specified in the original order), NMFS agreed to submit a proposed determination concerning the designation of critical habitat for Arctic ringed seals to the **Federal Register** by

March 15, 2021, and (to the extent a proposed rule has been published) a final rule by March 15, 2022. NMFS decided to issue this revised proposed rule rather than proceeding directly with a final rule because we are also considering the designation of critical habitat for the Beringia distinct population segment (DPS) of the Pacific bearded seal subspecies *Erignathus barbatus nauticus* (for which no proposed rule has been issued), and we expect that stakeholders will want to comment on both proposals simultaneously, because both species are ice-dependent and their habitats overlap. A revised proposed rule also affords an opportunity for additional public comment to help ensure that our decision is based on the best scientific data available, considering that several years have elapsed since our December 9, 2014, proposal. We are therefore issuing this revised proposed rule in tandem with a proposed rule for bearded seal critical habitat.

**Summary of Revisions to Proposed Critical Habitat**

In this revised proposed critical habitat designation, we incorporate additional relevant information that became available since the publication of our 2014 proposed rule. Based on the best scientific data currently available, our understanding of the physical and biological features essential to the conservation of the Arctic ringed seal and the specific areas where those features occur has not changed markedly since 2014. However, in the preamble of this revised proposed rule we provide updated information in the Description and Natural History section about the Arctic ringed seal's distribution and habitat use, and we include more details in the Specific Areas Containing the Essential Features section regarding the information considered in determining the areas that meet the definition of critical habitat for this species. After updating and evaluating the best scientific information available, we have also made the following changes from the December 9, 2014, proposed rule (79 FR 73010):

(1) We refined our descriptions of the essential features associated with sea ice, including the essential feature of sea ice suitable for the formation and maintenance of birth lairs. We now refer to ''snow-covered sea ice'' to underscore that this essential feature consists of a combination of sea ice and the on-ice snow layer within which subnivean birth lairs (snow caves) are constructed. In recognition of the limits of the data available on snow drift depths sufficient for these subnivean lairs, we clarify that such snow drifts are ''typically'' at least 54 centimeters (cm) deep.

(2) We modified the southern boundary of the proposed critical habitat designation to more accurately reflect where one or more of the essential features occur. Consistent with our 2014 proposed rule, in this revised proposed rule we primarily determined this boundary by identifying the southern extent of snow-covered sea ice essential for birth lairs. Birth lairs are used to shelter pups during whelping and nursing. We propose to define this essential feature as areas of seasonal landfast (shorefast) ice and dense, stable pack ice, excluding any bottom-fast ice extending seaward from the coastline (typically in waters less than 2 meters (m) deep), that have undergone deformation (*i.e.,* rafting, ridging, or hummocking due to wind and ocean currents) and contain snowdrifts of sufficient depth, typically at least 54 cm deep (see Physical and Biological Features Essential to the Conservation of the Species section). We relied on the birth lair essential feature to determine the southern boundary of this proposed critical habitat designation because peak molting (for adults) takes place later in the spring as sea ice retreats northward, and also because the annual extent and timing of sea ice is especially variable in the southern periphery of the Arctic ringed seal's habitat in the Bering Sea (Boveng *et al.* 2009, Stabeno *et al.* 2012b, Frey *et al.* 2015). Consequently, we concluded that the southern extent of sea ice suitable for birth lairs also provides the best estimate of the southern extent of sea ice suitable for basking and molting.

As discussed in detail below, because existing information is limited on whelping locations and the distribution of Arctic ringed seals in the Bering Sea during spring, a precise southern boundary for the critical habitat cannot be determined based on such information. Available estimates of snow-depth on Arctic sea ice derived from satellite remote-sensing data are spatially and temporally limited and are subject to a variety of sources of uncertainty (Spreen and Kern 2017, Sturm and Massom 2017, Webster *et al.* 2018). Further, there is a high degree of variability evident in snow depths on sea ice and the spatial distribution of those depths within and between years (Sturm and Massom 2017, Webster *et al.* 2018). We therefore turned to Sea Ice Index data maintained by the National Snow and Ice Data Center (NSIDC) (Fetterer *et al.* 2017, Version 3.0; accessed November 2019) for information on the estimated monthly position of the ice edge in the Bering Sea during spring based on a time series of satellite records.

In our 2014 proposed rule, we based the southern boundary of proposed critical habitat on the estimated median ice edge position in April, which is the peak month for Arctic ringed seal whelping (Kelly *et al.* 2010a). We interpreted the limited information available at that time on whelping locations and the spring distribution of Arctic ringed seals in the Bering Sea as suggesting that snow-covered sea ice essential for birth lairs extends to some point south of St. Matthew Island and Nunivak Island. After verifying that the estimated position of the April median ice edge contour appeared generally consistent with this information, we defined the southern boundary in that proposed rule based on a simplified version of this contour.

However, while developing this revised proposed rule, we recognized that suitable snow-covered sea ice would need to persist for several weeks for pups to be sheltered and nursed in birth lairs. We therefore considered whether the position of the ice edge during May (rather than April) would more accurately represent the southern extent of where snow-covered sea ice persists sufficiently to provide suitable conditions for pup development within birth lairs (and as noted above, potentially for basking and molting). We examined the estimated position of the May median ice edge for both the 30-year 1981 to 2010 reference period currently used by NSIDC for the Sea Ice Index (Fetterer *et al.* 2017, Version 3.0; accessed November 2019), and for the more recent 30-year period of 1990 to 2019, which was calculated using methods and data types similar to those used for the Sea Ice Index. We note that the two most recent years included in the 1990 to 2019 period had record low ice extent in the Bering Sea (Stabeno and Bell 2019). The May median ice edge from the Sea Ice Index is located about 22 kilometers (km) southwest of St. Matthew Island and about 85 km north of Nunivak Island; and for the more recent 1990 to 2019 period, is generally similar to that of the Sea Ice Index, except that east of St. Matthew Island the ice edge for the more recent period has a more variable shape. As a result, although the median ice edge for both 30-year periods reaches the coast at a similar location south of Hooper Bay, between that location and St. Matthew Island, the median ice edge for the more recent period is primarily located north of Hooper Bay.

After our 2014 proposed rule was issued, additional data also became

available on the spring distribution of ice-associated seals (including ringed seals) in the Bering Sea from aerial surveys conducted in 2012 and 2013 (NMFS Marine Mammal Laboratory, unpublished data). We used these data to inform our determination of the southern boundary in this revised proposed rule. Overall, ringed seal observations appeared to be more frequent along transect segments flown north of St. Matthew and Nunivak Islands than those flown farther south (*i.e.,* habitat we proposed for designation in 2014 based on the estimated median position of the ice edge in April). Although relatively few ringed seal pups were documented during these surveys (likely reflecting, at least in part, that pups were sheltered in subnivean lairs and thus would not have been detected), the majority of the limited detections of pups were located in Norton Sound, and few observations of pups were documented south of St. Matthew Island and Nunivak Islands.

Taken as a whole, we concluded that the data currently available on whelping locations and the spring distribution of ringed seals in the Bering Sea suggest that information on the estimated position of the ice edge for May provides the best estimate of the southern extent of snow-covered sea ice that persists sufficiently to provide suitable conditions for pup development within birth lairs. As we explained above, we also concluded that this southern boundary most accurately defines the southern extent of sea ice essential for basking and molting. Therefore, in this revised proposed rule we use information on the position of the ice edge for May, rather than for April, to delineate the southern boundary of Arctic ringed seal critical habitat. Specifically, given the reduction in sea ice east of St. Matthew Island between the reference period used for the Sea Ice Index and the more recent 30-year period described above, we elected to delineate the southern boundary to reflect the estimated position of the May median ice edge for the more recent 1990 to 2019 period. This revised proposed southern boundary is located roughly 125 km (western portion) to 325 km (eastern portion) north of the southern boundary we proposed in 2014.

In our 2014 proposed rule, we referred to the estimated position of the April median ice edge for the 22-year 1979 to 2000 reference period previously used (from 2002 through June 2013) for the Sea Ice Index. At that time, we reasoned that several of the more recent years included in the 1981 to 2010 reference period had above-average ice extent in the Bering Sea (*e.g.,* Stabeno *et al.* 2012a), and we inferred that use of these data would have resulted in the inclusion of areas (farther south and east in the Bering Sea) that are unlikely to contain the sea ice essential features on a consistent basis in more than a few scattered portions of those areas. However, upon further review, we concluded that the 30-year periods considered in this revised proposed rule provide a more appropriate basis for our analysis, in that more recent data on sea ice conditions are included and the median calculated over a lengthened 30-year period of record, which is commonly used in climatologies, incorporates more of the year-to-year variation in the sea ice extent.

(3) We modified the textual description of the shoreward boundary of the proposed critical habitat designation. In our 2014 proposed rule, we described the shoreward boundary as the ''coast line'' of Alaska as that term has been defined in the Submerged Lands Act (''the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters'') (43 U.S.C. 1301(c)). Upon further review, we concluded that delineating the shoreward boundary on this basis results in the omission of some smaller bays and shallow nearshore waters that contain the essential physical and biological features of habitat for Arctic ringed seals. Given the occurrence of Arctic ringed seal primary prey in shallow nearshore waters and evidence of ringed seal use of such waters during the open-water foraging period, in this revised proposed rule we delineate the shoreward boundary as the line that marks mean lower low water (MLLW). This proposed critical habitat does not extend into tidally-influenced channels of tributary waters of the Bering, Chukchi, or Beaufort seas.

(4) We revised our analysis of the impacts of designating the proposed critical habitat for the Arctic ringed seal to reflect the revisions summarized above, and to incorporate the best data currently available. This analysis is summarized in this revised proposed rule and described in detail in the associated Draft Impact Analysis Report.

(5) In response to information submitted by the U.S. Navy, we propose to exclude one particular area north of the Beaufort Sea shelf from the designation based on national security impacts because the benefits of exclusion outweigh the benefits of inclusion of this area.

**Description and Natural History**

The Arctic ringed seal is the smallest of the northern seals, with typical adult body size of 1.5 m in length and 70 kilograms in weight (Kelly *et al.* 2010a). Age of sexual maturity for female Arctic ringed seals generally ranges from 3 to 7 years (Smith 1987, Holst *et al.* 1999, Quakenbush *et al.* 2011, Crawford *et al.* 2015), and for males ranges from 5 to 7 years (Frost and Lowry 1981), but with geographic and temporal variability depending on animal condition and population structure (Kelly *et al.* 2010a). The average life span of ringed seals is about 15 to 28 years (Kelly *et al.* 2010a).

*Distribution and Habitat Use*

Arctic ringed seals are circumpolar and are found throughout ice-covered waters of the Arctic Ocean Basin and southward into adjacent seas, including the Bering, Chukchi, and Beaufort seas off Alaska's coast (Frost and Lowry 1981, Frost 1985, Kelly 1988, Rice 1998). Ringed seals are adapted to remaining in heavily ice-covered areas throughout the fall, winter, and spring by using the stout claws on their foreflippers to maintain breathing holes in the ice. Arctic ringed seals are highly associated with sea ice, and use the ice as a substrate for resting, whelping (birthing), nursing, and molting (shedding and regrowing hair and outer skin layers). The seasonality of ice cover strongly influences Arctic ringed seal movements, foraging, reproductive behavior, and vulnerability to predation. Kelly *et al.* (2010b) referred to three periods important to Arctic ringed seal seasonal movements and habitat use: The winter through early spring ''subnivean period'' when the seals rest primarily in subnivean lairs (snow caves on top of the ice); the late spring to early summer ''basking period'' between abandonment of the lairs and melting of the seasonal sea ice when the seals undergo their annual molt; and the open-water ''foraging period'' from ice break-up to freeze-up in the fall, when feeding occurs most intensively.

*Subnivean Period:* With the onset of freeze-up in the fall, many Arctic ringed seals that summer in the Beaufort and Chukchi seas are thought to move generally southward with the advancing ice, while others remain in these waters over winter (Frost 1985). Adult movements during the subnivean period have been reported as typically limited, especially where ice cover is extensive (Kelly and Quakenbush 1990, Harwood *et al.* 2007, Kelly *et al.* 2010b, Crawford *et al.* 2012b, Luque *et al.* 2014), likely due to maintenance of breathing holes and social behavior during the breeding

season (Kelly *et al.* 2010b). However, some adult males have been found to make long-distance movements in the Chukchi and Beaufort seas during January to March (Quakenbush *et al.* 2019). In contrast, subadult Arctic ringed seals have been observed to travel relatively long distances in winter to near the ice edge in the Bering Sea (Crawford *et al.* 2012a, 2019).

During freeze-up, ringed seals surface to breathe in the remaining open water of cracks and leads, and as these openings in the ice freeze over, the seals open breathing holes that they maintain as the ice thickens by abrading the ice with the claws on their foreflippers (Smith and Stirling 1975). Ringed seals excavate lairs in snowdrifts over their breathing holes where snow depth is sufficient (*e.g.,* McLaren 1958, Smith and Stirling 1975, Smith 1987). These subnivean lairs are occupied for resting, whelping, and nursing pups in areas of annual landfast (shorefast) ice (McLaren 1958, Burns 1970, Kelly *et al.* 1986, Frost and Burns 1989, Smith *et al.* 1991, Oceana and Kawerak 2014) and stable pack ice (Finley *et al.* 1983, Fedoseev *et al.* 1988, Wiig *et al.* 1999, Pilfold *et al.* 2014). Snowdrifts of sufficient depth typically occur only where the ice has undergone a low to moderate amount of deformation and where snow on the ice has drifted along pressure ridges or ice hummocks (Smith and Stirling 1975, Lydersen and Gjertz 1986, Furgal *et al.* 1996, Lydersen 1998).

Females give birth to a single pup in their lairs generally from mid-March through April, and the pups are nursed in the lairs for an average of 39 days (Hammill and Smith 1991), with considerable variation (Kelly *et al.* 2010a). Females continue to forage throughout lactation while making frequent visits to birth lairs (Hammill 1987, Kelly and Wartzok 1996, Simpkins *et al.* 2001). The pups develop foraging skills before weaning (Lydersen and Hammill 1993), and are normally weaned before break-up of spring ice (McLaren 1958, Smith 1973, Smith *et al.* 1991, Hammill *et al.* 1991, Kelly 1988).

Subnivean lairs provide protection from cold and predators throughout the winter months, but they are especially important for protecting newborn ringed seals. The lairs conceal ringed seals from predators, an advantage especially important to the small pups that start life with minimal tolerance for immersion in cold water (Smith *et al.* 1991). Major predators of ringed seals include polar bears (*Ursus maritimus*) and Arctic foxes (*Alopex lagopus*) (*e.g.,* Smith 1976, Frost and Burns 1989, Derocher *et al.* 2004, Thiemann *et al.* 2008). Pups in lairs with thin snow cover are more vulnerable to polar bear predation than pups in lairs with thick snow cover (Hammill and Smith 1989, Ferguson *et al.* 2005). For example, Hammill and Smith (1991) noted that polar bear predation on ringed seal pups increased four-fold in a year when average snow depths in their study area decreased from 23 to 10 cm. Stirling and Smith (2004) surmised that most pups that survived exposure to cold after their subnivean lairs collapsed during unseasonal rains were eventually killed by polar bears, Arctic foxes, or gulls.

Subnivean lairs also provide refuge from air temperatures too low for survival of ringed seal pups. When forced to flee into the water to avoid predators, the ringed seal pups that survive depend on the subnivean lairs to subsequently warm themselves (Smith *et al.* 1991). When snow depth is insufficient, pups can freeze in their lairs, as documented when roofs of lairs in the White Sea were only 5 to 10 cm thick (Lukin and Potelov 1978). Stirling and Smith (2004) also documented exposure of ringed seals to hypothermia following the collapse of subnivean lairs during unseasonal rains near southeastern Baffin Island.

During winter and spring, ringed seals are found throughout the Chukchi and Beaufort seas (Frost 1985, Kelly 1988). In the Bering Sea, surveys indicate that ringed seals use nearly the entire ice field over the Bering Sea shelf. During an exceptionally high ice year (1976), Braham *et al.* (1984) found ringed seals present in the southeastern Bering Sea north of the Pribilof Islands to outer Bristol Bay, primarily north of the ice front. But the authors noted that most of these seals were likely immature or nonbreeding animals. Frost (1985) indicated that ringed seals ''occur as far south as Nunivak Island and Bristol Bay, depending on ice conditions in a particular year, but generally are not abundant south of Norton Sound except in nearshore areas.'' More recently, surveys conducted in the Bering Sea during spring documented numerous ringed seals in both nearshore and offshore habitat, including south of Norton Sound (NMFS Marine Mammal Laboratory, 2012–2013, unpublished data). Relatively few ringed seal pups were documented during these surveys, likely reflecting, at least in part, that pups were sheltered in subnivean lairs and thus would not have been detected during the surveys. Although the majority of the limited detections of pups were located in Norton Sound, pups were also documented in offshore habitat farther south. Satellite tracking data for ringed seals tagged in Kotzebue Sound, Alaska, showed that adults remained, for the most part, in the Chukchi Sea and Bering Sea north of St. Lawrence Island during winter and spring (Crawford *et al.* 2012a). However, movement data for ringed seals tagged near Utqiaġvik, Alaska, in 2011 indicated that some adults overwintered toward the shelf break in the Bering Sea (North Slope Borough, 2012, unpublished data). Ringed seals tagged more recently in the Chukchi and Beaufort seas (primarily adults) used areas as far south as Nunivak Island during December to May, but the core-use area was located in southern Kotzebue Sound (Quakenbush *et al.* 2019). Finally, the subsistence harvest of ringed seal pups by hunters in Quinhagak, Alaska (Coffing *et al.* 1998), suggests that some ringed seals may whelp south of Nunivak Island.

*Basking Period:* Numbers of ringed seals hauled out on the surface of the ice typically begin to increase during spring as the temperatures warm and the snow covering the seals' lairs melts. Although the snow cover can melt rapidly, the ice remains largely intact and serves as a substrate for annual molting, during which time seals spend many hours basking in the sun (Smith 1973, Finley 1979, Smith and Hammill 1981, Kelly and Quakenbush 1990, Kelly *et al.* 2010b). Adults generally molt from mid-May to mid-July (McLaren 1958), although there is regional variation (Ryg and Øritsland 1991), and pups molt at or shortly after weaning (Kelly 1988, Lydersen and Hammill 1993). Subadult harbor seals *(Phoca vitulina*) and spotted seals (*Phoca largha*) tend to molt earlier than adults (Ashwell-Erickson *et al.* 1986, Burns 2002, Daniel *et al.* 2003), and this may also be the case for subadult ringed seals (Kelly and Quakenbush 1990). Usually the largest numbers of basking seals are observed in June (Smith 1973, Finley 1979, Smith *et al.* 1979, Smith and Hammill 1981, Moulton *et al.* 2002). Feeding is reduced and the seals' metabolism declines during the molt (Ashwell-Erickson *et al.* 1986). As seals complete this phase of the annual pelage cycle and the seasonal sea ice melts during the summer, ringed seals spend increasing amounts of time in the water feeding (Kelly *et al.* 2010b).

Most Arctic ringed seals that winter in the Bering and southern Chukchi seas are believed to migrate northward in spring as the ice edge recedes and spend the summer open-water foraging period in the pack ice of the northern Chukchi and Beaufort seas (Frost 1985). Existing information on the distribution and abundance of Arctic ringed seals in the U.S. Chukchi and Beaufort seas during the molting period comes largely from aerial surveys conducted for the most

part over the continental shelf within about 25 to 40 km of the Alaska coast. However, Bengtson *et al.* (2005) reported results for spring aerial surveys conducted during two successive years in the Chukchi Sea that included a limited number of offshore (beyond 43 km from the coast) transect lines flown perpendicular from the coast up to 185 km. Ringed seals were observed along these offshore transects, albeit at lower densities than transects flown closer to the coast. Aerial surveys conducted in spring to early summer (coincident with the periods of Arctic ringed seal reproduction and molting) in the U.S. Beaufort Sea to investigate bowhead whale density and distribution were concentrated over the continental shelf, but less extensive surveys were also conducted over the adjacent shelf slope and deeper waters up to about 100 km north of the shelf (Ljungblad 1981, Ljungblad *et al.* 1982, Ljungblad *et al.* 1983, Ljungblad *et al.* 1984, Ljungblad *et al.* 1985, Ljungblad *et al.* 1986, Ferguson 2013). Incidental sightings of ringed seals were recorded throughout the survey area, including in the limited areas surveyed north of the shelf.

*Open-Water Foraging Period:* Arctic ringed seals typically lose a significant proportion of their blubber mass in late winter through early summer and then replenish their blubber reserves during the open-water period, when the seals spend much of their time feeding (Ryg *et al.* 1990, Ryg and Øritsland 1991, Belikov and Boltunov 1998, Goodyear 1999, Young and Ferguson 2013).

Most Arctic ringed seals that winter in the Bering and southern Chukchi seas are believed to migrate northward in spring as the ice edge recedes and spend the summer open-water foraging period in the pack ice of the northern Chukchi and Beaufort seas (Frost 1985). Arctic ringed seals are also dispersed in ice-free areas of the Bering, Chukchi, and Beaufort seas during this period. Tracking data indicate that tagged ringed seals made extensive use of the continental shelf waters of the U.S. Chukchi and Beaufort seas during the open-water period (Crawford *et al.* 2012a, Quakenbush *et al.* 2019, Von Duyke *et al.* 2020). Quakenbush *et al.* (2019) identified a high-use area for tagged ringed seals during the open-water period that included Barrow Canyon and the western Beaufort Sea over the continental shelf similar to where Citta *et al.* (2018) mapped a relatively high density of locations of tagged ringed seals during summer. Although tagged ringed seals tracked in U.S. waters tended to remain over the continental shelf, several individuals also made trips into the deep waters north of the shelf (Crawford *et al.* 2019, Quakenbush *et al.* 2019; Alaska Department of Fish and Game (ADF&G) and North Slope Borough, 2019, unpublished data, Von Duyke *et al.* 2020). Von Duyke *et al.* (2020) reported that most of the forays by tagged ringed seals north of the shelf involved movements to retreating pack ice and included days when the seals hauled out on the ice. Dive recorders indicated that foraging-type movements occurred over both the continental shelf and north of the shelf, suggesting that both areas may be important during the open-water period. Similarly, during the open-water period, some, primarily subadult, ringed seals satellite-tagged in Svalbard, Norway, made forays into the Arctic Ocean Basin, and that time spent there increased after a major collapse of sea ice in this region, when the seals traveled farther to find sea ice (Hamilton *et al.* 2015, Hamilton *et al.* 2017). Observations of ringed seals near and beyond the outer extent of the U.S. Exclusive Economic Zone (EEZ) north of the shelf were also documented by marine mammal observers during a research geophysical survey conducted in the summer of 2010 (Beland and Ireland 2010).

*Diet*

High-quality abundant food is important to the annual energy budgets of Arctic ringed seals (Kelly *et al.* 2010a). The seals eat a wide variety of prey spanning several trophic levels; however, most prey are small, and preferred fishes tend to be schooling species that form dense aggregations (Kovacs 2007). Arctic ringed seals rarely prey upon more than 10 to 15 species in any specific geographic location, and not more than 2 to 4 of those species are considered to be key prey (Węsławski *et al.* 1994). Despite regional and seasonal variations in the diets of Arctic ringed seals, fishes of the cod family tend to dominate their diet in many areas from late autumn through early spring (Kelly *et al.* 2010a). Arctic cod (*Boreogadus saida*) is often reported to be among the primary prey species, especially during the ice-covered periods of the year (*e.g.,* Lowry *et al.* 1980, Bradstreet and Finley 1983, Smith 1987, Belikov and Boltunov 1998, Siegstad *et al.* 1998, Labansen *et al.* 2007, Quakenbush *et al.* 2011). Crustaceans are also commonly found in the diet of ringed seals and can be important in some regions, at least seasonally (*e.g.,* Lowry *et al.* 1980, Bradstreet and Finley 1983, Smith 1987, Belikov and Boltunov 1998, Siegstad *et al.* 1998, Quakenbush *et al.* 2011).

**Critical Habitat Identification**

In the following sections, we describe the relevant definitions and requirements in the ESA and implementing regulations at 50 CFR part 424, and the key information and criteria used to prepare this revised proposed critical habitat designation. In accordance with section 4(b)(2) of the ESA, this revised proposed critical habitat designation is based on the best scientific data available. Our primary sources of information include the status review report for the ringed seal (Kelly *et al.* 2010a), our proposed and final rules to list four subspecies of ringed seals, including the Arctic ringed seal, under the ESA (75 FR 77476, December 10, 2010; 77 FR 76706, December 28, 2012), articles in peer-reviewed journals, other scientific reports, and relevant Geographic Information System (GIS) and satellite data (*e.g.,* shoreline data, U.S. maritime limits and boundaries data, sea ice extent) for geographic area calculations and mapping.

To identify specific areas that may qualify as critical habitat for Arctic ringed seals, in accordance with 50 CFR 424.12(b), we followed a five-step process: (1) Identify 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) determine the specific areas within the geographical area occupied by the species that contain one or more of the physical or biological features essential to the conservation of the species; (4) determine which of these essential features may require special management considerations or protection; and (5) determine whether a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. Our evaluation and conclusions are described in detail in the following sections.

**Geographical Area Occupied by the Species**

The phrase ''geographical areas occupied by the species,'' which appears in the statutory definition of critical habitat, is defined by regulation as an area that may generally be delineated around species' occurrences as determined by the Secretary (*i.e.,* range) (50 CFR 424.02). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis, such as migratory corridors, seasonal habitats, and habitats used periodically, but not solely, by vagrant individuals (*Id.*).

Based on existing literature, including available information on Arctic ringed seal sightings and movements, the range of the Arctic ringed seal was identified in the final ESA listing rule (77 FR 76706; December 28, 2012) as the Arctic Ocean and adjacent seas, except west of 157°00′ E (the Kamchatka Peninsula), where the Okhotsk subspecies of the ringed seal occurs, or in the Baltic Sea where the Baltic subspecies of the ringed seal is found. As noted previously, we cannot designate areas outside U.S. jurisdiction as critical habitat. Thus, the geographical area under consideration for this designation is limited to areas under the jurisdiction of the United States that Arctic ringed seals occupied at the time of listing. This area extends to the outer boundary of the U.S. EEZ in the Chukchi and Beaufort seas, and as far south as Bristol Bay in the Bering Sea (Kelly *et al.* 2010a).

**Physical and Biological Features Essential to the Conservation of the Species**

The statutory definition of occupied critical habitat refers to ''physical or biological features essential to the conservation of the species,'' but the ESA does not specifically define or further describe these features. Implementing regulations at 50 CFR 424.02, however, define such features as those that occur in specific areas and that are essential to support the life-history needs of the species. The regulations provide additional details and examples of such features.

Based on the best scientific information available regarding the natural history of the Arctic ringed seal and the habitat features that are essential to support the species' life-history needs, we have identified the following physical or biological features that are essential to the conservation of the Arctic ringed seal within U.S. waters occupied by the species.

(1) *Snow-covered sea ice habitat suitable for the formation and maintenance of subnivean birth lairs used for sheltering pups during whelping and nursing, which is defined as areas of seasonal landfast (shorefast) ice and dense, stable pack ice, excluding any bottom-fast ice extending seaward from the coastline (typically in waters less than 2 m deep), that have undergone deformation and contain snowdrifts of sufficient depth, typically at least 54 cm deep.*

Snow-covered sea ice habitat suitable for the formation and maintenance of subnivean birth lairs used for sheltering pups during whelping and nursing is essential to conservation of the Arctic ringed seal because without the protection of lairs, ringed seal pups are more vulnerable to freezing and predation (Lukin and Potelov 1978, Smith 1987, Hammill and Smith 1991, Smith *et al.* 1991, Smith and Lydersen 1991, Stirling and Smith 2004, Ferguson *et al.* 2005).

Snowdrifts of sufficient depth for birth lair formation and maintenance typically occur in deformed ice where drifting has taken place along pressure ridges or ice hummocks (Smith and Stirling 1975, Lydersen and Gjertz 1986, Smith 1987, Kelly 1988, Furgal *et al.* 1996, Lydersen 1998). For purposes of assessing potential impacts of projected changes in April Northern Hemisphere snow conditions on ringed seals, Kelly *et al.* (2010a) considered 20 cm to be the minimum average snow depth required on areas of flat ice to form drifts of sufficient depth to support birth lair formation. Further, Kelly *et al.* (2010a) discussed that ringed seals require snowdrift depths of 50 to 65 cm or more to support birth lair formation. To identify the typical snowdrift depth for snow-covered sea ice habitat that we consider sufficient for Arctic ringed seal birth lair formation and maintenance, we derived a specific depth threshold as follows. At least seven studies have reported minimum snowdrift depth measurements at Arctic ringed seal birth lairs (typically measured near the center of the lairs or over the breathing holes) off the coasts of Alaska (Kelly *et al.* 1986, Frost and Burns 1989), the Canadian Arctic Archipelago (Smith and Stirling 1975, Kelly 1988, Furgal *et al.* 1996), Svalbard (Lydersen and Gjertz 1986), and in the White Sea (Lukin and Potelov 1978). The average minimum snowdrift depth measured at birth lairs was 54 cm across all of the studies combined, and 64 cm in the Alaska studies only. The average from studies in Alaska is based on data from fewer years over a shorter time span than from all seven studies combined (3 years during 1982–1984 versus 11 years during 1971–1993, respectively); consequently, the Alaska-specific average is more likely to be biased if an anomalous weather pattern occurred during its more limited timeframe. For this reason, we conclude that the average minimum snowdrift depth based on all studies combined (54 cm) provides the best estimate of the typical minimum snowdrift depth that is sufficient for birth lairs.

Arctic ringed seals favor landfast ice as whelping habitat (*e.g.,* Smith and Stirling 1975, 1978, Smith and Hammill 1981, Lydersen and Gjertz 1986, Smith and Lydersen 1991, Pilfold *et al.* 2014). However, landfast ice extending seaward from shore may freeze to the sea bottom in very shallow water (typically less than about 1.5 to 2 m deep) during the course of winter (commonly referred to as ''bottom-fast'' ice; Reimnitz *et al.* 1977, Newbury 1983, Hill *et al.* 1991, Dammann *et al.* 2018, Dammann *et al.* 2019), rendering it unsuitable for ringed seal birth lairs. Arctic ringed seal whelping has also been observed on both nearshore and offshore drifting pack ice. As Reeves (1998) noted, nearly all research on Arctic ringed seal reproduction has been conducted in landfast ice, and the potential importance of stable but drifting pack ice has not been adequately investigated. Studies in the Barents Sea (Wiig *et al.* 1999), Baffin Bay (Finley *et al.* 1983) and the Canadian Beaufort Sea (Pilfold *et al.* 2014) have documented pup production in pack ice, and Smith and Stirling (1975), citing unpublished data from the ''Western Arctic'' (presumably the Canadian Beaufort Sea), also indicated that ''the offshore areas of shifting but relatively stable ice are an important part of the breeding habitat.'' Lentfer (1972) reported ''a significant amount of ringed seal denning and pupping on moving heavy pack ice north of Barrow [*i.e.,* Utqiaġvik].'' Moreover, surveys conducted in the Bering and Chukchi seas during spring have documented ringed seals, including observations of pups, in offshore areas (NMFS Marine Mammal Laboratory, 2012–2013 and 2016, unpublished data). Ringed seal vocalizations detected throughout the winter and spring in long-term autonomous acoustic recordings collected along the shelf break north-northwest of Utqiaġvik, along with a seasonal change in the repertoire during the breeding season, also suggest that some Arctic ringed seals overwinter and breed in offshore pack ice (Jones *et al.* 2014). We therefore conclude that the best scientific information available indicates that snow-covered sea ice habitat essential for the formation and maintenance of birth lairs includes areas of both landfast ice (except for any bottom-fast ice extending seaward from the coastline) and dense, stable pack ice that have undergone deformation and contain snowdrifts of sufficient depth, typically at least 54 cm deep.

(2) *Sea ice habitat suitable as a platform for basking and molting, which is defined as areas containing sea ice of 15 percent or more concentration, excluding any bottom-fast ice extending seaward from the coastline (typically in waters less than 2 m deep).*

Sea ice habitat suitable as a platform for basking and molting is essential to conservation of the Arctic ringed seal

because molting is a biologically-important, energy-intensive process that could incur increased energetic costs if it were to occur in water, or increased risk of predation if it were to occur on land due to the absence of readily accessible escape routes to avoid predators (*i.e.,* breathing holes or natural openings in sea ice). Moreover, we are unaware of any studies establishing whether Arctic ringed seals can molt successfully in water, or reports of healthy Arctic ringed seals hauled out on land during the molt (they are known to come ashore during this period when sick). Traditional ecological knowledge indicates that ringed seals, mostly young individuals, have been occasionally seen hauled out on land in spring near Elim, Alaska, although molt status was not addressed (Huntington *et al.* 2015a). If Arctic ringed seals were unable to complete their annual molt successfully, they would be at increased risk from parasites and disease.

During their annual molt, Arctic ringed seals transition from lair use to basking on the surface of the ice for long periods of time near breathing holes, lairs, or cracks in the ice (Kelly *et al.* 2010a). The relatively long periods of time that ringed seals spend out of the water during the molt (*e.g.,* Smith 1973, Smith and Hammill 1981, Kelly *et al.* 2010b) have been ascribed to the need to maintain elevated skin temperatures during new hair growth (Feltz and Fay 1966, Kelly and Quakenbush 1990). Higher skin temperatures are facilitated by basking on the ice and this may accelerate shedding and regrowth of hair and skin (Feltz and Fay 1966).

Limited data are available on ice concentrations (percentage of ocean surface covered by sea ice) favored by Arctic ringed seals during the basking period, in particular for the period following ice breakup. Although a number of studies have reported an apparent preference for consolidated stable ice (*i.e.,* landfast ice and consolidated pack ice), at least during the initial weeks of the basking period, some of these studies have also reported observations of Arctic ringed seals hauled out at low densities in unconsolidated ice (*e.g.,* Stirling *et al.* 1982, Kingsley *et al.* 1985, Kingsley and Stirling 1991, Lunn *et al.* 1997, Chambellant *et al.* 2012). Crawford *et al.* (2012a) reported that the average ice concentrations (plus or minus standard error (SE), a measure of variability in the data) used by ringed seals in the Chukchi and Bering seas during the basking period in June was 20 percent (SE = 7.8 percent) for subadults and 38 percent (SE = 21.4 percent) for adults. Arctic ringed seals in the Chukchi Sea have also been observed basking in high densities on the last remnants of the seasonal sea ice during late June to early July, near the end of the molting period (S. Dahle, NMFS, personal communication, 2013). As discussed above, landfast ice extending seaward from shore may freeze to the sea bottom in very shallow water (typically less than about 1.5 to 2 m deep) during the course of winter and remain so into spring, potentially during part of the basking and molting period. There is also some evidence that ringed seal densities are lower in very shallow waters, at least in the Beaufort Sea during late May to early June (Moulton *et al.* 2002, Frost *et al.* 2004). Based on the best scientific information available, we therefore conclude that sea ice habitat essential for basking and molting is of at least 15 percent ice concentration, but does not include bottom-fast ice extending from the coastline.

(3) *Primary prey resources to support Arctic ringed seals, which are defined to be Arctic cod, saffron cod, shrimps, and amphipods.*

Primary prey resources are essential to conservation of the Arctic ringed seal because the seals likely rely on these prey resources the most to meet their annual energy budgets. Although Arctic ringed seals feed on a wide variety of vertebrate and invertebrate prey species, certain prey species appear to occupy a prominent role in their diets in waters along the Alaskan coast. Quakenbush *et al.* (2011; Tables 4–6) reported that prey items frequently consumed by ringed seals (considered here to be prey items identified in at least 25 percent of ringed seal stomachs collected) within the 1961 to 1984 and 1998 to 2009 periods in the Bering and Chukchi seas included Arctic cod, saffron cod (*Eleginus gracilis*), shrimps (from the families Hippolytidae, Pandalidae, and Crangonidae), and amphipods (primarily from the families Gammaridae and Hyperiidae). Results reported by Crawford *et al.* (2015; Tables 1 and 2) indicated that prey items frequently consumed by ringed seals during May through July within the 1975 to 1984 and 2003 to 2012 periods in the Bering Strait near Diomede included Arctic cod and shrimps (for seals ≥1 year of age); and in the Chukchi Sea near Shishmaref included saffron cod and shrimps (for both pups and seals ≥1 year of age). Dehn *et al.* (2007; Table 2) reported that in the Utqiaġvik vicinity, prey items frequently consumed by ringed seals between 1996 and 2001 (primarily during summer) included euphausiids (*Thysanoessa* spp.), cods (primarily Arctic and saffron cod), mysids (*Mysis* and *Neomysis* spp.), amphipods, and pandalid shrimps. Finally, Lowry *et al.* (1980; Table 2) found that prey items frequently consumed by ringed seals (considered here to be at least 25 percent of the total food volume in ringed seal stomachs collected in any of the five seasonal samples) in the Bering and Chukchi seas included Arctic cod, saffron cod, shrimps, and amphipods, and in the central Beaufort Sea (approximately 80 km northwest of Prudhoe Bay) included Arctic cod, as well as gammarid and hyperiid amphipods.

In summary, Arctic cod, saffron cod, shrimps, and amphipods were identified as prominent prey species for the studies conducted in both the Bering Sea and the Chukchi Sea, and Arctic cod and amphipods were also identified as prominent prey species for ringed seals sampled in the central Beaufort Sea. Therefore, based on these studies, we conclude that Arctic cod, saffron cod, shrimps, and amphipods are the primary prey resources of Arctic ringed seals in U.S. waters. Because Arctic ringed seals feed on a variety of prey items and regional and seasonal differences in diet have been reported, we conclude that areas in which the primary prey essential feature occurs are those that contain one or more of these particular prey resources.

**Specific Areas Containing the Essential Features**

To determine which areas qualify as critical habitat within the geographical area occupied by the species, we are required to identify ''specific areas'' that contain one or more of the physical or biological features essential to the conservation of the species (and that may require special management considerations or protection, as described below) (50 CFR 424.12(b)(1)(iii)). Delineation of the specific areas is done at a scale determined by the Secretary to be appropriate (50 CFR 424.12(b)(1)). Regulations at 50 CFR 424.12(c) also require that each critical habitat area be shown on a map.

In determining the scale and boundaries for the specific areas, we considered, among other things, the scales at which biological data are available and the availability of standardized geographical data necessary to map boundaries. Because the ESA implementing regulations allow for discretion in determining the appropriate scale at which specific areas are drawn (50 CFR 424.12(b)(1)), we are not required, nor was it possible, to

determine that each square inch, acre, or even square mile independently meets the definition of ''critical habitat.'' A main goal in determining and mapping the boundaries of the specific areas is to provide a clear description and documentation of the areas containing the identified essential features. This is ultimately fundamental to ensuring that Federal action agencies are able to determine whether their particular actions may affect the critical habitat.

As we explain below, the essential features of Arctic ringed seal critical habitat, in particular the sea ice essential features, are dynamic and variable on both spatial and temporal scales. As climatic conditions change there may be increased variability in sea ice characteristics and spatial/temporal coverage, including with respect to the southern extent of sea ice in the spring and the timing and rate of the retreat of sea ice during spring and early summer. Arctic ringed seal movements and habitat use are strongly influenced by the seasonality of sea ice and the seals can range widely in response to the specific locations of the most suitable habitat conditions. We have therefore identified one specific area to propose as critical habitat in the Bering, Chukchi, and Beaufort seas based on the expected occurrence of the identified essential features.

We first focused on identifying where sea ice essential features that support the species' life history functions of whelping and nursing (when birth lairs are constructed and maintained), and molting occur. As discussed above, Arctic ringed seals are highly associated with sea ice, and the seals tend to migrate seasonally to maintain access to the ice. Arctic ringed seal whelping, nursing, and molting takes place in the Bering, Chukchi, and Beaufort seas. Therefore, we considered where the sea ice essential features occur in all of these waters.

The dynamic nature of sea ice and the spatial and temporal variations in sea ice and on-ice snow cover conditions constrain our ability to map with precision the specific geographic locations where the sea ice essential features will occur. Sea ice characteristics such as ice extent, ice concentration, and ice surface topography vary spatiotemporally (*e.g.,* Iacozza 2011). Snowdrift depths on sea ice are also spatiotemporally variable, as drifting of snow is determined by characteristics of the ice, such as surface topography and weather conditions (*e.g.,* wind speed/direction and snowfall amounts), among other factors (Iacozza and Ferguson 2014). The specific geographic locations where essential sea ice habitat used by Arctic ringed seals occur vary from year to year, or even day to day, depending on many factors, including time of year, local weather, and oceanographic conditions (*e.g.,* Frost *et al.* 1988, Frost *et al.* 2004, Gadamus *et al.* 2015). In addition, the duration that sea ice habitat essential for birth lairs, or for basking and molting, is present in any given location can vary annually depending on the rate of ice melt and other factors. The temporal overlap of Arctic ringed seal molting with whelping and nursing, combined with the dynamic nature of sea ice and on-ice snow depths, also makes it impracticable to separately identify specific areas where each of these essential features occur. However, it is unnecessary to distinguish between specific areas containing sea ice essential for birth lairs and sea ice essential for basking and molting because the ESA permits the designation of critical habitat where one or more essential features occur.

Arctic ringed seals can range widely, which, combined with the dynamic variations in sea ice and on-ice snow depths, results in individuals distributing broadly and using sea ice habitats within a range of suitable conditions. We integrated these physical and biological factors into our identification of specific areas where one or both sea ice essential features occur by considering the information currently available on the seasonal distribution and movements of Arctic ringed seals during the annual period of reproduction and molting, along with satellite-derived estimates of the position of the sea ice edge over time. Although this approach allowed us to identify specific areas that contain one or both of the sea ice essential features at certain times, the available data supported delineation of specific areas only at a coarse scale. Consequently, we delineated a single specific area that contains the sea ice features essential to the conservation of Arctic ringed seals, as follows.

We first identified the southern boundary of this specific area. As explained in detail previously in the Summary of Revisions to Proposed Critical Habitat section, we delineated the southern boundary of where one or both of the sea ice essential features occur to reflect the estimated position of the May median ice edge for the 1990 to 2019 period. To simplify the southern boundary for purposes of delineation on maps, we modified this ice edge contour line as follows: (1) Intermediate points along the contour line between its intersection point with the seaward limit of the U.S. EEZ (61°18′15″ N/177°45′56″ W) and the point southwest of St. Matthew Island where the contour line turns northeastward (60°7′ N/172°1′ W) were removed to form the segment of the southern boundary that extends from the seaward limit of the U.S. EEZ southeastward approximately 340 km; and (2) intermediate points along the contour line between the point southwest of St. Matthew Island and the point where the contour line reaches the coast near Cape Romanzof were removed and connected to the coast to form the second segment of the southern boundary that extends northeastward approximately 370 km (at 61°48′42″ N/166°6′5″ W). This editing produced a simplified southern boundary that retains the general shape of the original ice edge contour line.

Because Arctic ringed seals use nearly the entire ice field over the Bering Sea shelf in the spring, depending upon ice conditions in a given year, some ringed seals may use sea ice for whelping south of the southern boundary described above. But we concluded that the variability in the annual extent and timing of sea ice in this southernmost portion of the Arctic ringed seal's range in the Bering Sea (*e.g.,* Boveng *et al.* 2009, Stabeno *et al.* 2012b, Frey *et al.* 2015) renders these waters unlikely to contain the sea ice essential features on a consistent basis in more than limited areas.

We then identified the northern boundary of the specific area that contains one or both of the sea ice essential features. As discussed above, Arctic ringed seals have a widespread distribution, including in offshore pack ice. The period during which ringed seals bask and molt overlaps with when many ringed seals also migrate north with the receding ice edge, sea ice and on-ice snow depths are dynamic and variable on both spatial and temporal scales, and sea ice suitable for basking and molting, and potentially for birth lairs, occurs over waters extending up to and beyond the seaward limit of the U.S. EEZ (see, *e.g.,* Fetterer *et al.* 2017, Sea Ice Index Version 3.0, accessed November 2019, Blanchard-Wrigglesworth *et al.* 2018). We therefore concluded that the outer extent of the U.S. EEZ to the north, west, and east best defines the remaining boundaries of the area containing the sea ice essential features. We note that Canada contests the limits of the U.S. EEZ in the eastern Beaufort Sea, asserting that the line delimiting the two countries' EEZs should follow the 141st meridian out to a distance of 200 nautical miles (nm) (as opposed to an equidistant line that extends seaward perpendicular to the coast at the U.S.-Canada land border).

The primary prey species essential to Arctic ringed seals are found in a range of habitats in U.S. waters occupied by these seals. Amphipods documented in the diet of Arctic ringed seals in U.S. waters include the pelagic hyperiid amphipod *Parathemisto libellula;* gammarid amphipod species that inhabit the underside of sea ice; and benthic amphipods and shrimps, which were well represented in sampling conducted for benthic assessments in the Beaufort and Chukchi seas (*e.g.,* Bluhm *et al.* 2009, Grebmeier *et al.* 2015, Ravelo *et al.* 2015, Sigler *et al.* 2017). Notably, Arctic cod and saffron cod make up a substantial portion of the fish biomass in the U.S. Chukchi Sea and Arctic cod dominates the fish biomass in the U.S. Beaufort Sea (North Pacific Fishery Management Council 2009, Logerwell *et al.* 2015). Arctic cod are regularly observed in association with sea ice, but they are also found in seasonally ice-free waters (*e.g.,* Bradstreet *et al.* 1986, Parker-Stetter *et al.* 2011, Logerwell *et al.* 2015). The southern extent of the distribution of Arctic cod and its abundance in the northern and eastern Bering Sea are more limited and linked to the extent of ice cover and associated cold bottom temperatures (Love *et al.* 2016, Mecklenburg *et al.* 2016, Forster 2019, Marsh and Mueter 2019). The distribution of saffron cod overlaps to some extent with that of Arctic cod in the Chukchi and Beaufort seas, but this species is typically found in warmer water and has a more shallow coastal distribution that extends farther south in the Bering Sea (Love *et al.* 2016, Mecklenburg *et al.* 2016). The movements and foraging activities of Arctic ringed seals are strongly influenced by the seasonality of ice cover, the seals forage throughout the year (albeit with reduced feeding during molting), and they are broadly distributed and can range widely. Thus, although Arctic ringed seals may forage seasonally in some particular areas, such as Barrow Canyon, the seals also make extensive use of a diversity of habitats for foraging across much broader areas in the Bering, Chukchi, and Beaufort seas. Although tagged ringed seals tracked in U.S. waters tended to remain over the continental shelf, several individuals also made trips into the deep waters north of the shelf during the open-water period, where dive recorders indicated that the seals showed foraging-type movements (see *Distribution and Habitat Use* section). Because of these considerations, as well as the limits of the currently available information on habitat use of foraging Arctic ringed seals, we conclude that the seaward boundaries delineated above for the sea ice essential features are also appropriate for defining the specific area where the primary prey essential feature occurs.

Crawford *et al.* (2012b) suggested that southern ice edge habitat in the Bering Sea near the shelf break south of the southern boundary specified above may be important for overwintering of subadult ringed seals, including for foraging. But aside from the limited data on subadult movements and dive behavior during winter near the ice edge and shelf break in the Bering Sea, we lack specific information on the significance of this habitat to the conservation of the species. We therefore conclude that it is appropriate to delineate the southern boundary as described above.

Finally, we considered the shoreward extent of where one or more of the essential features occur. Essential fish habitat (EFH) has been described and identified for certain life stages of both Arctic cod and saffron cod, which are two of the essential Arctic primary prey species (North Pacific Fishery Management Council 2009; 83 FR 31340, July 5, 2018). EFH for late juvenile and adult Arctic cod includes shallow nearshore areas of the continental shelf in the Chukchi and Beaufort seas, and EFH for late juvenile and adult saffron cod also includes a substantial portion of the shallow nearshore shelf habitat in the Chukchi Sea. Studies conducted in very shallow nearshore waters have documented the presence of one or both species at sampling sites in the Alaskan Beaufort Sea (Craig *et al.* 1982, Underwood *et al.* 1995, Wiswar *et al.* 1995, Johnson *et al.* 2010, Logerwell *et al.* 2015) and in Norton Sound (Barton 1978). There have been limited ringed seal surveys conducted in areas with very shallow waters (less than 3 to 5 m in depth). Nevertheless, there is some evidence that ringed seal densities are lower in such areas, at least in the Beaufort Sea during late May to early June (Moulton *et al.* 2002, Frost *et al.* 2004). Still, during the open-water foraging period and into early winter, satellite tracking data indicate some tagged ringed seals used shallow nearshore waters, for example, in Harrison Bay and Smith Bay (Quakenbush *et al.* 2019), and we infer that this nearshore habitat use is due to the availability of suitable prey. Similarly, information from traditional ecological knowledge indicates that some, primarily juvenile, ringed seals use shallow nearshore waters, including river mouths, for feeding during the summer in the Bering Strait region (Oceana and Kawerak 2014), and that in the fall, ringed seals return to and feed in Kotzebue Sound, including the relatively shallow waters of Hotham Inlet (Gadamus *et al.* 2015, Northwest Arctic Borough 2016). After considering the information currently available as a whole, principally based on occurrence of the primary prey essential feature, we are proposing to define the shoreward boundary of critical habitat as the line that marks MLLW. This specific area does not extend into tidally-influenced channels of tributary waters of the Bering, Chukchi, or Beaufort seas.

Data to determine the boundaries of the specific area containing the essential features are limited. We specifically seek additional data and comments on our proposed delineation of these boundaries (see Public Comments Solicited section).

**Special Management Considerations or Protection**

A specific area within the geographic area occupied by a species may only be designated as critical habitat if the area contains one or more essential physical or biological feature that may require special management considerations or protection (16 U.S.C. 1532(5)(A)(ii); 50 CFR 424.12(b)(iv)). ''Special management considerations or protection'' is defined as methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species (50 CFR 424.02). Courts have indicated that the ''may require'' standard requires that NMFS determine that special management considerations or protection of the essential features might be required either now or in the future (*i.e.,* such considerations or protection need not be immediately required). *See Cape Hatteras Access Pres. Alliance* v. *U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 123–24 (D.D.C. 2004)*; Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.,* 268 F. Supp. 2d 1197, 1218 (E.D. Cal. 2003). The relevant management need may be ''in the future based on possibility.'' *See Bear Valley Mut. Water Co.* v. *Salazar,* No. SACV 11–01263–JVS, 2012 WL 5353353, at *25 (C.D. Cal. Oct. 17, 2012); *see also Ctr. for Biological Diversity* v. *Norton,* 240 F. Supp. 2d 1090, 1098–99 (D. Ariz. 2003) (noting that the ''may require'' phrase can be rephrased and understood as ''can require'' or ''possibly requires'').

We have identified four primary sources of potential threats to each of the habitat features identified above as essential to the conservation of Arctic ringed seals: Climate change; oil and gas

exploration, development, and production; marine shipping and transportation; and commercial fisheries. As further detailed below, both sea ice essential features and the primary prey essential feature may require special management considerations or protection as a result of impacts (either independently or in combination) from these sources. We note that our evaluation does not consider an exhaustive list of threats that could have impacts on the essential features, but rather considers the primary potential threats that we are aware of at this time that support our conclusion that special management considerations or protection of each of the essential features may be required. Further, we highlight particular threats associated with each source of impacts while recognizing that certain threats are associated with more than one source (*e.g.,* marine pollution and noise).

*Climate Change*

The principal threat to the persistence of the Arctic ringed seal is anticipated loss of sea ice and reduced on-ice snow depths stemming from climate change. Climate-change-related threats to the Arctic ringed seal's habitat are discussed in detail in the ringed seal status review report (Kelly *et al.* 2010a), as well as in our proposed and final rules to list the Arctic ringed seal as threatened. Total Arctic sea ice extent has been showing a decline through all months of the satellite record since 1979 (Meier *et al.* 2014). Although there will continue to be considerable annual variability in the rate and timing of the breakup and retreat of sea ice, trends in climate change are moving toward ice that is more susceptible to melt (Markus *et al.* 2009), and areas of earlier spring ice retreat (Stammerjohn *et al.* 2012, Frey *et al.* 2015). Notably, February and March ice extent in the Bering Sea in 2018 and 2019 were the lowest on record (Stabeno and Bell 2019), and in the spring of 2019, melt onset in the Chukchi Sea occurred 20 to 35 days earlier than the 1981 to 2010 average (Perovich *et al.* 2019). Activities that release carbon dioxide and other heat-trapping greenhouse gases (GHGs) into the atmosphere, most notably those that involve fossil fuel combustion, are a major contributing factor to climate change and loss of sea ice (Intergovernmental Panel on Climate Change 2013, U.S. Global Climate Change Research Program 2017). Such activities may adversely affect the essential features of Arctic ringed seal habitat by diminishing snow-covered sea ice suitable for birth lairs and sea ice suitable for basking and molting, and by causing changes in the distribution, abundance, and/or species composition of prey resources (including Arctic ringed seal primary prey resources) (*e.g.,* Kortsch *et al.* 2015, Alabia *et al.* 2018, Holsman *et al.* 2018, Thorson *et al.* 2019, Huntington *et al.* 2020). Declines in the extent and timing of sea ice cover may also lead to increased shipping activity (discussed below) and other changes in anthropogenic activities, with the potential for increased risks to the habitat features essential to Arctic ringed seal conservation (Kelly *et al.* 2010a). The best scientific data available do not allow us to identify a causal linkage between any particular single source of GHG emissions and identifiable effects on the sea ice and primary prey features essential to the conservation of the Arctic ringed seal. Regardless, given that the quality and quantity of these essential features, in particular sea ice, may be diminished by the effects of climate change, we conclude that special management considerations or protection may be necessary, either now or in the future, although the exact focus and nature of that management is presently undeterminable.

*Oil and Gas Activity*

Oil and gas exploration, development, and production activities in the U.S. Arctic may include: Seismic surveys; exploratory, delineation, and production drilling operations; construction of artificial islands, causeways, ice roads, shore-based facilities, and pipelines; and vessel and aircraft operations. These activities have the potential to affect the essential features of Arctic ringed seal critical habitat, primarily through pollution (particularly in the event of a large oil spill), noise, and physical alteration of the species' habitat.

Large oil spills (considered in this section to be spills of relatively great size, consistent with common usage of the term) are generally considered to be the greatest threat associated with oil and gas activities in the Arctic marine environment (Arctic Monitoring and Assessment Programme (AMAP) 2007). In contrast to spills on land, large spills at sea, especially when ice is present, are difficult to contain or clean up (National Research Council 2014, Wilkinson *et al.* 2017). Responding to a sizeable spill in the Arctic environment would be particularly challenging. Reaching a spill site and responding effectively would be especially difficult, if not impossible, in winter when weather can be severe and daylight extremely limited. Oil spills under ice or in ice-covered waters are the most challenging to deal with due to, among other factors, limitations on the effectiveness of current containment and recovery technologies when sea ice is present. The extreme depth and the pressure that oil was under during the 2010 oil blowout at the Deepwater Horizon well in the Gulf of Mexico may not exist in the shallow continental shelf waters of the Beaufort and Chukchi seas. Nevertheless, the difficulties experienced in stopping and containing the Deepwater Horizon blowout, where environmental conditions, available infrastructure, and response preparedness were comparatively good, point toward even greater challenges in containing and cleaning a large spill in a much more environmentally severe and geographically remote Arctic location.

Although planning, management, and use of best practices can help reduce risks and impacts, the history of oil and gas activities indicates that accidents cannot be eliminated (AMAP 2007). Data on large spills (*e.g.,* operational discharges, spills from pipelines, blowouts) in Arctic waters are limited because oil exploration and production there has been limited. The Bureau of Ocean Energy Management (BOEM) (BOEM 2011) estimated the chance of one or more oil spills greater than or equal to 1,000 barrels occurring if development were to take place in the Beaufort Sea or Chukchi Sea Planning Areas as 26 percent for the Beaufort Sea over the estimated 20 years of production and development, and 40 percent for the Chukchi Sea over the estimated 25 years of production and development.

Icebreaking vessels, which may be used for in-ice seismic surveys or to manage ice near exploratory drilling ships, also have the potential to affect the sea ice essential features of Arctic ringed seal critical habitat through physical alteration of the sea ice (also see *Marine Shipping and Transportation* section). Other examples of activities associated with oil and gas activities that may physically alter the essential sea ice features include construction and maintenance of offshore ice roads, ice pads, and camps; as well as other offshore through-ice activities such as trenching and installation of pipelines. In addition, there is evidence that noise associated with activities such as seismic surveys can result in behavioral and other effects on fishes and invertebrate species (Carroll *et al.* 2017, Slabbekoorn *et al.* 2019), although the available data on such effects are currently limited, in particular for invertebrates (Hawkins *et*

*al.* 2015, Hawkins and Popper 2017), and the nature of potential effects specifically on the primary prey resources of Arctic ringed seals are unclear.

In summary, a large oil spill could render areas containing the identified essential features unsuitable for use by Arctic ringed seals. In such an event, sea ice habitat suitable for whelping, nursing, and/or for basking and molting could be oiled. The primary prey resources could also become contaminated, experience mortality, or be otherwise adversely affected by spilled oil. In addition, disturbance effects (both physical alteration of habitat and acoustic effects) could alter the quality of the essential features of Arctic ringed seal critical habitat, or render habitat unsuitable. We conclude that the essential features of the habitat of the Arctic ringed seal may require special management considerations or protection in the future to minimize the risks posed to these features by oil and gas exploration, development, and production.

*Marine Shipping and Transportation*

The reduction in Arctic sea ice that has occurred in recent years has renewed interest in using the Arctic Ocean as a potential waterway for coastal, regional, and trans-Arctic marine operations and in extension of the navigation season in surrounding seas (Brigham and Ellis 2004, Arctic Council 2009). Marine traffic along the western and northern coasts of Alaska includes tug, towing, and cargo vessels, tankers, research and government vessels, vessels associated with oil and gas exploration and development, fishing vessels, and cruise ships (Adams and Silber 2017, U.S. Committee on the Marine Transportation System 2019). Automatic Identification System data indicate that the number of unique vessels operating annually in U.S. waters north of the Bering Sea in 2015 to 2017 increased 128 percent over the number recorded in 2008 (U.S. Committee on the Marine Transportation System 2019). Climate models predict that the warming trend in the Arctic will accelerate, causing the ice to begin melting earlier in the spring and resume freezing later in the fall, resulting in an expansion of potential transit routes and a lengthening of the potential navigation season, and a continuing increase in vessel traffic (Khon *et al.* 2010, Smith and Stephenson 2013, Stephenson *et al.* 2013, Huntington *et al.* 2015b, Melia *et al.* 2016, Aksenov *et al.* 2017, Khon *et al.* 2017). For instance, analysis of four potential growth scenarios (ranging from reduced activity to accelerated growth) suggests from 2008 to 2030, the number of unique vessels operating in U.S. waters north of 60° N (*i.e.,* northern Bering sea and northward) may increase by 136 to 346 percent (U.S. Committee on the Marine Transportation System 2019).

The fact that nearly all vessel traffic in the Arctic, with the exception of icebreakers, purposefully avoids areas of ice, and primarily occurs during the ice-free or low-ice seasons, helps to mitigate the risks of shipping to the essential habitat features identified for Arctic ringed seals. However, icebreakers pose greater risks to these features since they are capable of operating year-round in all but the heaviest ice conditions and are often used to escort other types of vessels (*e.g.,* tankers and bulk carriers) through ice-covered areas. Furthermore, new classes of ships are being designed that serve the dual roles of both tanker/carrier and icebreaker (Arctic Council 2009). Therefore, if icebreaking activities increase in the Arctic in the future, as expected, the likelihood of negative impacts (*e.g.,* habitat alteration and risk of oil spills) occurring in ice-covered areas where Arctic ringed seals reside will likely also increase. We are not aware of any data currently available on the effects of icebreaking on the habitat of Arctic ringed seals during the reproductive and molting periods. Although impacts of icebreaking are likely to vary between species depending on a variety of factors, we note that Wilson *et al.* (2017) demonstrated the potential for impacts of icebreaking on Caspian seal (*Pusa caspica*) mothers and pups, including displacement, break-up of whelping and nursing habitat, and vessel collisions with mothers or pups. The authors noted that while pre-existing shipping channels were used by seals as artificial leads, which expanded access to whelping habitat, seals that whelp on the edge of such leads are vulnerable to vessel collision and repeated disturbance.

In addition to the potential effects of icebreaking on the essential features, the maritime shipping industry transports various types of petroleum products, both as fuel and cargo. In particular, if increased shipping involves the tanker transport of crude oil or oil products, there would be an increased risk of spills (Arctic Climate Impact Assessment 2005, U.S. Arctic Research Commission 2012). Similar to oil and gas activities, the most significant threat posed by shipping activities is considered to be the accidental or illegal discharge of oil or other toxic substances carried by ships (Arctic Council 2009).

Vessel discharges associated with normal operations, including sewage, grey water, and oily wastes are expected to increase as a result of increasing marine shipping and transportation in Arctic waters (Arctic Council 2009, Parks *et al.* 2019), which could affect the primary prey of Arctic ringed seals. Increases in marine shipping and transportation and other vessel traffic is also introducing greater levels of underwater noise (Arctic Council 2009, Moore *et al.* 2012), with the potential for behavioral and other effects in fishes and invertebrates (Slabbekoorn *et al.* 2010, Hawkins and Popper 2017, Popper and Hawkins 2019), although there are substantial gaps in the understanding of such effects, in particular for invertebrates (Hawkins *et al.* 2015, Hawkins and Popper 2017), and the nature of potential effects specifically on the primary prey of Arctic ringed seals are unclear.

We conclude that the essential features of the habitat of the Arctic ringed seal may require special management considerations or protection in the future to minimize the risks posed by potential shipping and transportation activities because: (1) Physical alteration of sea ice by icebreaking activities could reduce the quantity and/or quality of the sea ice essential features; (2) in the event of an oil spill, sea ice essential for birth lairs and/or for basking and molting could become oiled; and (3) the quantity and/or quality of the primary prey resources could be diminished as a result of spills, vessel discharges, and noise associated with shipping, transportation, and icebreaking activities.

*Commercial Fisheries*

The specific area identified in this revised proposed rule as meeting the definition of critical habitat for the Arctic ringed seal overlaps with the Arctic Management Area and the Bering Sea and Aleutian Islands Management Area identified by the North Pacific Fishery Management Council. No commercial fishing is permitted within the Arctic Management Area due to insufficient data to support the sustainable management of a commercial fishery there. However, as additional information becomes available, commercial fishing may be allowed in this management area. Two of the primary Arctic ringed seal prey species identified as essential to the species' conservation—Arctic cod and saffron cod—have been identified as likely initial target species for commercial fishing in the Arctic

Management Area in the future (North Pacific Fishery Management Council 2009).

In the northern portion of the Bering Sea and Aleutian Islands Management Area, commercial fisheries overlap with the southernmost portion of the proposed critical habitat. Portions of the proposed critical habitat also overlap with certain state commercial fisheries management areas. Commercial catches from waters of the specific area identified as containing the features essential to the conservation of the Arctic ringed seal primarily include: Pacific halibut (*Hippoglossus stenolepis*), several other flatfish species, Pacific cod (*Gadus macrocephalus*), several crab species, walleye pollock (*Theragra chalcogramma*), and several salmon species.

Commercial fisheries may affect the primary prey resources identified as essential to the conservation of the Arctic ringed seal, through removal of prey biomass and potentially through modification of benthic habitat by fishing gear that contacts the seafloor. Given the potential changes in commercial fishing that may occur with the expected increasing length of the open-water season and distribution shifts of some economically valuable species responding to climate change (*e.g.,* Stevenson and Lauth 2019, Thorson *et al.* 2019, Spies *et al.* 2020), we conclude that the primary prey resources essential feature may require special management considerations or protection in the future to address potential adverse effects of commercial fishing on this feature.

**Unoccupied Areas**

Section 3(5)(A)(ii) of the ESA authorizes the designation of specific areas outside the geographical area occupied by the species, if those areas are determined to be essential for the conservation of the species. Our regulations at 50 CFR 424.12(b)(2) require that we first evaluate areas occupied by the species, and only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. Because Arctic ringed seals are considered to occupy their entire historical range that falls within U.S. jurisdiction, we find that there are no unoccupied areas within U.S. jurisdiction that are essential to their conservation.

**Application of ESA Section 4(a)(3)(B)(i)**

Section 4(a)(3)(B)(i) of the ESA precludes designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) 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. *See* 16 U.S.C. 1533(a)(3)(B)(i); 50 CFR 424.12(h). Where these standards are met, the relevant area is ineligible for consideration as potential critical habitat. The regulations implementing the ESA set forth a number of factors to guide consideration of whether this standard is met, including the degree to which the plan will protect the habitat of the species (50 CFR 424.12(h)(4)). This process is separate and distinct from the analysis governed by section 4(b)(2) of the ESA, which directs us to consider the economic impact, the impact on national security, and any other relevant impact of designation, and affords the Secretary discretion to exclude particular areas if the benefits of exclusion outweigh the benefits of inclusion of such areas. *See* 16 U.S.C. 1533(b)(2).

Before publication of this revised proposed rule, we contacted DOD (Air Force and Navy) and requested information on any facilities or managed areas that are subject to an INRMP and are located within areas that could potentially be designated as critical habitat for the Arctic ringed seal. In response to our request, the Air Force provided information regarding twelve radar sites with an INRMP in place, 10 of which (7 active and 3 inactive) are located adjacent to the area under consideration for designation as critical habitat: Barter Island Long Range Radar Site (LRRS), Cape Lisburne LRRS, Cape Romanzof, LRRS, Kotzebue LRRS, Oliktok LRRS, Point Barrow LRRS, Tin City LRRS, Bullen Point Short Range Radar Site (SRRS), Point Lay LRRS, and Point Lonely SRRS. The Air Force requested exemption of these radar sites pursuant to section 4(a)(3)(B)(i) of the ESA. Based on our review of the INRMP (draft 2020 update), the area being considered for designation as critical habitat, all of which occurs seaward of the MLLW line, does not overlap with DOD lands. Therefore, we conclude that there are no properties owned, controlled, or designated for use by DOD that are subject to ESA section 4(a)(3)(B)(i) for this revised proposed critical habitat designation, and thus the exemptions requested by the Air Force are not necessary because no critical habitat would be designated in those radar sites.

**Analysis of Impacts Under Section 4(b)(2) of the ESA**

Section 4(b)(2) of the ESA requires the Secretary to designate critical habitat for threatened and endangered species on the basis of the best scientific data available 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. Regulations at 50 CFR 424.19(b) also specify that the Secretary will consider the probable impacts of the designation at a scale that the Secretary determines to be appropriate, and that such impacts may be qualitatively or quantitatively described. The Secretary is also required to compare impacts with and without the designation (50 CFR 424.19(b)). In other words, we are required to assess the incremental impacts attributable to the critical habitat designation relative to a baseline that reflects existing regulatory impacts in the absence of the critical habitat.

Section 4(b)(2) also describes an optional process by which the Secretary may go beyond the mandatory consideration of impacts and weigh the benefits of excluding any particular area (that is, avoiding the economic, national security, or other relevant impacts) against the benefits of designating it (primarily, the conservation value of the area). If the Secretary concludes that the benefits of excluding particular areas outweigh the benefits of designation, the Secretary may exclude the particular area(s) so long as the Secretary concludes on the basis of the best available scientific and commercial information that the exclusion will not result in extinction of the species (16 U.S.C. 1533(b)(2)). NMFS and the U.S. Fish and Wildlife Service have adopted a joint policy setting out non-binding guidance explaining generally how we exercise our discretion under 4(b)(2). *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (''4(b)(2) policy,'' 81 FR 7226, February 11, 2016).

While section 3(5) of the ESA defines critical habitat as ''specific areas,'' section 4(b)(2) requires the agency to consider the impacts of designating any ''particular area.'' Depending on the biology of the species, the characteristics of its habitat, and the nature of the impacts of designation, ''particular'' areas may be—but need not necessarily be—delineated so that they

are the same as the already identified ''specific'' areas of potential critical habitat. For the reasons set forth below, we have exercised the discretion delegated to us by the Secretary to conduct an exclusion analysis based on national security impacts with respect to a particular area north of the Beaufort Sea shelf that meets the definition of critical habitat for the Arctic ringed seal, and we are proposing to exclude this area from the designation because we have concluded that the benefits of exclusion outweigh the benefits of inclusion.

The primary impacts of a critical habitat designation arise from the ESA section 7(a)(2) requirement that Federal agencies ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat (*i.e.,* adverse modification standard). Determining these impacts is complicated by the fact that section 7(a)(2) contains the overlapping requirement that Federal agencies ensure that their actions are not likely to jeopardize the species' continued existence. One incremental impact of critical habitat designation is the extent to which Federal agencies change their proposed actions to ensure they are not likely to adversely modify critical habitat, beyond any changes they would make to ensure actions are not likely to jeopardize the continued existence of the species. Additional impacts of critical habitat designation include any state and/or local protection that may be triggered as a direct result of designation (we did not identify any such impacts for this proposed designation), and benefits that may arise from education of the public to the importance of an area for species conservation.

In determining the impacts of designation, we focused on the incremental change in Federal agency actions as a result of critical habitat designation and the adverse modification standard (see *Ariz. Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160, 1172–74 (9th Cir. 2010) (holding that the U.S. Fish and Wildlife Service permissibly attributed the economic impacts of protecting the northern spotted owl as part of the baseline and was not required to factor those impacts into the economic analysis of the effects of the critical habitat designation)). We analyzed the impacts of this designation based on a comparison of conditions with and without the designation of critical habitat for the Arctic ringed seal. The ''without critical habitat'' scenario represents the baseline for the analysis. It includes process requirements and habitat protections already extended to the Arctic ringed seal under its ESA listing and under other Federal, state, and local regulations. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the Arctic ringed seal.

Our analysis for this revised proposed rule is described in detail in the associated Draft Impact Analysis Report that is available for public review and comment (see Public Comments Solicited). This analysis assesses the incremental costs and benefits that may arise due to the critical habitat designation, with economic costs estimated over the next 10 years. We chose the 10-year timeframe because it is lengthy enough to reflect the planning horizon for reasonably predicting future human activities, yet it is short enough to allow reasonable projections of changes in use patterns in an area, as well as of exogenous factors (*e.g.,* world supply and demand for petroleum, U.S. inflation rate trends) that may be influential. This timeframe is consistent with guidance provided in Office of Management and Budget (OMB) Circular A–4 (OMB 2003, 2011). We recognize that economic costs of the designation are likely to extend beyond the 10-year timeframe of the analysis, though we have no information indicating that such costs in subsequent years would be different from those projected for the first 10-year period. Although not quantified or analyzed in detail due to the high level of uncertainty regarding longer-term effects, the Draft Impact Analysis Report includes a discussion of the potential types of costs and benefits that may accrue beyond the 10-year time window of the analysis.

Below, we summarize our analysis of the impacts of designating the specific area identified in this revised proposed rule as meeting the definition of critical habitat for the Arctic ringed seal. Additional detail is provided in the Draft Impact Analysis Report prepared for this revised proposed rule.

*Benefits of Designation*

We expect that Arctic ringed seals will increasingly experience the ongoing loss of sea ice and changes in ocean conditions associated with climate change, and the significance of other habitat threats will likely increase as a result. As noted above, the primary benefit of a critical habitat designation—and the only regulatory consequence—stems from the ESA section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to destroy or adversely modify the designated habitat. This benefit is in addition to the section 7(a)(2) requirement that all Federal agencies ensure that their actions are not likely to jeopardize listed species' continued existence. Another benefit of critical habitat designation is that it provides specific notice of the areas and features essential to the conservation of the Arctic ringed seal. This information will focus future ESA section 7 consultations on key habitat attributes. By identifying the specific areas where the features essential to the conservation of the Arctic ringed seal occur, there may also be enhanced awareness by Federal agencies and the general public of activities that might affect those essential features. The designation of critical habitat can also inform Federal agencies regarding the habitat needs of Arctic ringed seals, which may facilitate using their authorities to support the conservation of this species pursuant to ESA section 7(a)(1), including to design proposed projects in ways that minimize adverse effects to critical habitat.

In addition, the critical habitat designation may result in indirect benefits, as discussed in detail in the Draft Impact Analysis Report, including education and enhanced public awareness, which may help focus and contribute to conservation efforts for the Arctic ringed seal and its habitat. For example, by identifying areas and features essential to the conservation of the Arctic ringed seal, complementary protections may be developed under state or local regulations or voluntary conservation plans. These other forms of benefits may be economic in nature (whether market or non-market, consumptive, non-consumptive, or passive), educational, cultural, or sociological, or they may be expressed through beneficial changes in the ecological functioning of the species' habitat, which itself yields ancillary welfare benefits (*e.g.,* improved quality of life) to the region's human population. For example, because the critical habitat designation is expected to result in enhanced conservation of the Arctic ringed seal over time, residents of the region who value these seals, such as subsistence users, are expected to experience indirect benefits. As another example, the geographic area identified in this revised proposed rule as meeting the definition of critical habitat for the Arctic ringed seal overlaps substantially with the range of the polar bear in the United States, and the Arctic ringed seal is the primary prey species of the polar bear, so the designation may also provide indirect conservation benefits to the polar bear. Indirect conservation benefits may also

extend to other co-occurring species, such as the Pacific walrus (*Odobenus rosmarus divergens*), the Beringia DPS bearded seal, and other seal species.

It is not presently feasible to monetize, or even quantify, each component part of the benefits accruing from the designation of critical habitat for the Arctic ringed seal. Therefore, we augmented the quantitative measurements that are summarized here and discussed in detail in the Draft Impact Analysis Report with qualitative and descriptive assessments, as provided for under 50 CFR 424.19(b) and in guidance set out in OMB Circular A–4. Although we cannot monetize or quantify all of the incremental benefits of the critical habitat designation, we conclude that they are not inconsequential.

*Economic Impacts*

Direct economic costs of the critical habitat designation accrue primarily through implementation of section 7(a)(2) of the ESA in consultations with Federal agencies to ensure that their proposed actions are not likely to destroy or adversely modify critical habitat. Those economic impacts may include both administrative costs and costs associated with project modifications. At this time, on the basis of how protections are currently implemented for Arctic ringed seals under the Marine Mammal Protection Act (MMPA) and as a threatened species under the ESA, we do not anticipate that additional requests for project modifications will result specifically from this designation of critical habitat. In other words, the critical habitat designation is not likely to result in more requested project modifications because our section 7 consultations on potential effects to Arctic ringed seals and our incidental take authorizations for Arctic activities under section 101(a) of the MMPA both typically address habitat-associated effects to the seals even in the absence of a critical habitat designation. As a result, the direct incremental costs of this critical habitat designation are expected to be limited to the additional administrative costs of considering Arctic ringed seal critical habitat in future section 7 consultations.

To identify the types of Federal activities that may affect critical habitat for the Arctic ringed seal, and therefore would be subject to the ESA section 7 adverse modification standard, we examined the record of section 7 consultations for 2013 to 2019 to identify Federal activities that occur within the specific area being considered as critical habitat for the Arctic ringed seal and that may affect the essential features of the critical habitat. These activities include oil and gas related activities, dredge mining, navigation dredging, in-water construction, commercial fishing, oil spill response, and certain military activities. We projected the occurrence of these activities over the timeframe of the analysis (the next 10 years) using the best available information on planned activities and the frequency of recent consultations for particular activity types. Notably, all of the projected future Federal actions that may trigger an ESA section 7 consultation due to the potential to affect one or more of the essential habitat features also have the potential to affect Arctic ringed seals. In other words, none of the activities we identified would trigger a consultation solely on the basis of the critical habitat designation. We recognize there is inherent uncertainty involved in predicting future Federal actions that may affect the essential features of Arctic ringed seal critical habitat. We specifically seek comments and information regarding the types of activities that are likely be subject to section 7 consultation as a result of the proposed designation, and we will consider any relevant information received during the comment period in developing the economic analysis supporting the final rule (see Public Comment Solicited section).

We expect that the majority of future ESA section 7 consultations analyzing potential effects on the proposed essential habitat features will involve NMFS and BOEM authorizations and permitting of oil and gas related activities. In assessing costs associated with these consultations, we took a conservative approach by estimating that future formal and informal consultations addressing these activities would be more complex than for other activities, and would therefore incur higher third party (*i.e.,* applicant/permittee) incremental administrative costs per consultation to consider effects to Arctic ringed seal critical habitat (see Draft Impact Analysis Report). These higher third party costs may not be realized in all cases because the administrative effort required for a specific consultation depends on factors such as the location, timing, nature, and scope of the potential effects of the proposed action on the essential features. There is also considerable uncertainty regarding the timing and extent of future oil and gas exploration and development in Alaska's Outer Continental Shelf (OCS) waters, as indicated by Shell's 2015 withdrawal from exploratory drilling in the Chukchi Sea and BOEM's 2017–2022 OCS Oil and Gas Leasing Program. Although NMFS completed formal consultations for oil and gas exploration activities in the Chukchi Sea in all but two years between 2006 and 2015, no such activities or related consultations with NMFS have occurred since that time.

As detailed in the Draft Impact Analysis Report, the total incremental costs associated with designating the entire area identified in this revised proposed rule as meeting the definition of critical habitat for the Arctic ringed seal over the next 10 years, in discounted present value terms, are estimated to be $800,000 (discounted at 7 percent). In annual terms, the estimated range of discounted incremental costs is $58,000 to $106,000. About 80 percent of these incremental costs are expected to accrue from ESA section 7 consultations associated with oil and gas related activities in the Chukchi and Beaufort seas and adjacent onshore areas. Although not quantifiable at this time, the Draft Impact Analysis Report acknowledges that the oil and gas industry may also incur indirect costs associated with the critical habitat designation if future third-party litigation over specific section 7 consultations creates delays or other sources of regulatory uncertainty.

We have preliminarily concluded that the potential economic impacts associated with the critical habitat designation are modest both in absolute terms and relative to the level of economic activity expected to occur in the affected area, which is primarily associated with oil and gas activities that may occur in the Beaufort and Chukchi seas. As a result, and in light of the benefits of critical habitat designation discussed above and in the Draft Impact Analysis Report, we are not proposing to exercise our discretion to exclude any particular area from the critical habitat designation by evaluating whether the benefits of excluding such area based on economic impacts outweighs the benefits of including such area.

*National Security Impacts*

Section 4(b)(2) of the ESA also requires consideration of national security impacts. As noted in the Application of ESA Section 4(a)(3)(B)(i) section above, before publication of our 2014 proposed rule, we contacted DOD regarding any potential impacts of designating critical habitat for the Arctic ringed seal on military operations. In a letter dated June 3, 2013, the DOD Regional Environmental Coordinator indicated that no impacts on national

security were foreseen from such a designation. As a result, in that proposed rule we did not identify any direct impacts from the critical habitat designation on activities associated with national security.

Following publication of our 2014 proposed rule, by a letter dated April 17, 2015, DOD indicated that upon further review, it had identified national security concerns with the designation due to overlap of the proposed critical habitat with the area north of Prudhoe Bay to the Canadian border extending seaward from approximately 125 to 200 nm that is used by the U.S. Navy for training and testing activities. DOD requested that NMFS exclude this area from the critical habitat designation due to national security impacts, expressing the view that designation of this area will impact national security if training and testing activities are prohibited or severely degraded, as detailed in a comment letter from the Navy dated March 30, 2015. More recently, by letter dated March 17, 2020, the Navy reiterated its request for this exclusion due to national security impacts, but modified the description of the particular area to extend seaward from approximately 100 to 200 nm (noting that ice conditions have required a shift closer to shore).

The Navy indicated in its written communications that it conducts Arctic training and testing exercises, referred to by the Navy as Ice Exercises (ICEXs), on and below the sea ice within the particular area requested for exclusion. ICEXs and the accompanying base camps are established anywhere from 100 to 200 nm north of Prudhoe Bay, Alaska. These exercises are planned to occur every 2 years and typically last 25 to 45 days. ICEX camps include approximately 15 to 20 temporary shelters which support 30 to 65 personnel. Training and testing activities include: Submarine activities; submarine surfacing, in which submarines avoid pressure ridges and conduct surfacings in first year ice or in polynyas; aircraft operations; building of runways; and other on-ice activities. The Navy noted that ICEX activities alter the ice by creating holes to deploy training and testing equipment and surfacing submarines. The Navy explained that due to the need for stable ice, flights are conducted immediately prior to buildup of the ICEX camp to determine the final location.

The Navy also noted that the Office of Naval Research conducts research testing activities in the deep waters of the Beaufort Sea with acoustic sources and the use of icebreaking ships to deploy and retrieve these sources, which it plans to continue in the future, and expressed concern that the designation of critical habitat could impact these activities. The Navy indicated that it also conducts other training and testing activities in the Arctic region in support of gaining and maintaining military readiness in this region, and expects additional training and testing activities to occur in this region. The activities may be similar to those identified for ICEXs, and likely also would include vessel movements, icebreaking, and support transport by air and sea. Testing activities may include air platform/vehicle tests, missile testing, gunnery testing, and anti-submarine warfare tracking testing.

The Navy expressed the concern that the critical habitat may impact national security if training and testing activities are prohibited or are required to be mitigated (for the protection of critical habitat) to the point where training and testing value is severely degraded, or if the Navy is unable to access certain locations within the Arctic region. The Navy indicated that if the critical habitat designation maintains the same boundaries identified in our 2014 proposed designation, it does not foresee a way that its training and testing activities will be able to be conducted without significant impacts on those activities. In support of this assertion the Navy noted that through consultation with NMFS under section 7 of the ESA for training on the east coast of the United States, the Navy agreed to restrict certain training activities in North Atlantic right whale critical habitat during the calving season, noting that those training activities can be conducted in nearby areas that are not designated as critical habitat during the calving season. The Navy indicated that due to the size of the area proposed in 2014 as critical habitat for the Arctic ringed seal and the uniqueness of Arctic conditions, the Navy would not be able to shift its training activities to other areas or to different times of the year.

In addition to the information provided by the Navy, by letter dated April 30, 2020, the Air Force provided information concerning its activities at radar sites located adjacent to the area under consideration for designation as critical habitat (relevant sites identified above in the Application of ESA Section 4(a)(3)(B)(i) section). The Air Force requested that we consider excluding critical habitat near these sites under section 4(b)(2) of the ESA due to impacts on national security. Although we are not proposing to exempt the radar sites pursuant to section 4(a)(3)(B)(i) of the ESA, as discussed above, here we consider whether to propose excluding critical habitat located adjacent to these sites under section 4(b)(2).

The Air Force noted that annual fuel and cargo resupply activities occur at these radar sites primarily in the summer and installation beaches are used for offload. The Air Force indicated that coastal operations at these installations are limited, and when barge operations occur, protective measures are implemented per the Polar Bear and Pacific Walrus Avoidance Plan (preliminary final 2020) associated with the INRMP in place for these sites. The Air Force discussed that it also conducts sampling and monitoring at these sites as part of the department's Installation Restoration Program, and conducts larger scale contaminant or debris removal in some years that can require active disturbance of the shoreline. Coastal barge operations are a feature of both monitoring and removal actions.

Federal agencies have an existing obligation to consult with NMFS under section 7(a)(2) of the ESA to ensure the activities they fund or carry out are not likely to jeopardize the continued existence of the Arctic ringed seal, regardless of whether or where critical habitat is designated for the species. The activities described in the Air Force's exclusion request are localized and small in scale, and it is unlikely that modifications to these activities would be needed to address impacts to critical habitat beyond any modifications that may be necessary to address impacts to Arctic ringed seals. We therefore anticipate that the time and costs associated with consideration of the effects of future Air Force actions on Arctic ringed seal critical habitat under section 7(a)(2) of the ESA would be limited if any, and the consequences for the Air Force's activities, even if we do not exempt or exclude the requested areas from critical habitat designation, would be negligible.

As a result, and in light of the benefits of critical habitat designation discussed above and in the Draft Impact Analysis Report, we have preliminarily concluded that the benefits of exclusion do not outweigh the benefits of designation and are therefore not proposing to exercise our discretionary authority to exclude these particular areas pursuant to section 4(b)(2) of the ESA with respect to the Air Force's request based on national security impacts. However, given the specific national security concerns identified by the Navy, below we provide an analysis of our decision to exercise our discretionary authority under section 4(b)(2) of the ESA to propose excluding

the area requested by the Navy based on national security impacts. We will continue to coordinate with DOD regarding the identification of potential national security impacts that could result from the critical habitat designation to further inform our determinations regarding exclusions from the designation under section 4(b)(2) based on national security impacts.

*Other Relevant Impacts*

Finally, under ESA section 4(b)(2) we consider any other relevant impacts of critical habitat designation to inform our decision as to whether to exclude any areas. For example, we may consider potential adverse effects on existing management or conservation plans that benefit listed species, and we may consider potential adverse effects on tribal lands or trust resources. In preparing this revised proposed designation, we have not identified any such management or conservation plans, tribal lands or resources, or anything else that would be adversely affected by the critical habitat designation. Some Alaska Native organizations and tribes have expressed concern that the critical habitat designation might restrict subsistence hunting of ringed seals or other marine mammals, such that important hunting areas should be considered for exclusion, but no restrictions on subsistence hunting are associated with this designation. Accordingly, we are not exercising our discretion to conduct an exclusion analysis pursuant to section 4(b)(2) of the ESA based on other relevant impacts.

**Proposed Exclusion Based on National Security Impacts**

Based on the written information provided by the Navy (summarized in the *National Security Impacts* section above), and clarifications provided through subsequent communications with the Navy regarding the location of the particular area requested for exclusion, we evaluated whether there was a reasonably specific justification indicating that designating certain areas as critical habitat would have a probable incremental impact on national security. In accordance with our 4(b)(2) policy (81 FR 7226, February 11, 2016), when the Navy provides a reasonably specific justification, we will defer to its expert judgment as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected by the critical habitat designation. In conducting our review of this exclusions request under section 4(b)(2) of the ESA, we also gave great weight to the Navy's national security concerns. To weigh the national security impacts against conservation benefits of a potential critical habitat designation, we considered the following: (1) The size of the area requested for exclusion compared with the total size of the specific area that meets the definition of critical habitat for the Arctic ringed seal; (2) the conservation value of the area requested for exclusion; (3) the likelihood that the Navy's activities would affect the area requested for exclusions and trigger ESA section 7 consultations, and the likelihood that Navy activities would need to be modified to avoid adverse modification or destruction of critical habitat; and (4) the likelihood that other Federal actions may occur that would no longer be subject to the ESA's critical habitat provisions if the particular area were excluded from the designation.

The area requested for exclusion comprises approximately 12 percent of the marine habitat that meets the definition of critical habitat for the Arctic ringed seal, and approximately 41 percent of the portion of this marine habitat north of the Beaufort Sea shelf (north of the 200-m isobath). As noted by the Navy in its exclusion request, and as discussed above in the *Distribution and Habitat Use* and Specific Areas Containing the Essential Features sections, data currently available on ringed seal use of the requested exclusion area, particularly for the northernmost portion, are limited. As we discussed above (see Specific Areas Containing the Essential Features section), aerial surveys of ringed seals during the periods of reproduction and molting have been conducted for the most part over the continental shelf within about 25 to 40 km of the Alaska coast. However, incidental sightings of ringed seals were documented up to about 100 km north of the Beaufort Sea shelf during bowhead whale aerial surveys conducted during spring and early summer. Although we are not aware of any similar data for U.S. waters farther north, the trend toward areas of earlier spring ice retreat lends support for our decision to propose defining the northern boundary of the specific area that meets the definition of critical habitat for the Arctic ringed seal as the outer extent of the U.S. EEZ. In addition, recent satellite telemetry data for ringed seals tagged on the Alaska coast show that during the open-water season, some of these seals made forays north of the Beaufort Sea shelf, including into parts of the area requested for exclusion (Crawford *et al.* 2019, Quakenbush *et al.* 2019; Alaska Department of Fish and Game (ADF&G) and North Slope Borough, 2019, unpublished data, Von Duyke *et al.* 2020). We note that the telemetry data for these seals are unlikely to fully reflect the distribution of this species in U.S. waters, for instance because, as discussed by Citta *et al.* (2018), the distribution of telemetry locations for tagged ringed seals is influenced by the location and season of tagging. Thus, although the area requested for exclusion contains one or more of the essential features of the Arctic ringed seal's critical habitat, data are limited to inform our assessment of the relative value of this area to the conservation of the species. Dive recorders indicated that foraging-type movements of some of these tagged seals occurred over both the continental shelf and north of the shelf, suggesting that both areas may be important to ringed seals during the open-water period. Observations of ringed seals near and beyond the outer extent of the U.S. EEZ in the Arctic Ocean Basin were also documented by marine mammal observers during a research geophysical survey conducted in the summer of 2010.

The testing and training activities described in the Navy's exclusion request are temporally limited, localized, and small in scale, and it is very unlikely that modifications to these activities would be needed to address impacts to critical habitat beyond any modifications that may be necessary to address impacts to Arctic ringed seals. Moreover, the Navy has an existing obligation to consult with NMFS under section 7(a)(2) of the ESA to ensure the activities it funds or carries out are not likely to jeopardize the continued existence of the Arctic ringed seal, regardless of whether or where critical habitat is designated for the species. Aside from the Navy's training and testing activities, we are aware of few other Federal actions that would be expected to affect the particular area requested for exclusion.

We recognize that there are limited data currently available to inform our evaluation of the conservation value to the Arctic ringed seal of the particular area requested for exclusion. Therefore, given the Navy's specific justification regarding potential impacts on national security stemming from the potential designation of critical habitat for the Arctic ringed seal in the particular area requested for exclusion, and the fact that few other Federal actions are

expected to occur that would no longer be subject to consideration of effects on Arctic ringed seal critical habitat if the particular area were excluded from the designation, we have concluded that the benefits of excluding this particular area due to national security impacts outweigh the benefits of designating this area as critical habitat for the Arctic ringed seal. Moreover, failure to designate this area as critical habitat is not expected to result in the extinction of the species because the area is small in comparison to the entirety of the proposed critical habitat, we have no reason to believe it is more valuable for Arctic ringed seals than other portions of the proposed critical habitat, and threats to Arctic ringed seals in this area (including habitat-related threats) from Federal actions would continue to be subject to section 7 consultations. Consequently, we are proposing to exclude this area from the designation of critical habitat for the Arctic ringed seal, and we adjusted the proposed boundaries accordingly. We modified the curvilinear southern boundary of the proposed exclusion area recommended by the Navy to simplify its delineation while still including the full area the Navy recommended, resulting in a slightly larger area (about 1 percent more area) being proposed for exclusion.

As explained in the Draft Impact Analysis Report, the total incremental costs associated with the particular area we are proposing to exclude, which stem from administrative costs of adding critical habitat analyses to consultations on the Navy's ICEX activities over the next 10 years, are estimated to be $13,300 (discounted at 7 percent). Thus, the total incremental costs associated with the revised proposed critical habitat designation over the next 10 years, if this area is excluded, are estimated to be $786,000 (discounted at 7 percent). In annual terms, the estimated range of discounted incremental costs is $57,000 to $105,000.

**Revised Proposed Critical Habitat Designation**

We propose to designate as critical habitat a specific area of marine habitat in Alaska and offshore Federal waters of the Bering, Chukchi, and Beaufort seas, within the geographical area presently occupied by the Arctic ringed seal. This critical habitat area contains physical or biological features essential to the conservation of Arctic ringed seals that may require special management considerations or protection. Based on national security impacts, we propose to exclude a particular area of marine habitat north of the Beaufort Sea shelf that is used by the Navy for training and testing activities because we determined that the benefits to national security of exclusion outweigh the benefits of designation. We have not identified any unoccupied areas that are essential to the conservation of the Arctic ringed seal, and thus we are not proposing any such areas for designation as critical habitat. In accordance with our regulations regarding critical habitat designation (50 CFR 424.12(c)), the map included in the proposed regulation, as clarified by the accompanying regulatory text, would constitute the official boundary of the proposed designation.

**Effects of Critical Habitat Designation**

Section 7(a)(2) of the ESA requires Federal agencies, including NMFS, to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. Federal agencies must consult with us on any agency action that may affect listed species or critical habitat. During interagency consultation, we evaluate the agency action to determine whether the action is likely to adversely affect listed species or critical habitat. The potential effects of a proposed action may depend on, among other factors, the specific timing and location of the action relative to the seasonal presence of essential features or seasonal use of critical habitat by listed species for essential life history functions. Although the requirement to consult on an action that may affect critical habitat applies regardless of the season, NMFS addresses spatial-temporal considerations when evaluating the potential impacts of a proposed action during the ESA section 7 consultation process. For example, if an action with short-term effects is proposed during a time of year that sea ice is not present, we may advise that consequences to critical habitat are unlikely. If we conclude in a biological opinion pursuant to section 7(a)(2) of the ESA that the agency action would likely result in the destruction or adverse modification of critical habitat, we would recommend reasonable and prudent alternatives to the action that avoid that result.

Reasonable and prudent alternatives are defined in 50 CFR 402.02 as 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. NMFS may also provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

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 (among other reasons for reinitiation). Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which consultation has been completed, if those actions may affect designated critical habitat for the Arctic ringed seal. Activities subject to the ESA section 7 consultation process include activities on Federal lands as well as activities requiring a permit or other authorization from a Federal agency (*e.g.,* a section 10(a)(1)(B) permit from NMFS), or some other Federal action, including funding (*e.g.,* Federal Highway Administration or Federal Emergency Management Agency funding). Consultation under section 7 of the ESA would not be required for Federal actions that do not affect listed species or designated critical habitat, and would not be required for actions on non-Federal and private lands that are not carried out, funded, or authorized by a Federal agency.

**Activities That May Be Affected by Critical Habitat Designation**

Section 4(b)(8) of the ESA requires, to the maximum extent practicable, in any proposed regulation to designate critical habitat, an evaluation and brief description of those activities that may adversely modify such habitat or that may be affected by such designation. A variety of activities may affect Arctic ringed seal critical habitat and, if carried out, funded, or authorized by a Federal agency, may be subject to ESA section 7 consultation. Such activities include: In-water and coastal construction; activities that generate water pollution; dredging; commercial fishing; oil and gas exploration, development, and production; oil spill response; and

certain military readiness activities. As explained above, at this time, on the basis of how protections are currently implemented for Arctic ringed seals under the MMPA and as a threatened species under the ESA, we do not anticipate that additional requests for project modifications will result specifically from this proposed designation of critical habitat.

Private or non-Federal entities may also be affected by the proposed critical habitat designation if a Federal permit is required, Federal funding is received, or the entity is involved in or receives benefits from a Federal project. These activities would need to be evaluated with respect to their potential to destroy or adversely modify Arctic ringed seal critical habitat. As noted in the Public Comments Solicited section below, NMFS also requests information on the types of non-Federal activities that may be affected by this rulemaking.

**Public Comments Solicited**

To ensure the final action resulting from this revised proposal will be as accurate and effective as possible, we solicit comments and information from the public, other concerned government agencies, Alaska Native tribes and organizations, the scientific community, industry, non-governmental organizations, and any other interested parties concerning our revised proposed designation of critical habitat for the Arctic ringed seal. In particular, we are interested in data and information regarding the following: (1) The distribution and habitat use of Arctic ringed seals; (2) the identification, location, and quality of physical or biological features essential to the conservation of the Arctic ringed seal, including in particular, the delineation of the northern, southern, and shoreward boundaries of where one or more of these features occur; (3) the potential impacts of designating the proposed critical habitat, including information on the types of Federal activities that may trigger an ESA section 7 consultation; (4) current or planned activities in the area proposed for designation and their possible impacts on the proposed critical habitat; (5) the potential effects of the designation on Alaska Native cultural practices and villages; (6) any foreseeable economic, national security, Tribal, or other relevant impacts resulting from the revised proposed designation; (7) whether any data used in the economic analysis needs to be updated; (8) foreseeable additional costs arising specifically from the designation of critical habitat for the Arctic ringed seal that have not been identified in the Draft Impact Analysis Report; (9) additional information regarding impacts on small businesses and federally recognized tribes not identified in the Draft Impact Analysis Report; and (10) whether any particular areas that we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the ESA and why. For these described impacts or benefits, we request that the following specific information (if relevant) be provided to inform our ESA section 4(b)(2) analysis: (1) A map and description of the affected area; (2) a description of the activities that may be affected within the area; (3) a description of past, ongoing, or future conservation measures conducted within the area that may protect Arctic ringed seal habitat; and (4) a point of contact.

You may submit your comments and information concerning this revised proposed rule by any one of the methods described under **ADDRESSES** above. The revised proposed rule and supporting documentation can be found on the Federal eRulemaking Portal at *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0114*. We will consider all comments and information received during the reopened comment period for this revised proposed rule in preparing the final rule. Accordingly, the final decision may differ from this revised proposed rule.

**References Cited**

A complete list of all references cited in this revised proposed rule can be found on the Federal eRulemaking Portal and is available upon request from the NMFS office in Juneau, Alaska (see **ADDRESSES**).

**Classifications**

*National Environmental Policy Act*

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. *See Douglas Cnty.* v. *Babbitt,* 48 F.3d 1495, 1502–08 (9th Cir. 1995).

*Regulatory Flexibility Act*

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, 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 that describes the effects of the rule on small entities (*i.e.,* small businesses, small not-for-profit organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility act analysis (IRFA) that is included as part of the Draft Impact Analysis Report for this revised proposed rule. The IRFA estimates the potential number of small businesses that may be directly regulated by this revised proposed rule, and the impact (incremental costs) per small entity for a given activity type. Specifically, based on an examination of the North American Industry Classification System (NAICS), this analysis classifies the economic activities potentially directly regulated by the proposed action into industry sectors and provides an estimate of their number in each sector, based on the applicable NAICS codes. A summary of the IRFA follows.

A description of the action (*i.e.,* revised proposed designation of critical habitat), why it is being considered, and its legal basis are included in the preamble of this revised proposed rule. This proposed action does not impose new recordkeeping or reporting requirements on small entities. The analysis did not reveal any Federal rules that duplicate, overlap, or conflict with the proposed action. Existing Federal laws and regulations overlap with the revised proposed rule only to the extent that they provide protection to natural resources within the area proposed as critical habitat generally. However, no existing regulations specifically prohibit destruction or adverse modification of critical habitat for the Arctic ringed seal.

This revised proposed critical habitat rule does not directly apply to any particular entity, small or large. The regulatory mechanism through which critical habitat protections are enforced is section 7 of the ESA, which directly regulates only those activities carried out, funded, or permitted by a Federal agency. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. In some cases, small entities may participate as third parties (*e.g.,* permittees, applicants, grantees) during ESA section 7 consultations (the primary parties being the Federal action agency and NMFS) and thus they may be indirectly affected by the critical habitat designation.

Based on the best information currently available, the Federal actions projected to occur within the time frame of the analysis (*i.e.,* the next 10 years) that may trigger an ESA section 7 consultation due to the potential to affect one or more of the essential

habitat features also have the potential to affect Arctic ringed seals. Thus, as discussed above, we expect that none of the activities we identified would trigger a consultation solely on the basis of this critical habitat designation; in addition, we do not anticipate that additional requests for project modifications will result specifically from this designation of critical habitat. As a result, the direct incremental costs of this critical habitat designation are expected to be limited to the additional administrative costs of considering Arctic ringed seal critical habitat in future section 7 consultations that would occur regardless based on the listing of Arctic ringed seals.

As detailed in the Draft Impact Analysis Report, the oil and gas exploration, development, and production industries participate in activities that are likely to require consideration of critical habitat in ESA section 7 consultations. The Small Business Administration size standards used to define small businesses in these cases are: (1) An average of no more than 1,250 employees (crude petroleum and natural gas extraction industry); or (2) average annual receipts of no more than $41.5 million (support activities for oil and gas operations industry). Only two of the parties identified in the oil and gas category appear to qualify as small businesses based on these criteria. Based on past ESA section 7 consultations, the additional third party administrative costs in future consultations involving Arctic ringed seal critical habitat over the next 10 years are expected to be borne principally by large oil and gas operations. The estimated range of annual third party costs over this 10 year period is $32,000 to $59,000 (discounted at 7 percent), virtually all of which is expected to be associated with oil and gas activities. It is possible that a limited portion of these administrative costs may be borne by small entities (based on past consultations, an estimated maximum of two entities). Two government jurisdictions with ports appear to qualify as small government jurisdictions (serving populations of fewer than 50,000). The total third party costs that may be borne by these small government jurisdictions over 10 years are less than $1,000 (discounted at 7 percent) for the additional administrative effort to consider Arctic ringed seal critical habitat as part of a future ESA section 7 consultation involving one port.

As required by the RFA (as amended by the SBREFA), we considered alternatives to the proposed critical habitat designation for the Arctic ringed seal. We considered and rejected the alternative of not designating critical habitat for the Arctic ringed seal, because such an alternative does not meet our statutory requirements under the ESA. We also considered and rejected the alternative of designating as critical habitat the entire specific area that contains at least one identified essential feature (*i.e.,* no areas excluded), because the alternative does not allow the agency to take into account circumstances in which the benefits of exclusion for national security impacts outweigh the benefits of critical habitat designation. Finally, through the ESA 4(b)(2) exclusion analysis process, we identified and selected an alternative under which a particular area is proposed for exclusion based on national security impacts after determining that the benefits of exclusion outweigh the conservation benefits to the species, while the remainder of the specific area that contains at least one identified essential feature would be designated as critical habitat. We selected this alternative because it would result in a critical habitat designation that provides for the conservation of the species and is consistent with the ESA and joint NMFS and U.S. Fish and Wildlife Service regulations concerning critical habitat at 50 CFR part 424 while potentially reducing national security impacts. Based on the best information currently available, we concluded that this alternative would result in minimal impacts to small entities and the economic impacts associated with the critical habitat designation would be modest.

*Paperwork Reduction Act*

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. This revised proposed rule does not contain any new or revised collection of information. This rule, if adopted, would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(1) This revised 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.'' The designation of critical habitat does not impose an enforceable duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect of a critical habitat designation is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly affected by the designation of critical habitat, but 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 affected because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandate Reform Act would not apply, nor would critical habitat shift to state governments the costs of the large entitlement programs listed above.

(2) This revised proposed rule will not significantly or uniquely affect small governments because it is not likely to produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. In addition, the designation of critical habitat imposes no obligations on local, state, or tribal governments. Therefore, a Small Government Agency Plan is not required.

*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 (Section 515 of Pub. L. 106–554).

On December 16, 2004, the OMB issued its Final Information Quality Bulletin for Peer Review (Bulletin) establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The Bulletin was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The primary purpose of the Bulletin, which was implemented under the Information

Quality Act, is to improve the quality and credibility of scientific information disseminated by the Federal government by requiring peer review of ''influential scientific information'' and ''highly influential scientific information'' prior to public dissemination. Influential scientific information is defined as information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions. The Bulletin provides agencies broad discretion in determining the appropriate process and level of peer review. Stricter standards were established for the peer review of ''highly influential scientific assessments,'' defined as information whose dissemination could have a potential impact of more than $500 million in any one year on either the public or private sector or that the information is novel, controversial, or precedent-setting, or has significant interagency interest.

The evaluation of critical habitat presented in this revised proposed rule and the information presented in the supporting Draft Impact Analysis Report are considered influential scientific information subject to peer review. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the critical habitat analysis contained in our 2014 proposed rule from five reviewers, and of the information used to prepare the associated impact analysis report from three reviewers. We reviewed the comments received from these reviewers for substantive issues and new information regarding critical habitat for the Arctic ringed seal, and we used this information as applicable in the development of this revised proposed rule and the associated Draft Impact Analysis Report. The peer review comments are compiled in two reports that are available on the Federal eRulemaking Portal or upon request (see **ADDRESSES**). We are obtaining additional independent peer review of the information used to prepare this revised proposed rule, and will address all comments received in developing the final rule.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and co-management agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments outlines the responsibilities of the Federal Government in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat. 452), as amended by section 518 of Public Law 108–447 (118 Stat. 3267), directs all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under E.O. 13175.

As the entire proposed critical habitat area is located seaward of the line of MLLW and does not extend into tidally-influenced channels of tributary waters, no tribal-owned lands overlap with the revised proposed designation. However, we seek comments and information concerning tribal and Alaska Native corporation activities that are likely to be affected by the proposed designation (see Public Comments Solicited section). Although this revised proposed designation overlaps with areas used by Alaska Natives for subsistence, cultural, and other purposes, no restrictions on subsistence hunting are associated with the critical habitat designation. We coordinate with Alaska Native hunters regarding management issues related to Arctic ringed seals through the Ice Seal Committee (ISC), a co-management organization under section 119 of the MMPA. We discussed the designation of critical habitat for Arctic ringed seals with the ISC and provided updates regarding the timeline for publication of this revised proposed rule. We will also contact potentially affected tribes and Alaska Native corporations by mail and offer them the opportunity to consult on the revised designation of critical habitat for the Arctic ringed seal and discuss any concerns they may have. If we receive any such requests in response to this revised proposed rule, we will respond to each request before issuing a final rule.

*Executive Order 12630, Takings*

Under E.O. 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 E.O. 12630, the revised proposed rule does not have significant takings implications. The designation of critical habitat directly affects only Federal agency actions (*i.e.,* those actions authorized, funded, or carried out by Federal agencies). Further, no areas of private property exist within the revised proposed critical habitat and hence none would be affected by this action. Therefore, a takings implication assessment is not required.

*Executive Order 12866, Regulatory Planning and Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

OMB has determined that this revised proposed rule is significant for purposes of E.O. 12866 review. A Draft Impact Analysis Report has been prepared that considers the economic costs and benefits of the revised proposed critical habitat designation and alternatives to this rulemaking as required under E.O. 12866. To review this report, see the **ADDRESSES** section above.

Based on the Draft Impact Analysis Report, the total estimated present value of the incremental impacts of the revised proposed critical habitat designation is approximately $786,000 over the next 10 years (discounted at 7 percent). Assuming a 7 percent discount rate, the range of annual impacts is estimated to be $57,000 to $105,000. Overall, economic impacts are expected to be small and Federal agencies are anticipated to bear at least 45 percent of these costs. While there are expected beneficial economic impacts of designating critical habitat for the Arctic ringed seal, there are insufficient data available to monetize those impacts (see *Benefits of Designation* section).

This proposed rulemaking is expected to be regulatory under E.O. 13771.

*Executive Order 13132, Federalism*

Executive Order 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Pursuant to E.O. 13132, we determined that this revised proposed rule does not have significant federalism effects and that a federalism assessment is not required. The designation of critical habitat directly affects only the responsibilities of Federal agencies. As a result, the revised proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or

on the distribution of power and responsibilities among the various levels of government, as specified in the Order. State or local governments may be indirectly affected by the revised proposed designation if they require Federal funds or formal approval or authorization from a Federal agency as a prerequisite to conducting an action. In these cases, the State or local government agency may participate in the ESA section 7 consultation as a third party. However, in keeping with Department of Commerce policies and consistent with ESA regulations at 50 CFR 424.16(c)(1)(ii), we will request information for this revised proposed rule from the appropriate state resource agencies in Alaska.

*Executive Order 13211, Energy Supply, Distribution, and Use*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking a significant energy action. Under E.O. 13211, a significant energy action means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under E.O. 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this revised proposed critical habitat designation on the supply, distribution, or use of energy (see Draft Impact Analysis Report for this revised proposed rule). This proposed critical habitat designation overlaps with five BOEM planning areas for Outer Continental Shelf oil and gas leasing; however, the Beaufort and Chukchi Sea planning areas are the only areas with existing or planned leases.

Currently, the majority of oil and gas production occurs on land adjacent to the Beaufort Sea and the proposed critical habitat area. Any proposed offshore oil and gas projects would likely undergo an ESA section 7 consultation to ensure that the project would not likely destroy or adversely modify designated critical habitat. However, as discussed in the Draft Impact Analysis Report for this revised proposed rule, such consultations will not result in any new and significant effects on energy supply, distribution, or use. ESA section 7 consultations have occurred for numerous oil and gas projects within the area of the critical habitat designation (*e.g.,* regarding possible effects on endangered bowhead whales, a species without designated critical habitat) without adversely affecting energy supply, distribution, or use, and we would expect the same relative to critical habitat for Arctic ringed seals. We have, therefore, determined that the energy effects of this revised proposed rule are unlikely to exceed the impact thresholds identified in E.O. 13211, and that this rulemaking is not a significant energy action.

**List of Subjects**

*50 CFR Part 223*

Endangered and threatened species.

*50 CFR Part 226*

Endangered and threatened species.

Dated: December 28, 2020.

**Samuel D. Rauch III,**

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

For the reasons set out in the preamble, 50 CFR parts 223 and 226 are proposed to be amended as follows:

## PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e), under Marine Mammals, by revising the entry for the ''Seal, ringed (Arctic subspecies)'' to read as follows:

**§ 223.102 Enumeration of threatened marine and anadromous species.**

* * * * *

(e) * * *

| Species [1] | | | Citation(s) for listing determination(s) | Critical habitat | ESA rules |
|---|---|---|---|---|---|
| Common name | Scientific name | Description of listed entity | | | |
| **Marine Mammals** | | | | | |
| * | * | * | * | * | * |
| Seal, ringed (Arctic subspecies). | *Phoca (=Pusa) hispida hispida.* | Entire subspecies ..... | 77 FR 76706, Dec. 28, 2012. | 226.229 | NA |
| * | * | * | * | * | * |

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722; February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612; November 20, 1991).

* * * * *

## PART 226—DESIGNATED CRITICAL HABITAT

■ 3. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

■ 4. Add § 226.229 to read as follows:

**§ 226.229 Critical Habitat for the Arctic Subspecies (*Pusa hispida hispida*) of the Ringed Seal.**

Critical habitat is designated for the Arctic subspecies of the ringed seal as depicted in this section. The map, clarified by the textual descriptions in this section, is the definitive source for determining the critical habitat boundaries.

(a) *Critical habitat boundaries.* Critical habitat for the Arctic subspecies of the ringed seal includes marine waters within one specific area in the Bering, Chukchi, and Beaufort seas, extending from the line of mean lower low water (MLLW) to an offshore limit within the U.S. Exclusive Economic Zone (EEZ). Critical habitat does not extend into tidally-influenced channels of tributary waters of the Bering, Chukchi, or Beaufort seas. The boundary extends offshore from the northern limit of the United States-Canada border approximately 190 km to 71°17′29″ N139°28′8″ W, and from this point runs generally westward along the line connecting the following points: 71°43′32″ N/141°59′29″ W, 71°46′18″ N/144°31′13″ W, 71°50′25″ N/145°53′17″ W, 72°10′39″ N/149°10′58″ W, 72°20′4″ N/150° W, and 72°20′4″ N/152° W. From this point (72°20′4″ N/152° W) the boundary follows longitude 152° W northward to the seaward limit of the

U.S. EEZ, and then follows the limit of the U.S. EEZ northwestward; then southwestward and south to the intersection of the southern boundary of the critical habitat in the Bering Sea at 61°18′15″ N/177°45′56″ W. The southern boundary extends southeastward from this intersection point to 60°7′ N/172°1′ W, then northeastward along a line extending to near Cape Romanzof at 61°48′42″ N/166°6′5″ W, with the shoreward boundary defined by line of MLLW. Critical habitat does not include permanent manmade structures such as boat ramps, docks, and pilings that were in existence within the legal boundaries on or before the effective date of this rule.

(b) *Essential features.* The essential features for the conservation of the Arctic subspecies of the ringed seal are:

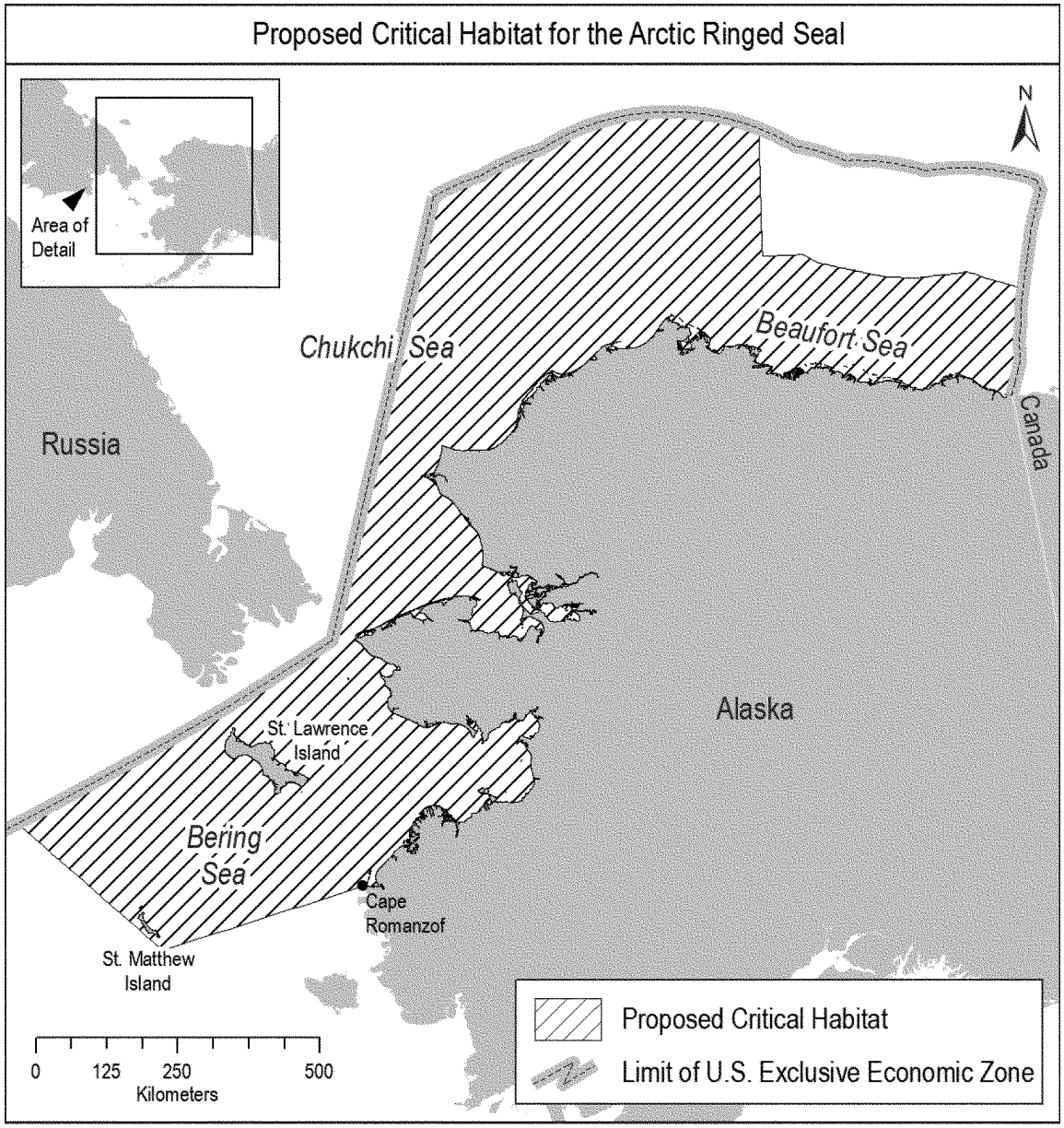
(1) Snow-covered sea ice habitat suitable for the formation and maintenance of subnivean birth lairs used for sheltering pups during whelping and nursing, which is defined as areas of seasonal landfast (shorefast) ice and dense, stable pack ice, excluding any bottom-fast ice extending seaward from the coastline (typically in waters less than 2 m deep), that have undergone deformation and contain snowdrifts of sufficient depth, typically at least 54 cm deep.

(2) Sea ice habitat suitable as a platform for basking and molting, which is defined as areas containing sea ice of 15 percent or more concentration, excluding any bottom-fast ice extending seaward from the coastline (typically in waters less than 2 m deep).

(3) Primary prey resources to support Arctic ringed seals, which are defined to be Arctic cod (*Boreogadus saida*), saffron cod (*Eleginus gracilis*), shrimps, and amphipods.

(c) *Map of Arctic ringed seal critical habitat.*

**BILLING CODE 3510–22–P**




[FR Doc. 2020–29008 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–C**

# Notices

Federal Register
Vol. 86, No. 5
Friday, January 8, 2021

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

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Doc. No. AMS–FGIS–20–0094]**

### Grain Fees for Official Inspection and Weighing Services Under the United States Grain Standards Act (USGSA)

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Agricultural Marketing Service (AMS) is announcing the 2021 fee schedule for official inspection and weighing services performed under the USGSA, as amended, in order to comply with Federal Grain Inspection Service regulations and the Agriculture Reauthorizations Act of 2015. This action publishes the annual review of Schedule A fees calculation and the resulting fees.

**DATES:** The new fee schedule went into effect on January 1, 2021.

**ADDRESSES:** Prospective customers can find the fee scheduled posted on the Agency's public website.

**FOR FURTHER INFORMATION CONTACT:** Denise Ruggles, FGIS Executive Program Analyst, USDA AMS; Telephone: (816) 659–8406; Email: *Denise.M.Ruggles@usda.gov.*

**SUPPLEMENTARY INFORMATION:** The USGSA provides the Secretary of Agriculture with the authority to charge and collect reasonable fees to cover the costs of performing official services and the costs associated with managing the program. The regulations require that the Federal Grain Inspection Service (FGIS) annually review the national tonnage fees, local tonnage fees, and fees for service. After calculating the tonnage fees according to the regulatory formula in 7 CFR 800.71(b)(1), FGIS then reviews the amount of funds in the operating reserve at the end of the fiscal year (FY2020 in this case) to ensure that it has 4½ months of operating expenses as required by § 800.71(b)(2) of the regulations. If the operating reserve has more or less than 4½ months of operating expenses, then FGIS must adjust all Schedule A fees. For each $1,000,000, rounded down, that the operating reserve varies from the target of 4½ months, FGIS will adjust all Schedule A fees by 2 percent. If the operating reserve exceeds the target, all Schedule A fees will be reduced. If the operating reserve does not meet the target, all Schedule A fees will be increased. The maximum annual increase or decrease in fees is 5 percent (7 CFR 800.71(b)(2)(i)–(ii)).

Tonnage fees for the 5-year rolling average tonnage were calculated on the previous 5 fiscal years—2016, 2017, 2018, 2019, and 2020. Tonnage fees consist of the national tonnage fee and local tonnage fee and are calculated and rounded to the nearest $0.001 per metric ton. The tonnage fees are calculated as follows:

*National tonnage fee.* The national tonnage fee is the national program administrative costs for the previous fiscal year divided by the average yearly tons of export grain officially inspected and/or weighed by delegated States and designated agencies, excluding land carrier shipments to Canada and Mexico, and outbound grain officially inspected and/or weighed by FGIS during the previous 5 fiscal years.

$$\text{National Tonnage Fee} = \frac{\text{FY2020 National Administrative Costs}}{\text{5 Year Rolling Average Export Tons}}$$

| Fiscal year | Metric tons |
|---|---|
| 2016 | 122,330,979 |
| 2017 | 135,017,935 |
| 2018 | 129,687,652 |
| 2019 | 107,896,235 |
| 2020 | 110,090,771 |
| 5-year Rolling Average | 121,004,714 |

The national program administrative costs for fiscal year 2020 were $5,704,963. The fiscal year 2021 national tonnage fee, prior to the operating reserve review, is calculated to be at $0.047 per metric ton.

*Local tonnage fee.* The local tonnage fee is the field office administrative costs for the previous fiscal year divided by the average yearly tons of outbound grain officially inspected and/or weighed by the field office during the previous 5 fiscal years.

$$Local\ Tonnage = \frac{FY2020\ Field\ Office\ Administrative\ Costs}{5\ Year\ Rolling\ Average\ Export\ Tons\ (Local)}$$

The field office fiscal year tons for the previous 5 fiscal years and calculated 5-year rolling averages are as follows:

| Field office | FY 2016 | FY 2017 | FY 2018 | FY 2019 | FY 2020 | 5-Year rolling average |
|---|---|---|---|---|---|---|
| New Orleans | 66,077,535 | 70,439,862 | 66,996,126 | 57,807,378 | 59,768,303 | 64,217,841 |
| League City | 12,581,236 | 13,307,780 | 8,424,216 | 7,939,994 | 9,318,595 | 10,314,364 |

| Field office | FY 2016 | FY 2017 | FY 2018 | FY 2019 | FY 2020 | 5-Year rolling average |
|---|---|---|---|---|---|---|
| Portland | 4,645,754 | 5,175,459 | 4,643,241 | 2,530,648 | 3,331,672 | 4,065,355 |
| Toledo | 2,030,506 | 2,229,920 | 1,802,762 | 1,597,584 | 948,840 | 1,721,922 |

The local field office administrative costs for fiscal year 2020 and the fiscal year 2021 calculated local field office tonnage fees, prior to the operating reserve review, are as follows:

| Field office | FY 2020 Local administrative costs | Calculated FY 2021 local tonnage fee |
|---|---|---|
| New Orleans | $1,209,886 | $0.019 |
| League City | 574,717 | 0.056 |
| Portland | 346,941 | 0.085 |
| Toledo | 238,162 | 0.138 |

*Operating reserve.* In order to maintain an operating reserve not less than 3 and not more than 6 months, FGIS reviewed the value of the operating reserve at the end of FY2020 to ensure that an operating reserve of 4½ months is maintained.

The program operating reserve at the end of fiscal year 2020 was $10,007,544, with a monthly operating expense of $2,983,133. The target of 4.5 months of operating reserve is $13,424,097. Therefore, the operating reserve is less than 4.5 times the monthly operating expenses by $3,416,553. For each $1,000,000, rounded down, below the target level, all Schedule A fees must be increased by 2 percent. The operating reserve is $3.4 million below the target level, resulting in a calculated 5 percent increase, as required by § 800.71(b)(2)(ii). Therefore, for 2021, FGIS is increasing all the 2020 Schedule A fees for service in Schedule A in paragraph (a)(1) by 5 percent. All Schedule A fees for service are rounded to the nearest $0.10, except for fees based on tonnage or hundredweight. The fee Schedule A has been published on the agency's public website.

(Authority: 7 U.S.C. 71–87k.)

**Bruce Summers,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2021–00165 Filed 1–7–21; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2020–0112]**

### Notice of Request for Revision to and Extension of Approval of an Information Collection; Approval of Laboratories for Conducting Aquatic Animal Tests for Export Health Certificates

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Revision to and extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with its efforts to certify certain laboratories that conduct aquatic animal testing for export activities.

**DATES:** We will consider all comments that we receive on or before March 9, 2021.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-*0112.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0112, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0112* or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on conducting aquatic animal tests for export health certificates, contact Ms. Janet Warg, Microbiologist, Diagnostic Virology Laboratory, National Veterinary Services Laboratories, 1920 Dayton Avenue, P.O. Box 844, Ames, IA 50010; (515) 337–7551. For more information on the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Approval of Laboratories for Conducting Aquatic Animal Tests for Export Health Certificates.

*OMB Control Number:* 0579–0429.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* The Animal Health Protection Act (AHPA, 7 U.S.C. 8301 *et seq.*) is the primary Federal law governing the protection of animal health. The AHPA gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary to prevent the spread of any livestock or poultry pest or disease.

Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the ability of U.S. producers to compete in the global market of

animal and animal product trade. To facilitate the export of U.S. animals and animal products, the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture maintains information regarding the import health requirements of other countries for animals and animal products, including aquaculture animals, exported from the United States.

While APHIS does not currently require the approval or certification of laboratories that conduct disease tests for the export of aquaculture animals, some countries that import these animals from the United States require them to be tested for certain diseases and the test results recorded on the export certificates. In addition, the test results must originate from a laboratory approved by the competent authority of the exporting country, which is APHIS in this case. State, university, and private laboratories can voluntarily seek APHIS approval of individual diagnostic methods. Though APHIS does not have regulations for the approval or certification of laboratories that conduct tests for the export of aquaculture animals, APHIS provides this approval as a service to U.S. exporters who export aquaculture animals to countries that require this certification.

APHIS evaluates diagnostic methods for detecting aquatic animal pathogens listed by the World Organization for Animal Health (OIE) in the OIE diagnostic manual and other supporting scientific literature. APHIS lists the laboratories approved to conduct diagnostic testing in support of export health certification of aquatic species at *https://www.aphis.usda.gov/*animal_health/lab_info_services/downloads/ApprovedLabs_Aquaculture.pdf. Once approved, the laboratories are inspected by APHIS every 2 years to maintain their approval.

The approval of laboratories to conduct tests for the export of aquaculture animals requires the use of certain information collection activities including notification of intent to request approval, application for APHIS approval, protocol statement, submission and recordkeeping of sample copies of diagnostic reports, quality assurance/control plans and their recordkeeping, notification of proposed changes to assay protocols, recordkeeping of supporting assay documentation, and request for removal of approved status.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

*Estimate of burden:* The public burden for this collection of information is estimated to average 11.4 hours per response.

*Respondents:* State, university, and private laboratory personnel.

*Estimated annual number of respondents:* 8.

*Estimated annual number of responses per respondent:* 70.

*Estimated annual number of responses:* 560.

*Estimated total annual burden on respondents:* 6,382 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 4th day of January 2021.

**Mark Davidson,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2021–00064 Filed 1–7–21; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2019–0068]**

### Notice of Availability of an Environmental Assessment for Release of *Lilioceris* egena for Biological Control of Air Potato

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of availability.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment (EA) relative to permitting the release of an insect, *Lilioceris egena,* for the biological control of air potato (*Dioscorea bulbifera*). Based on the environmental assessment and other relevant data, we have reached a preliminary determination that the release of this control agent within the continental United States will not have a significant impact on the quality of the human environment. We are making the EA available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before February 8, 2021.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0068.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2019–0068, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0068* or in our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** Dr. Colin D. Stewart, Assistant Director, Pests, Pathogens, and Biocontrol Permits, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1237; (301) 851–2327; *colin.stewart@usda.gov.*

**SUPPLEMENTARY INFORMATION:**

## Background

The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the release of an insect, *Lilioceris egena,* into the continental United States for use as a biological control agent to reduce the severity of air potato (*Dioscorea bulbifera*) infestations.

Air potato is an herbaceous, twining vine that can grow 65 feet long or more, capable of climbing and out-competing native vegetation. Since its introduction to Florida in 1905, air potato has aggressively spread throughout the State; this species is reportedly naturalized in Georgia, Alabama, Mississippi, Louisiana, Texas, and Hawaii. In 1999, the Florida Department of Agricultural and Consumer Services added air potato to its list of noxious weeds in an attempt to protect the State's native plant species from being displaced or hybridized. Presently, the air potato is well established in Florida and probably throughout the Gulf States where it has the potential to severely disrupt entire ecosystems.

Existing air potato management options, which include chemical and mechanical control methods, are ineffective, expensive, temporary, or have non-target impacts. Thus, a permit application has been submitted to APHIS for the purpose of releasing an insect, *L. egena,* into the continental United States for use as a biological control agent to reduce the severity of air potato infestations.

APHIS' review and analysis of the proposed action are documented in detail in an environmental assessment (EA) titled ''Field Release of the Beetle *Lilioceris egena* (Coleoptera: Chrysomelidae) for Classical Biological Control of Air Potato, *Dioscorea bulbifera* (Dioscoreaceae), in the Continental United States'' (October 2019). We are making the EA available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the heading **DATES** at the beginning of this notice.

The EA may be viewed on the *Regulations.gov* website or in our reading room (see **ADDRESSES** above for instructions for accessing *Regulations.gov* and information on the location and hours of the reading room). You may request paper copies of the EA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the EA when requesting copies.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 4th day of January 2021.

**Michael Watson,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2021–00063 Filed 1–7–21; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF COMMERCE

### Bureau of Economic Analysis

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Direct Investment Surveys: BE–605, Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate With Foreign Parent

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on October 23, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* Bureau of Economic Analysis (BEA), Commerce.

*Title:* Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent.

*OMB Control Number:* 0608–0009.

*Form Number:* BE–605.

*Type of Request:* Regular submission.

*Number of Responses:* 17,800 annually.

*Average Hours per Response:* One hour is the average but may vary considerably among respondents because of differences in company size and complexity.

*Estimated Total Annual Burden Hours:* 17,800.

*Needs and Uses:* The Quarterly Survey of Foreign Direct Investment in the United States—Transactions of U.S. Affiliate with Foreign Parent (Form BE–605) obtains quarterly data on transactions and positions between foreign-owned U.S. business enterprises and their ''affiliated foreign groups'' (*i.e.,* their foreign parents and foreign affiliates of their foreign parents). The survey is a sample survey that covers all U.S. affiliates above a size-exemption level. The sample data are used to derive universe estimates of direct investment transactions, positions, and income in non-benchmark years from similar data reported in the BE–12, Benchmark Survey of Foreign Direct Investment in the United States, which is conducted every five years and will next be conducted for the fiscal year ending in 2022. The data collected through the BE–605 survey are essential for the preparation of the U.S. international transactions, national income and product, and input-output accounts and the international investment position of the United States. The data are needed to measure the size and economic significance of foreign direct investment in the United States, measure changes in such investment, and assess its impact on the U.S. economy.

*Affected Public:* Businesses or other for-profit organizations.

*Frequency:* Quarterly.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* International Investment and Trade in Services Survey Act (Pub. L. 94–472, 22 U.S.C. 3101–3108, as amended).

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

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

the collection or the OMB Control Number 0608–0009.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2021–00085 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–06–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Request for Applicants for Appointment to the United States-Brazil CEO Forum

**AGENCY:** International Trade Administration (ITA), Department of Commerce (DOC).

**ACTION:** Solicitation of applications.

**SUMMARY:** In March 2007, the Governments of the United States and Brazil established the U.S.-Brazil CEO Forum. This notice announces the opportunity for up to three individuals for appointment to the U.S. Section of the Forum for a term ending on February 24, 2022. The current three-year term of the U.S. Section began on February 25, 2019 and will expire February 24, 2022. Nominations received in response to this notice will also be considered for on-going appointments to fill any future vacancies that may arise before November 30, 2021.

**DATES:** Applications for immediate consideration should be received no later than close of business January 22, 2021. After that date, applications will continue to be accepted through November 30, 2021 to fill any new vacancies that may arise.

**ADDRESSES:** Please send requests for consideration to Raquel Silva, Office of Latin America and the Caribbean, U.S. Department of Commerce, by email at *Raquel.Silva@trade.gov*.

**FOR FURTHER INFORMATION CONTACT:** Raquel Silva, 202–482–4157, Office of Latin America and the Caribbean, U.S. Department of Commerce.

**SUPPLEMENTARY INFORMATION:** The Secretary of Commerce and the Director of the National Economic Council, together with the Planalto Casa Civil Minister (Presidential Chief of Staff) and the Brazilian Minister of Industry, Foreign Trade & Services, co-chair the U.S.-Brazil CEO Forum (Forum), pursuant to the Terms of Reference signed in March 2007 by the U.S. and Brazilian governments, as amended, which set forth the objectives and structure of the Forum. The Terms of Reference may be viewed at: *http://www.trade.gov/ceo-forum/*. The Forum, consisting of both private and public sector members, brings together leaders of the respective business communities of the United States and Brazil to discuss issues of mutual interest, particularly ways to strengthen the economic and commercial ties between the two countries. The Forum consists of the U.S. and Brazilian Government co-chairs and a Committee comprised of private sector members. The Committee is composed of two Sections, each consisting of approximately ten to twelve members from the private sector, representing the views and interests of the private sector business community in the United States and Brazil. Each government appoints the members to its respective Section. The Committee provides joint recommendations to the two governments that reflect private sector views, needs and concerns regarding the creation of an economic environment in which their respective private sectors can partner, thrive and enhance bilateral commercial ties to expand trade between the United States and Brazil.

This notice seeks candidates to fill up to three positions on the U.S. Section of the Forum as well as any future vacancies that may arise before November 30, 2021. Each candidate must be the Chief Executive Officer or President (or have a comparable level of responsibility) of a U.S.-owned or -controlled company that is incorporated or otherwise organized in and has its main headquarters in the United States and that is currently doing business in both Brazil and the United States. Each candidate also must be a U.S. citizen or otherwise legally authorized to work in the United States and able to travel to Brazil and locations in the United States to attend official Forum meetings as well as independent U.S. Section and Committee meetings. In addition, the candidate may not be a registered foreign agent under the Foreign Agents Registration Act of 1938, as amended. Evaluation of applications for membership in the U.S. Section by eligible individuals will be based on the following criteria:

—A demonstrated commitment by the individual's company to the Brazilian market either through exports or investment.

—A demonstrated strong interest in Brazil and its economic development.

—The ability to offer a broad perspective and business experience to the discussions.

—The ability to address cross-cutting issues that affect the entire business community.

—The ability to initiate and be responsible for activities in which the Forum will be active.

—A demonstrated commitment and ability to attend the majority of Forum meetings.

In addition to the above criteria, members will be selected on the basis of who will best carry out the objectives of the Forum as stated in the Terms of Reference establishing the U.S.-Brazil CEO Forum. The U.S. Section of the Forum should also include members that represent a diversity of business sectors and geographic locations. To the extent possible, U.S. Section members also should represent a cross-section of small, medium, and large firms.

U.S. members will receive no compensation for their participation in Forum-related activities. Individual members will be responsible for all travel and related expenses associated with their participation in the Forum, including attendance at Committee and Section meetings. Only appointed members may participate in official Forum meetings; substitutes and alternates will not be designated. According to the current Terms of Reference, members are normally to serve three-year terms, but may be reappointed. Consistent failure to actively participate in Forum meetings and activity may result in early termination of a CEO's membership on the Forum.

As delineated in 83 FR 65627 (December 21, 2018), to be considered for membership, please submit the following information as instructed in the **ADDRESSES** and **DATES** captions above: Name(s) and title(s) of the individual(s) requesting consideration; name and address of company's headquarters; location of incorporation; information that the company is U.S.-owned or U.S.-controlled; size of the company; size of company's export trade to Brazil, investment in Brazil, and nature of operations or interest in Brazil; an affirmative statement that the applicant meets all Forum eligibility criteria and is neither registered nor required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended; and a brief statement of why the candidate should be considered, including information about the candidate's ability to initiate and be responsible for activities in which the Forum will be active, and commitment to attending the majority of Forum meetings. Applications will be considered as they are received. All candidates will be notified of whether they have been selected.

**Authority:** 15 U.S.C. 1512.

Dated: January 4, 2021.

**Alexander Peacher,**

*Director for the Office of Latin America & the Caribbean.*

[FR Doc. 2021–00119 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–HE–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA737]**

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

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

**ACTION:** Notice of SEDAR 73 Assessment Webinar II for South Atlantic Red Snapper.

**SUMMARY:** The SEDAR 73 assessment of the South Atlantic stock of red snapper will consist of a data scoping webinar, a workshop, and a series of assessment webinars.

**DATES:** The SEDAR 73 Assessment Webinar II will be held via webinar January 27, 2021, from 1 p.m. until 4 p.m. EST. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice. Additional SEDAR 73 workshops and webinar dates and times will publish in a subsequent issue in the **Federal Register**.

**ADDRESSES:**

*Meeting address:* The SEDAR 73 Assessment Webinar II will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/3564149816471064075.*

*SEDAR address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; *www.sedarweb.org.*

**FOR FURTHER INFORMATION CONTACT:** Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4373; email: *Kathleen.howington@safmc.net.*

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

The items of discussion at the Assessment Webinar II:

- Finalize any data decisions remaining.
- Continue discussion on modelling issues and decisions.

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

**Special Accommodations**

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

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

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

Dated: January 5, 2021.

**Rey Israel Marquez,**

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

[FR Doc. 2021–00158 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA695]**

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

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

**ACTION:** Notice of SEDAR 66 Assessment Webinar II for South Atlantic Tilefish.

**SUMMARY:** The SEDAR 66 stock assessment of the South Atlantic stock of Tilefish will consist of a data scoping webinar, a workshop, and a series of assessment webinars. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The SEDAR 66 South Atlantic Tilefish Assessment Webinar II will be held via webinar on January 27, 2021, from 9 a.m. until 12 p.m. EST. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice. Additional SEDAR 66 webinar dates and times will publish in a subsequent issue in the **Federal Register**.

**ADDRESSES:**

*Meeting address:* The SEDAR 66 South Atlantic Tilefish Assessment Webinar II will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/1224779398882236940.*

*SEDAR address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; *www.sedarweb.org.*

**FOR FURTHER INFORMATION CONTACT:** Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive,

Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *Kathleen.howington@safmc.net.*

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

The items of discussion at the SEDAR 66 South Atlantic Tilefish Assessment Webinar II are as follows:

- Finalize any data discussions if needed
- Continue discussion on base model configuration
- Discuss proposed changes to model, sensitivity runs, and projections

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

**Special Accommodations**

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

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

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

Dated: January 5, 2021.

**Rey Israel Marquez,**

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

[FR Doc. 2021–00159 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA786]**

### Marine Mammals; File No. 25417

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Ed Charles, Silverback Films, 1 St. Augustine's Yard, Gaunts Lane, Bristol, BS1 5DE, United Kingdom, has applied in due form for a permit to conduct commercial or educational photography on marine mammals.

**DATES:** Written, telefaxed, or email comments must be received on or before February 8, 2021.

**ADDRESSES:** These documents are available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 25417 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Jordan Rutland or Shasta McClenahan, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the regulations governing the taking of marine mammals (50 CFR part 216), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

The applicant proposes to film marine mammals in California to obtain footage for a Netflix documentary series on the migration of gray whales (*Eschrichtius robustus*). Up to 600 gray whales, 672 killer whales (*Orcinus orca*), 200 harbor seals (*Phoca vitulina*), 1,000 California sea lions (*Zalophus californianus*), 1,000 Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), 2,000 common bottlenose dolphins (*Tursiops truncatus*), 10 northern fur seals (*Callorhinus ursinus*), 150 Dall's porpoises (*Phocoenoides dalli*), 2,000 short-beaked common dolphins (*Delphinus delphis*), 1,000 long-beaked common dolphins (*D. capensis*), 1,000 northern right whale dolphins (*Lissodelphis borealis*), 1,000 Risso's dolphins (*Grampus griseus*), and 30 Steller sea lions (*Eumetopias jubatus;* Eastern distinct population segment) may be filmed annually from vessels, unmanned aircraft systems, or underwater divers. The permit would expire on May 20, 2022.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: January 5, 2021.

**Julia Marie Harrison,**

*Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2021–00177 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA776]**

### New England 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 New England Fishery Management Council (Council, NEFMC) will hold a three-day meeting to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Due to federal and state travel restrictions and updated guidance from the Centers for Disease Control and Prevention related to COVID–19, this meeting will be conducted entirely by webinar.

**DATES:** The webinar meeting will be held on Tuesday, Wednesday, and Thursday, January 26, January 27, and January 28, 2021, beginning at 9 a.m. each day. The first day will start off with a meeting of the Council's Groundfish Committee. When the committee concludes its business and adjourns, the full Council will convene its January 2021 meeting.

**ADDRESSES:** All meeting participants and interested parties can register to join the webinar at *https://attendee.gotowebinar.com/register/2437948643327117067.* The Council will use this same webinar link for both the Groundfish Committee meeting and the full Council meeting.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone: (978) 465–0492; *www.nefmc.org.*

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492, ext. 113.

**SUPPLEMENTARY INFORMATION:**

## Agenda

*Tuesday, January 26, 2021*

The day will begin with a meeting of the Council's Groundfish Committee, which will: (1) Receive the Groundfish Advisory Panel's latest report; (2) discuss and vote on the last component of Framework Adjustment 61—a proposed universal sector exemption to allow fishing for redfish; (3) receive the Recreational Advisory Panel's latest report; (4) discuss and develop recommendations on fishing year 2021 recreational measures for Gulf of Maine cod and Gulf of Maine haddock; (5) receive a summary of public feedback on developing a strawman proposal for a potential limited entry program for party/charter vessels in the recreational groundfish fishery plus discuss the proposal and next steps; (6) receive an update on work to revise acceptable biological catch (ABC) control rules for groundfish stocks; (7) receive an update on Cod Stock Structure Working Groups; and (8) discuss other business as needed.

Following the lunch break, the Groundfish Committee will continue to work through its agenda. Immediately after the committee adjourns, the full Council will convene to discuss the Groundfish Committee Report and: (1) Take final action on a universal sector exemption to allow fishing for redfish, which is part of Framework Adjustment 61 to the Northeast Multispecies Fishery Management Plan (FMP), and vote to submit the framework to NMFS; and (2) take action on any other issues resulting from Groundfish Committee recommendations. After this discussion, the Council will adjourn for the day.

*Wednesday, January 27, 2021*

After introductions and brief announcements, the Council will receive reports on recent activities from its Chairman and Executive Director, NMFS's Greater Atlantic Regional Fisheries Office (GARFO) Regional Administrator, the Northeast Fisheries Science Center (NEFSC) Director, the Mid-Atlantic Fishery Management Council liaison, staff from the Atlantic States Marine Fisheries Commission (ASMFC), and representatives from NOAA General Counsel, NOAA's Office of Law Enforcement, the U.S. Coast Guard, and NMFS's Highly Migratory Species Advisory Panel. Next, the Council will hear from the Scallop Committee and receive a brief overview of 2020 Gulf of Maine scallop survey results. Then, the Council will take final action on Framework Adjustment 33 to the Atlantic Sea Scallop FMP, which contains 2021 fishery specifications, 2020 default specifications, measures to mitigate impacts on Georges Bank yellowtail flounder and northern windowpane flounder, plus other measures. Finally, the Council may discuss adding listening or scoping sessions for a limited access leasing program to its list of 2021 scallop priorities. If it does so, the Council also may consider deleting a previously approved scallop priority in exchange.

Following the lunch break, the Council will receive a brief Ecosystem-Based Fishery Management (EBFM) progress report on steps needed to conduct informational workshops about EBFM using public outreach materials, focusing on potential application to a Georges Bank example Fishery Ecosystem Plan (eFEP). The Council then will hear from NEFSC's Northeast Fishery Monitoring and Research Division, which will provide an overview of (1) current division organization; (2) the status of ongoing responsibilities; (3) at-sea monitoring and observer program activities, funding status, and impacts due to COVID–19; and (4) a cooperative research update. Next, the Council will receive a presentation on the Science Center's cost survey for commercial fishing businesses, including: (1) An overview of survey methods and data collected to date; (2) a discussion on challenges and opportunities; and (3) efforts to solicit industry feedback while planning for next cost survey. The Council will close out the day with a report on the Northeast Trawl Advisory Panel's January 14, 2021 meeting.

*Thursday, January 28, 2021*

The Council will begin the third day of its meeting with a NEFSC presentation on the peer reviewed results of the Index-Based Methods and Control Rules 2020 Research Track Assessment. Next, the Council will discuss small-mesh Northeast multispecies (whiting). First, the Council will take final action on small-mesh multispecies specifications for the 2021–23 fishing years. Second, the Council may discuss adding a 2021 whiting priority to (1) analyze factors for why the northern whiting fishery is not achieving optimum yield (OY), and (2) recommend measures to allow greater resource utilization. The Council also may consider deleting a previously approved whiting priority in exchange for adding a new one if it takes action. Following this discussion, members of the public will have the opportunity to speak during an open comment period on issues that relate to Council business but are not included on the published agenda for this meeting. The Council asks the public to limit remarks to 3–5 minutes. These comments will be received through the webinar. A guide for how to publicly comment through the webinar is available on the Council website at *https://s3.amazonaws.com/nefmc.org/NEFMC-meeting-remote-participation_generic.pdf.* Next, the Council will receive a brief update on offshore energy development and ongoing/future habitat-related work and priorities. This will be followed by a presentation from NOAA's Greater Atlantic Regional Fisheries Office on North Atlantic right whales. The presentation will cover: (1) The Atlantic Large Whale Take Reduction Plan Draft Environmental Impact Statement (DEIS) and proposed rule; and (2) the Draft Batched Biological Opinion for right whales covering 10 fisheries. The Council will have an opportunity to ask questions and offer comments on these items. The Council then will take up other business, which is when it will

briefly discuss and approve a draft letter to NMFS supporting the investigation of using vessel monitoring system (VMS) notifications rather than **Federal Register** notices to announce area closures for the Atlantic herring fishery. The Council also will discuss other business as needed. Finally, the Council will close out the open portion of its meeting and go into closed session to discuss 2021–23 appointments to the Scientific and Statistical Committee.

Although non-emergency issues not contained on this agenda may come before the Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

**Special Accommodations**

This meeting is being conducted entirely by webinar. Requests for auxiliary aids should be directed to Thomas A. Nies (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: January 5, 2021.

**Rey Israel Marquez,**

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

[FR Doc. 2021–00160 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XA735]**

### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Training Activities in the Gulf of Alaska Temporary Maritime Activities Area

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

**ACTION:** Notice; receipt of application for a Letter of Authorization; request for comments and information.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to training activities in the Gulf of Alaska (GOA) Temporary Maritime Activities Area (TMAA) Study Area for a period of seven years, from April 2022 through April 2029. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of the Navy's request for the development and implementation of regulations governing the incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on the Navy's application and request.

**DATES:** Comments and information must be received no later than January 29, 2021.

**ADDRESSES:** Comments on the applications should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Comments should be sent to *ITP.Davis@noaa.gov.*

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

**FOR FURTHER INFORMATION CONTACT:** Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401. An electronic copy of the Navy's application may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

The MMPA states that the term ''take'' means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

The National Defense Authorization Act (NDAA) for Fiscal Year 2004 (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B Harassment). On August 13, 2018, the

2019 NDAA (Pub. L. 115–232) amended the MMPA to allow incidental take regulations for military readiness activities to be issued for up to seven years.

**Summary of Request**

On October 9, 2020, NMFS received an adequate and complete application from the Navy requesting authorization for take of marine mammals, by Level A and Level B harassment incidental to training (categorized as military readiness activities) from the use of active sonar and other transducers and explosives (occurring at or near the surface of the water) in the TMAA Study Area. The requested regulations would be valid for seven years, from 2022 through 2029.

This will be the third time NMFS has promulgated incidental take regulations pursuant to the MMPA relating to similar military readiness activities in the GOA TMAA, following those effective from May 4, 2011 to May 4, 2016 (76 FR 25479; May 4, 2011) and from April 26, 2017 to April 26, 2022 (82 FR 19530; April 27, 2017).

**Description of the Specified Activity**

The TMAA Study Area is a temporary area established in conjunction with the Federal Aviation Administration that is a surface, undersea space, and airspace maneuver area within the GOA for ships, submarines, and aircraft to conduct required training activities. As depicted in Figure 1–1 of the Navy's application, the TMAA is a polygon roughly resembling a rectangle oriented from northwest to southeast, approximately 300 nautical miles (nmi) (556 kilometers [km]) in length by 150 nmi (278 km) in width, located south of Montague Island and east of Kodiak Island.

The following types of training activities and exercises, which are classified as military readiness activities pursuant to section 315(f) of Public Law 101–314 (16 U.S.C. 703), are included in the specified activity described in the Navy's application: Air warfare, surface warfare, anti-submarine warfare (ASW), electronic warfare, Naval Special Warfare, strike warfare, and support operations.

The Navy's application includes proposed mitigation measures for marine mammals that would be implemented during training activities in the TMAA Study Area (see Section 11 of the Navy's application). Proposed procedural mitigation measures and geographic mitigation areas generally include: (1) The use of Lookouts to observe for biological resources and communicate the need for mitigation implementation; (2) powerdowns, shutdowns, and delay of starts to avoid exposure of marine mammals to high levels of sound or explosive blasts more likely to result in injury or more serious behavioral disruption; and (3) limiting the use of active sonar or explosives in certain biologically important areas to reduce the probability or severity of impacts when they are more likely to contribute to fitness impacts (see Figure 11–1 of the Navy's application).

The Navy also proposes to undertake monitoring and reporting efforts to track compliance with incidental take authorizations and to help investigate the effectiveness of implemented mitigation measures in the TMAA Study Area. This includes Adaptive Management, the Integrated Comprehensive Monitoring Program, the Strategic Planning Process, and Annual Monitoring and Activity Reports. As an example, under the Integrated Comprehensive Monitoring Program, the monitoring relating to the effects of Navy training activities on protected marine species are designed to increase the understanding of the likely occurrence of marine mammals in the vicinity of the action (*i.e.,* presence, abundance, distribution, and density of species) and to increase the understanding of the nature, scope, or context of the likely exposure of marine mammals to any of the potential stressors associated with the action.

**Information Solicited**

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see ADDRESSES). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the Navy, if appropriate.

Dated: December 21, 2020.

**Donna Wieting,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2020–28694 Filed 1–7–21; 8:45 am]

**BILLING CODE 3510–22–P**

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Procurement List; Proposed deletions

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed deletions from the Procurement List.

**SUMMARY:** The Committee is proposing to delete product(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**DATES:** Comments must be received on or before: February 07, 2021.

**ADDRESSES:** Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia, 22202–4149.

**FOR FURTHER INFORMATION CONTACT:** For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

**Deletions**

The following product(s) are proposed for deletion from the Procurement List:

*Product(s)*

NSN(s)—Product Name(s):
7210–01–030–5311—Pillowcase, 32½″ X 20½″
7210–00–119–7357—Pillowcase, 32½″ X 20½″, White
*Designated Source of Supply:* Cambria County Association for the Blind and Handicapped, Johnstown, PA
*Contracting Activity:* DLA Troop Support, Philadelphia, PA
NSN(s)—Product Name(s):
8465–01–647–6670—US Forest Service Pack, Personal Gear Model 2014
*Designated Source of Supply:* Huntsville Rehabilitation Foundation, Huntsville, AL
*Contracting Activity:* DLA Troop Support, Philadelphia, PA
NSN(s)—Product Name(s):
6150–01–040–6848—Kit, Wiring, ATON Buoy
*Designated Source of Supply:* Greenville Rehabilitation Center, Greenville, SC
*Contracting Activity:* SFLC Procurement Branch 3, Baltimore, MD
NSN(s)—Product Name(s):
7910–00–685–3908—Pad, Machine, Polishing, Floor, 14″ x ¼″
7910–00–685–3909—Pad, Machine, Polishing, Floor, 16″ x ¼″
7910–00–685–3914—Pad, Machine, Scrubbing, Floor, 18″ x ¼″
7910–00–685–3915—Pad, Machine, Scrubbing, Floor, 16″ x ¼″
7910–00–685–4239—Pad, Machine, Stripping, Floor, 12″ x ¼″
7910–00–685–6656—Pad, Machine, Scrubbing, Floor, 12″ x ¼″
7910–00–685–6657—Pad, Machine, Scrubbing, Floor, 13″ x ¼″
7910–00–685–6659—Pad, Machine, Scrubbing, Floor, 15″ x ¼″

7910–00–685–6660—Pad, Machine, Scrubbing, Floor, 17″ x ¼″
7910–00–685–6671—Pad, Machine, Polishing, Floor, 15″ x ¼″
7910–00–685–6672—Pad, Machine, Polishing, Floor, 17″ x ¼″
7910–00–685–6686—Pad, Machine, Polishing, Floor, 12″ x ¼″
7910–00–685–6687—Pad, Machine, Polishing, Floor, 13″ x ¼″
7910–00–820–7989—Pad, Floor, Buffing, Nylon, Tan, 15″
7910–00–NIB–0006—Pad, Floor, Burnishing, Animal Hair, Gray, 17″
7910–00–NIB–0009—Pad, Floor, Burnishing, Animal Hair, Gray, 21″
7910–00–NIB–0016—Pad, Floor, Polishing, Animal Hair, Beige, 17″
7910–00–NIB–0029—Pad, Floor, Buffing, Polyester, Red, 14″
7910–00–NIB–0030—Pad, Floor, Buffing, Polyester, Red, 15″
7910–00–NIB–0034—Pad, Floor, Scrubbing, Polyester, Blue, 14″
7910–00–NIB–0040—Pad, Floor, Scrubbing, Polyester, Blue, 21″
7910–01–512–5933—Pad, Floor, Stripping, Polyester, Brown, 17″
7910–01–512–5937—Pad, Floor, Scrubbing, Polyester, Blue, 13″
7910–01–512–5950—Pad, Floor, Scrubbing, Polyester, Blue, 17″

*Designated Source of Supply:* Beacon Lighthouse, Inc., Wichita Falls, TX
*Contracting Activity:* GSA/FSS Greater Southwest ACQUISITI, Fort Worth, TX

**Michael R. Jurkowski,**

*Deputy Director, Business & PL Operations.*

[FR Doc. 2021–00151 Filed 1–7–21; 8:45 am]

**BILLING CODE 6353–01–P**

## COUNCIL ON ENVIRONMENTAL QUALITY

### Guidance Document Online Portal

**AGENCY:** Council on Environmental Quality.

**ACTION:** Notice of online portal for agency guidance documents.

**SUMMARY:** In accordance with Executive Order (E.O.) 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' dated October 9, 2019, and Office of Management and Budget (OMB) Memorandum M–20–02, dated October 31, 2019, the Council on Environmental Quality (CEQ) is providing notice of where the public may access CEQ guidance documents.

**ADDRESSES:** The portal may be found at *https://www.whitehouse.gov/ceq/resources/.*

**FOR FURTHER INFORMATION CONTACT:** Amy B. Coyle, Deputy General Counsel, Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503, 202–395–5750, *amy.b.coyle@ceq.eop.gov.*

**SUPPLEMENTARY INFORMATION:** E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' [1] requires that each agency establish or maintain on its website a single, searchable, indexed database that contains or links to all agency guidance documents [2] in effect. In accordance with E.O. 13891 and OMB's implementing guidance, set forth in OMB Memorandum M–20–02,[3] CEQ has complied with this requirement through its website portal, which is available to the public at *whitehouse.gov/ceq/resources.*[4] As required by E.O. 13891, the website also reiterates that: (1) The contents of the guidance documents accessed through the portal lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract; and (2) these documents are intended only to provide clarity to the public regarding existing requirements under statutes and regulations administered by CEQ. Under the E.O., CEQ may not cite, use, or rely on any guidance document that is not posted on or linked to the website portal, except to establish historical facts.

CEQ will also include on its website portal a link to its final rule establishing CEQ's internal agency procedures for issuing guidance documents, required by section 4 of E.O. 13891. The final rule relating to CEQ's guidance document procedures is published elsewhere in this issue of the **Federal Register**.

**Authority:** 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; and E.O. 13891, 84 FR 55235.

**Mary B. Neumayr,**

*Chairman.*

[FR Doc. 2020–28879 Filed 1–7–21; 8:45 am]

**BILLING CODE 3125–F1–P**

[1] 84 FR 55235 (Oct. 15, 2019).

[2] E.O. 13891 defines ''guidance document'' as ''an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. . . .'' *Id.*

[3] OMB issued its guidance memorandum on October 31, 2019. *See* M–20–02, Guidance Implementing Executive Order 13891, Titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents'' (Oct. 31, 2019), *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf.*

[4] CEQ's website portal at *https://www.whitehouse.gov/ceq/resources/* includes links to CEQ guidance documents and resources, some of which are provided on nepa.gov (*https://www.energy.gov/nepa/ceq-guidance-documents*) and sustainability.gov (*https://www.sustainability.gov/resources.html*).

## DEPARTMENT OF EDUCATION

**[Docket No. ED–2020–SCC–0167]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request

**AGENCY:** Federal Student Aid (FSA), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of a currently approved collection.

**DATES:** Interested persons are invited to submit comments on or before February 8, 2021.

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Beth Grebeldinger, (202) 377–4018.

**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:* Personal Authentication Service (PAS) for FSA ID.

*OMB Control Number:* 1845–0131.

*Type of Review:* A revision of a currently approved collection.

*Respondents/Affected Public:* Individuals or Households.

*Total Estimated Number of Annual Responses:* 6,671,000.

*Total Estimated Number of Annual Burden Hours:* 1,667,750.

*Abstract:* Federal Student Aid (FSA) requests extension of the Person Authentication Service (PAS) which creates an FSA ID, a standard user name and password solution. In order to create an FSA ID to gain access to certain FSA systems (FAFSA on the Web, NSLDS, *StudentLoans.gov,* etc.) a user must register on-line for an FSA ID account. The FSA ID allows the customer to have a single identity, even if there is a name change or change to other personally identifiable information. The information collected to create the FSA ID enables electronic authentication and authorization of users for FSA web-based applications and information and protects users from unauthorized access to user accounts on all protected FSA sites.

Dated: January 5, 2021.

**Kate Mullan,**

*PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2021–00107 Filed 1–7–21; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2021–SCC–0002]**

### Agency Information Collection Activities; Comment Request; Migrant Student Information Exchange User Application Form

**AGENCY:** Office of Elementary and Secondary Education, Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

**DATES:** Interested persons are invited to submit comments on or before March 9, 2021.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2021–SCC–0002. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted 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 PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208D, Washington, DC 20202–8240.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Benjamin Starr, 202–245–8116.

**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:* Migrant Student Information Exchange User Application Form.

*OMB Control Number:* 1810–0868.

*Type of Review:* An extension without change of a currently approved collection.

*Respondents/Affected Public:* State, Local, and Tribal Governments *Total Estimated Number of Annual Responses:* 312.

*Total Estimated Number of Annual Burden Hours:* 156.

*Abstract:* This extension request is necessary to continue the collection of the existing MSIX User Application. State educational agencies (SEAs) with MEPs will collect the information from state and local education officials who desire access to the MSIX system. The form verifies the applicant's need for MSIX data and authorizes the user's access to that data. The burden hours associated with the data collection are required to meet the statutory mandate in Sec. 1308(b) of Elementary and Secondary Education Act (ESEA), as amended by the Every Student Succeeds Act, which is to facilitate the electronic exchange by the SEAs of a set of minimum data elements to address the educational and related needs of migratory children.

Dated: January 5, 2021.

**Kate Mullan,**

*PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2021–00154 Filed 1–7–21; 8:45 am]

**BILLING CODE 4000–01–P**

## ELECTION ASSISTANCE COMMISSION

### Sunshine Act Meetings

**AGENCY:** U.S. Election Assistance Commission.

**ACTION:** Sunshine Act notice; notice of public roundtable agenda.

**SUMMARY:** Roundtable discussion: 2020 Elections lessons learned.

**DATES:** Wednesday, January 27, 2021, 1:30 p.m.–3:30 p.m. Eastern.

**ADDRESSES:**

**Virtual via Zoom**

The roundtable discussion is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

**FOR FURTHER INFORMATION CONTACT:** Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose:* In accordance with the Government in the Sunshine Act (Sunshine Act), Public Law 94–409, as amended (5 U.S.C. 552b), the U.S. Election Assistance Commission (EAC) will conduct a virtual roundtable discussion on the lessons learned from the 2020 elections. This event will be the first in a series of virtual events with election officials addressing the challenges and successes of the 2020 primaries and general election.

*Agenda:* The U.S. Election Assistance Commission (EAC) will hold a roundtable discussion on the lessons learned from the 2020 primaries and general election. This roundtable will include state election officials, who will offer remarks on their experiences as they administered elections throughout the year. Speakers will also answer questions from the EAC Commissioners. This is the kickoff event for a 2020 Elections Lessons Learned. Additional virtual events will be announced in early 2021.

The full agenda will be posted in advance on the EAC website: *https://www.eac.gov.*

*Status:* This roundtable discussion will be open to the public.

**Amanda Joiner,**

*Associate Counsel, U.S. Election Assistance Commission.*

[FR Doc. 2021–00269 Filed 1–6–21; 4:15 pm]

**BILLING CODE P**

## ELECTION ASSISTANCE COMMISSION

### Sunshine Act Meetings

**AGENCY:** U.S. Election Assistance Commission.

**ACTION:** Notice of public quarterly conference call for EAC Board of Advisors.

**SUMMARY:** Board of Advisors quarterly meeting (virtual).

**DATES:** Wednesday, January 13, 2021, 2:00 p.m.–3:00 p.m. EDT.

**ADDRESSES:** Virtual via Zoom link.

The Board of Advisors quarterly meeting is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

**FOR FURTHER INFORMATION CONTACT:** Phillip Olaya, Telephone: (202) 336–3980, Email: *polaya@eac.gov.*

For assistance joining the event: Contact the host, Steve Uyak at *suyak@eac.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose:* In accordance with the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. appendix 2), the U.S. Election Assistance Commission (EAC) Board of Advisors will conduct a virtual meeting to discuss current EAC activities.

*Agenda:* The Board of Advisors (BOA) will receive updates of EAC activities and Annual Meeting and BOA Committee/Sub-Committee Updates. The Board of Advisors will discuss the next Quarterly BOA Conference Call.

The full agenda will be posted in advance on the EAC website: *https://www.eac.gov.*

*Status:* Members of the public may submit relevant written statements to the Board of Advisors with respect to the meeting no later than 10:00 a.m. EDT on Wednesday, January 13, 2021. Statements may be sent via email to *facaboards@eac.gov,* via standard mail addressed to the U.S. Election Assistance Commission, 633 3rd Street NW, Suite 200, Washington, DC 20001, or by fax at 301–734–3108.

**Amanda Joiner,**

*Associate Counsel, U.S. Election Assistance Commission.*

[FR Doc. 2021–00318 Filed 1–6–21; 4:15 pm]

**BILLING CODE P**

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Idaho Cleanup Project

**AGENCY:** Office of Environmental Management, Department of Energy.

**ACTION:** Notice of open virtual meeting.

**SUMMARY:** This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho Cleanup Project (ICP). The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

**DATES:** Thursday, January 28, 2021; 8:00 a.m.–2:30 p.m.

The opportunities for public comment are at 10:00 a.m. and 1:15 p.m. MT.

This time is subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

**ADDRESSES:** This meeting will be held virtually via Zoom. To attend, please contact Jordan Davies, ICP Citizens Advisory Board (CAB) support staff, by email *jdavies@northwindgrp.com* or phone (720) 452–7379, no later than 5:00 p.m. MT on Tuesday, January 26, 2021.

*To Sign Up for Public Comment:* Please contact Jordan Davies by email, *jdavies@northwindgrp.com,* no later than 5:00 p.m. MT on Tuesday, January 26, 2021.

**FOR FURTHER INFORMATION CONTACT:** Danielle Miller, Federal Coordinator, U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, Idaho 83415. Phone (208) 526–5709; or email: *millerdc@id.doe.gov* or visit the Board's internet home page at: *https://www.energy.gov/em/icpcab/.*

**SUPPLEMENTARY INFORMATION:** *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

*Tentative Topics* (agenda topics may change up to the day of the meeting; please contact Danielle Miller for the most current agenda):

- Recent Public Outreach
- ICP Overview, including Updates on Integrated Waste Treatment Unit (IWTU) and Site Reconstitution
- New Idaho Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Disposal Facility Cell
- CERCLA Five-year Review
- Fiscal Year 2022 Budget
- Fiscal Year 2023 Budget Priorities
- Budget Recommendation Discussion

*Public Participation:* The online virtual meeting is open to the public. Written statements may be filed with the Board either before or within seven days after the meeting by sending them to Jordan Davies at the aforementioned email address. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Danielle Miller, Federal Coordinator, at the address and telephone number listed above. Minutes will also be available at the following website: *https://www.energy.gov/em/icpcab/listings/cab-meetings.*

Signed in Washington, DC on January 5, 2021.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2021–00156 Filed 1–7–21; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Electricity Advisory Committee; Meeting

**AGENCY:** Office of Electricity, Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Electricity Advisory Committee. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Wednesday, February 3, 2021; 11:45 a.m.–5:10 p.m. EST; Thursday, February 4, 2021; 11:45 a.m.–5:10 p.m. EST.

**ADDRESSES:** Due to ongoing precautionary measures surrounding the spread of COVID–19, the February meeting of the EAC will be held via WebEx video and teleconference. In order to track all participants, the Department is requiring that those wishing to attend register for the meeting here: *https://www.energy.gov/oe/february-3-4-2021-meeting-electricity-advisory-committee.* Please note, you must register for each day you would like to attend.

**FOR FURTHER INFORMATION CONTACT:** Christopher Lawrence, Designated Federal Officer, Office of Electricity, U.S. Department of Energy, Washington, DC 20585; Telephone: (202) 586–5260 or Email: *christopher.lawrence@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:** *Purpose of the Committee:* The Electricity Advisory Committee (EAC) was established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. 2, to provide advice to the U.S. Department of Energy (DOE) in implementing the Energy Policy Act of 2005, executing certain sections of the Energy Independence and Security Act of 2007, and modernizing the nation's electricity delivery infrastructure. The EAC is composed of individuals of diverse backgrounds selected for their technical expertise and experience, established records of distinguished professional service, and their knowledge of issues that pertain to the electric sector.

**Tentative Agenda**

*February 3, 2021*

11:45 a.m.–12:00 p.m. WebEx Attendee Sign-On
12:00 p.m.–12:20 p.m. Welcome, Introductions, Developments since the October 2020 Meeting
12:20 p.m.–12:40 p.m. Update on Office of Electricity Programs and Initiatives
12:40 p.m.–1:10 p.m. Overview of FERC Order 2222 1:10 p.m.–2:00 p.m. Panel Presentation: Aggregated DER participation in ISO/RTO markets enabled by FERC 2222—RTO/ISO Perspectives
2:00 p.m.–2:50 p.m. Panel Presentation: Aggregated DER participation in ISO/RTO markets enabled by FERC 2222—Utility Perspectives
2:50 p.m.–3:10 p.m. Break 3:10 p.m.–5:00 p.m. Energy Storage Subcommittee Report
5:00 p.m.–5:10 p.m. Wrap-up and Adjourn Day 1

*February 4, 2021*

11:45 a.m.–12:00 p.m. WebEx Attendee Sign-On
12:00 p.m.–12:10 p.m. Welcome
12:10 p.m.–1:00 p.m. Panel: Integration of Energy Storage into the Bulk Power Supply—Energy Storage System Capabilities, and the Challenges of Resource Planning, Operational Dispatch, and Aggregation
1:00 p.m.–2:30 p.m. Discussion Between EAC Members and Panelists
2:30 p.m.–2:45 p.m. Break
2:45 p.m.–3:00 p.m. Subcommittee Update: Grid Resilience for National Security
3:00 p.m.–4:00 p.m. Panel Sponsored by Grid Resilience for National Security Subcommittee
4:00 p.m.–4:20 p.m. Subcommittee Update: Smart Grid
4:20 p.m.–4:40 p.m. Subcommittee Update: Energy Storage
4:40 p.m.–5:00 p.m. Public Comments
5:00 p.m.–5:10 p.m. Wrap-up and Adjourn February 2021 Meeting of the EAC

The meeting agenda may change to accommodate EAC business. For EAC agenda updates, see the EAC website at: *http://energy.gov/oe/services/electricity-advisory-committee-eac.*

*Public Participation:* The EAC welcomes the attendance of the public at its meetings. Individuals who wish to offer public comments at the EAC meeting may do so on February 4, but must register in advance. Approximately 20 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed three minutes. Anyone who is not able to attend the meeting, or for whom the allotted public comments time is insufficient to address pertinent issues with the EAC, is invited to send a written statement identified by ''Electricity Advisory Committee February 2021 Meeting,'' to Mr. Christopher Lawrence at *christopher.lawrence@hq.doe.gov.*

*Minutes:* The minutes of the EAC meeting will be posted on the EAC web page at *http://energy.gov/oe/services/electricity-advisory-committee-eac.* They can also be obtained by contacting Mr. Christopher Lawrence at the address above.

Signed in Washington, DC on January 5, 2021.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2021–00157 Filed 1–7–21; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### National Nuclear Security Administration

### Agency Information Collection Extension

**AGENCY:** National Nuclear Security Administration, U.S. Department of Energy.

**ACTION:** Submission for Office of Management and Budget (OMB) review; comment request.

**SUMMARY:** The Department of Energy (DOE) has submitted a request to the OMB for the extension of information collection authorities under the provisions of the Paperwork Reduction Act of 1995. DOE requests a three-year extension of its authority to collection information for its American Assured Fuel Supply Program, OMB Control Number 1910–5173. The proposed collection is necessary for DOE to determine the eligibility of the applicants to access low enriched uranium (LEU) in the American Assured Fuel Supply (AAFS).

**DATES:** Comments regarding this collection must be received on or before February 8, 2021. If you anticipate difficulty in submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4718.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent

within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Comments and recommendations may also be sent within 30 days of publication of this notice to Jessica Norles, Foreign Affairs Specialist, by email at *jessica.norles@nnsa.doe.gov.* If comments cannot be sent by email, please contact Jessica Norles at the phone number listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice for an alternative means of submission.

**FOR FURTHER INFORMATION CONTACT:** For other questions, contact Jessica Norles, Foreign Affairs Specialist, Office of Nonproliferation and Arms Control, National Nuclear Security Administration, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585, *jessica.norles@nnsa.doe.gov,* (202) 586–2271.

**SUPPLEMENTARY INFORMATION:** DOE published in the **Federal Register** a Notice of Availability for the American Assured Fuel Supply (AAFS). 76 FR 51357 (Aug. 18, 2011), and a Notice of Availability of application requirements to access the material in the AAFS. 78 FR 72071 (Dec. 2, 2013). DOE previously submitted an information collection extension request to the OMB for an extension under the Paperwork Reduction Act of 1995 in 2017. 82 FR 17650 (April 12, 2017).

*This information collection request contains:* (1) *OMB No.:* 1910–5173; (2) *Information Collection Request Title:* The American Assured Fuel Supply Program; (3) *Type of Review:* Extension; (4) *Purpose:* DOE created the AAFS, a reserve of LEU to serve as a backup fuel supply for foreign recipients to be supplied through U.S. persons, or for domestic recipients, in the event of fuel supply disruption. This effort supports the United States Government's nuclear nonproliferation objectives by supporting civilian nuclear energy development while minimizing proliferation risks. This collection of information is necessary for DOE to determine the eligibility of applicants to access the LEU in the AAFS and implement this important nonproliferation initiative; (5) *Annual Estimated Number of Respondents:* 10; (6) *Annual Estimated Number of Total Responses:* 10; (7) *Annual Estimated Number of Burden Hours:* 8 per respondent for a total of 80 per year; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $960.13 per respondent for a total of $9,601.28 per year.

**Signing Authority**

This document of the Department of Energy was signed on December 16, 2020, by Brent K. Park, Deputy Administrator for Defense Nuclear Nonproliferation, National Nuclear Security Administration, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 5, 2021.

**Treena V. Garrett,**

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

[FR Doc. 2021–00108 Filed 1–7–21; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

### Combined Notice of Filings #1

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

*Docket Numbers:* EC20–85–000.

*Applicants:* Entergy Texas, Inc.

*Description:* Additional Information for the July 30, 2020 Application for Authorization Under Section 203 of the Federal Power Act of Entergy Texas, Inc.

*Filed Date:* 12/30/20.

*Accession Number:* 20201230–5500.

*Comments Due:* 5 p.m. ET 1/11/21.

*Docket Numbers:* EC21–38–000.

*Applicants:* Imperial Valley Solar 2, LLC.

*Description:* Application for Authorization Under Section 203 of the Federal Power Act of Imperial Valley Solar 2, LLC.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5439.

*Comments Due:* 5 p.m. ET 1/21/21.

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

*Docket Numbers:* ER10–2042–037; ER10–1862–031; ER10–1871–010; ER10–1893–031; ER10–1934–031; ER10–1938–032; ER10–1942–029; ER10–2985–035; ER10–3049–036; ER10–3051–036; ER11–4369–016; ER16–2218–016; ER17–696–017.

*Applicants:* Calpine Energy Services, L.P., Calpine Construction Finance Company, LP, Calpine Energy Solutions, LLC, Calpine PowerAmerica—CA, LLC, CES Marketing IX, LLC, CES Marketing X, LLC, Champion Energy, LLC, Champion Energy Marketing LLC, Champion Energy Services, LLC, Morgan Energy Center, LLC, North American Power and Gas, LLC, North American Power Business, LLC, Power Contract Financing, L.L.C.

*Description:* Triennial Market Power Analysis for Southeast Region of Calpine Southeast MBR Sellers.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5356.

*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER10–2063–004.

*Applicants:* Otter Tail Power Company.

*Description:* Triennial Market Power Analysis for Central Region and Notice of Non-Material Change in Status of Otter Tail Power Company.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5370.

*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER10–2645–006.

*Applicants:* Baconton Power LLC.

*Description:* Triennial Market Power Analysis for Southeast Region of Baconton Power LLC.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5367.

*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER16–1720–016.

*Applicants:* Invenergy Energy Management LLC.

*Description:* Triennial Market Power Analysis for Southeast Region of Invenergy Energy Management LLC.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5328.

*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER17–1394–002; ER19–2728–001; ER19–2729–001.

*Applicants:* 83WI 8me, LLC, Lily Solar LLC, Lily Solar Lessee, LLC.

*Description:* Supplement to September 22, 2020 Notice of Non-Material Change in Status of X-Elio Public Utilities, et al.

*Filed Date:* 12/15/20.

*Accession Number:* 20201215–5169.

*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER18–548–001; ER18–547–001; ER18–549–001.

*Applicants:* CP Energy Marketing (US) Inc., CPI USA North Carolina LLC, Decatur Energy Center, LLC.

*Description:* Triennial Market Power Analysis for Southeast Region of Capital Power Southeast MBR Sellers.

*Filed Date:* 12/31/20.
*Accession Number:* 20201231–5327.
*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER18–1197–004.
*Applicants:* Camilla Solar Energy LLC.
*Description:* Triennial Market Power Analysis for Southeast Region of Camilla Solar Energy LLC.
*Filed Date:* 12/31/20.
*Accession Number:* 20201231–5298.
*Comments Due:* 5 p.m. ET 3/1/21.

*Docket Numbers:* ER21–743–000; TS21–1–000.
*Applicants:* Hardin Wind LLC.
*Description:* Request for Waiver of Open-Access Requirements of Order Nos. 888, et al. of Hardin Wind LLC.
*Filed Date:* 12/23/20.
*Accession Number:* 20201223–5375.
*Comments Due:* 5 p.m. ET 1/13/21.

*Docket Numbers:* ER21–788–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original ISA/CSA, Service Agreement Nos. 5861/5862; Queue No. AB2–070 to be effective 12/1/2020.
*Filed Date:* 12/31/20.
*Accession Number:* 20201231–5097.
*Comments Due:* 5 p.m. ET 1/21/21.

*Docket Numbers:* ER21–789–000.
*Applicants:* Consolidated Edison Company of New York, Inc.
*Description:* § 205(d) Rate Filing: PASNY Tariff RY2 12–31–2020 to be effective 1/1/2021.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5001.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–790–000.
*Applicants:* Consolidated Edison Company of New York, Inc.
*Description:* § 205(d) Rate Filing: WDS RY 2 to be effective 1/1/2021.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5002.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–791–000.
*Applicants:* North Star Solar PV LLC.
*Description:* Tariff Cancellation: Notices of Cancellation and Withdrawal of Rate Schedule to be effective 1/5/2021.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5003.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–792–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Tariff Cancellation: Notice of Termination of E&P Agreement EDPR CA Solar Park-Sandrini Sol 2 (EP–26) to be effective 3/6/2021.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5036.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–793–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Tariff Cancellation: Notice of Termination of E&P Agreement EDPR CA Solar Park-Sonrisa (EP–23) to be effective 3/6/2021.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5037.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–794–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original ISA, Service Agreement No. 5866; Queue No. AD1–082 to be effective 12/7/2020.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5041.
*Comments Due:* 5 p.m. ET 1/25/21.

*Docket Numbers:* ER21–795–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Original WMPA SA No. 5875; Queue No AE2–129 to be effective 12/3/2020.
*Filed Date:* 1/4/21.
*Accession Number:* 20210104–5068.
*Comments Due:* 5 p.m. ET 1/25/21.

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

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00135 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL21–23–000]**

### Startrans IO, L.L.C.; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 30, 2020, the Commission issued an order in Docket No. EL21–23–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Startrans IO, L.L.C.'s proposed rate reduction to its transmission revenue requirement and proposed revisions to its transmission owner tariff are unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. *Startrans IO, L.L.C.,* 173 FERC ¶ 61,280 (2020).

The refund effective date in Docket No. Docket No. EL21–23–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL21–23–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2020), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory

Commission, 888 First Street, NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00133 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

*Docket Numbers:* RP20–980–003.

*Applicants:* East Tennessee Natural Gas, LLC.

*Description:* Compliance filing ETNG Compliance Filing—Docket No. RP20–980 to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5029.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–343–001.

*Applicants:* Dauphin Island Gathering Partners.

*Description:* Tariff Amendment: Negotiated Rate Filing Amendment 12–31–2020 to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5009.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–351–000.

*Applicants:* Columbia Gas Transmission, LLC.

*Description:* § 4(d) Rate Filing: CCRM 2021 to be effective 2/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5006.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–352–000.

*Applicants:* Millennium Pipeline Company, LLC.

*Description:* Compliance filing 2020 Penalty Revenue Crediting Report.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5008.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–353–000.

*Applicants:* Cove Point LNG, LP.

*Description:* § 4(d) Rate Filing: Cove Point—Initial PVIC Filing to be effective 2/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5010.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–354–000.

*Applicants:* Northern Border Pipeline Company.

*Description:* § 4(d) Rate Filing: Negotiated Rate Agmt—Scout Energy TQ742F to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5012.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–355–000.

*Applicants:* Trailblazer Pipeline Company LLC.

*Description:* § 4(d) Rate Filing: TPC 2020–12–31 Negotiated Rate Agreements to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5013.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–356–000.

*Applicants:* Rockies Express Pipeline LLC.

*Description:* § 4(d) Rate Filing: REX 2020–12–31 Negotiated Rate Agreements to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5014.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–357–000.

*Applicants:* Cheyenne Connector, LLC.

*Description:* § 4(d) Rate Filing: CC 2020–12–31 Negotiated Rate Agreement Filing to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5015.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–358–000.

*Applicants:* El Paso Natural Gas Company, L.L.C.

*Description:* § 4(d) Rate Filing: Negotiated Rate Agreement (Conoco) to be effective 2/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5018.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–359–000.

*Applicants:* Northern Natural Gas Company.

*Description:* § 4(d) Rate Filing: 20201231 Negotiated Rate to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5019.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–360–000.

*Applicants:* Eastern Gas Transmission and Storage, Inc.

*Description:* § 4(d) Rate Filing: Eastern GTS—December 31, 2020 Nonconforming Service Agreement to be effective 2/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5023.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–361–000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: Negotiated Rates—Shell 911778 eff 01–01–2021 to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5024.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–362–000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: Negotiated Rates—Various Releases eff 01–01–2021 to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5027.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–363–000.

*Applicants:* Southern Star Central Gas Pipeline, Inc.

*Description:* § 4(d) Rate Filing: Vol. 2-Negotiated Rate Agreement—Scout Energy Group V to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5036.

*Comments Due:* 5 p.m. ET 1/12/21.

*Docket Numbers:* RP21–364–000.

*Applicants:* Rockies Express Pipeline LLC.

*Description:* § 4(d) Rate Filing: REX 2020–12–31 Non-Conforming Negotiated Rate Amendment to be effective 1/1/2021.

*Filed Date:* 12/31/20.

*Accession Number:* 20201231–5046.

*Comments Due:* 5 p.m. ET 1/12/21.

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

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00132 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER21–744–000]**

### Wallingford Renewable Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Wallingford Renewable Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 25, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00130 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PF20–4–000]**

### Kern River Gas Transmission Company; Notice of Scoping Period Requesting Comments on Environmental Issues for the Planned Delta Lateral Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document that will discuss the environmental impacts of the Delta Lateral Project involving construction and operation of facilities by Kern River Gas Transmission Company (Kern River) in Millard County, Utah. The Commission will use this environmental document in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on February 3, 2021. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission before the opening of this docket on July 1, 2020, you will need to file those comments in Docket No. PF20–4–000 to ensure they are considered.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas

Facility On My Land? What Do I Need To Know?'' addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (*www.ferc.gov*) under the links to Natural Gas Questions or Landowner Topics.

**Public Participation**

There are three methods you can use to submit your written comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; a comment on a particular project is considered a ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (PF20–4–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Additionally, the Commission offers a free service called eSubscription, which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

**Summary of the Planned Project**

Kern River plans to construct and operate an approximately 35.84-mile-long, 24-inch-diameter pipeline; a delivery meter station located near Delta, Utah; and appurtenant facilities including a block valve, taps, and a launcher and receiver in Millard County, Utah. The planned Delta Lateral Project would provide about 140 million standard cubic feet of natural gas per day to the Intermountain Power Agency's Intermountain Power Project.

The Delta Lateral Project would consist of the following facilities:

- A 35.84-mile-long, 24-inch-diameter natural gas pipeline;
- a delivery meter station;
- two mainline taps with automated lateral inlet valve assemblies;
- an in-line inspection device (*i.e.,* pig [1]) launcher and receiver;
- an automated lateral block valve assembly; and
- ancillary facilities.

The general location of the project facilities is shown in appendix 1.[2]

**Land Requirements for Construction**

Construction of the planned facilities would disturb about 538 acres of land for the pipeline and aboveground facilities. Following construction, Kern River would maintain about 218 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses. About 50 percent of the planned pipeline route parallels existing pipeline, utility, or road rights-of-way.

**NEPA Process and the Environmental Document**

Any environmental document issued by Commission staff will discuss impacts that could occur as a result of the construction and operation of the planned project under the relevant general resource areas:

- Geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- air quality and noise; and
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the planned project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Although no formal application has been filed, Commission staff have already initiated a NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before the Commission receives an application. As part of the pre-filing review, Commission staff will contact federal and state agencies to discuss their involvement in the scoping process and the preparation of the environmental document.

If a formal application is filed, Commission staff will then determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the environmental issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its determination on the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/Notice of Schedule* will be issued after an application is filed, which will open an additional public comment period. Staff will then prepare a draft EIS that will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS, and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary [3] and the

[1] A ''pig'' is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary.'' For instructions on connecting to eLibrary, refer to the last page of this notice. At this time, the Commission has suspended access to the Commission's Public Reference Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll free, (886) 208–3676 or TTY (202) 502–8659.

[3] For instructions on connecting to eLibrary, refer to the last page of this notice.

Commission's natural gas environmental documents web page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this project to formally cooperate in the preparation of the environmental document.[4] 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. Currently, the U.S Department of the Interior, Bureau of Land Management has expressed its intention to participate as a cooperating agency in the preparation of the environmental document to satisfy its NEPA responsibilities related to this project.

**Consultation Under Section 106 of the National Historic Preservation Act**

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation Office(s), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] The environmental document for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

**Environmental Mailing List**

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please return the attached ''Mailing List Update Form'' (appendix 2).

**Becoming an Intervenor**

Once Kern River files its application with the Commission, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Only intervenors have the right to seek rehearing of the Commission's decision 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 pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214). Motions to intervene are more fully described at *https://www.ferc.gov/resources/guides/how-to.asp.* Please note that the Commission will not accept requests for intervenor status at this time. You must wait until the Commission receives a formal application for the project, after which the Commission will issue a public notice that establishes an intervention deadline.

**Additional Information**

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at *https://www.ferc.gov/news-events/events* along with other related information.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00129 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER21–772–000]**

### Resi Station, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Resi Station, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 24, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: January 4, 2021.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2021–00128 Filed 1–7–21; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2019–0238; FRL–10017–46]**

## 1,4-Dioxane; Final Toxic Substances Control Act (TSCA) Risk Evaluation; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) is announcing the availability of the final Toxic Substances Control Act (TSCA) risk evaluation of 1, 4-dioxane. The purpose of conducting risk evaluations under TSCA is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation, without consideration of costs or other nonrisk factors. EPA has determined that specific conditions of use of 1, 4-dioxane present an unreasonable risk of injury to health or the environment. For those conditions of use for which EPA has found an unreasonable risk, EPA must take regulatory action to address that unreasonable risk through risk management measures enumerated in TSCA. EPA has also determined that specific conditions of use do not present an unreasonable risk of injury to health or the environment. For those conditions of use for which EPA has found no unreasonable risk of injury to health or the environment, the Agency's determination is a final Agency action and is issued via order in the risk evaluation.

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0238, is available online at *http://www.regulations.gov* or in-person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280.

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Public Reading Room are closed to visitors with limited exceptions. The EPA/DC staff continue to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** *For technical information contact:* Yvette Selby-Mohamadu, Office of Pollution Prevention and Toxics (7403M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–5245; email address: *selby-mohamadu.yvette@epa.gov.*

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general. This action may be of interest to persons who are or may be interested in risk evaluations of chemical substances under TSCA, 15 U.S.C. 2601 *et seq.* Since other entities may also be interested in this final risk evaluation, the EPA has not attempted to describe all the specific entities that may be affected by this action.

*B. What is EPA's authority for taking this action?*

TSCA section 6, 15 U.S.C. 2605, requires EPA to conduct risk evaluations to ''determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.'' 15 U.S.C. 2605(b)(4)(A). TSCA sections 6(b)(4)(A) through (H) enumerate the deadlines and minimum requirements applicable to this process, including provisions that provide instruction on chemical substances that must undergo evaluation, the minimum components of a TSCA risk evaluation, and the timelines for public comment and completion of the risk evaluation. TSCA also requires that EPA operate in a manner that is consistent with the best available science, make decisions based on the weight of the scientific evidence and consider the reasonably available information. 15 U.S.C. 2625(h), (i), and (k). TSCA section 6(i) directs that a determination of ''no unreasonable risk'' shall be issued by order and considered to be a final Agency action, while a determination of ''unreasonable risk'' is not considered to be a final Agency action. 15 U.S.C. 2605(i).

The statute identifies the minimum components for all chemical substance risk evaluations. For each risk evaluation, EPA must publish a document that outlines the scope of the risk evaluation to be conducted, which includes the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations that EPA expects to consider. 15 U.S.C. 2605(b)(4)(D). The statute further provides that each risk evaluation must also: (1) Integrate and assess available information on hazards and exposures for the conditions of use of the chemical substance, including information that is relevant to specific risks of injury to health or the environment and information on relevant potentially exposed or susceptible subpopulations; (2) describe whether aggregate or sentinel exposures were considered and the basis for that consideration; (3) take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use; and (4) describe the weight of the scientific evidence for the identified hazards and exposures. 15 U.S.C. 2605(b)(4)(F)(i) through (ii) and (iv) through (v). Each risk evaluation

must not consider costs or other nonrisk factors. 15 U.S.C. 2605(b)(4)(F)(iii).

The statute requires that the risk evaluation process be completed within a specified timeframe and provide an opportunity for public comment on a draft risk evaluation prior to publishing a final risk evaluation. 15 U.S.C. 2605(b)(4).

Subsection 5.4.1 of the final risk evaluation for 1, 4-dioxane constitutes the order required under TSCA section 6(i)(1), and the ''no unreasonable risk'' determinations in that subsection are considered to be a final Agency action effective on the date of issuance of the order. In conducting risk evaluations, ''EPA will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of use within the scope of the risk evaluation . . . .'' 40 CFR 702.47. Under EPA's implementing regulations, ''[a] determination by EPA that the chemical substance, under one or more of the conditions of use within the scope of the risk evaluation, does not present an unreasonable risk of injury to health or the environment will be issued by order and considered to be a final Agency action, effective on the date of issuance of the order.'' 40 CFR 702.49(d). For purposes of TSCA section 19(a)(1)(A), the date of issuance of the TSCA section 6(i)(1) order for 1, 4-dioxane shall be at 1:00 p.m. Eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when this notice is published in the **Federal Register**, which is in accordance with 40 CFR 23.5.

*C. What action is EPA taking?*

EPA is announcing the availability of the risk evaluation of the chemical substance identified in Unit II. In this risk evaluation, EPA has made unreasonable risk determinations on some of the conditions of use within the scope of the risk evaluation for this chemical. For those conditions of use for which EPA has found an unreasonable risk of injury to health or the environment, EPA must initiate regulatory action to address those risks through risk management measures enumerated in 15 U.S.C. 2605(a).

EPA also is announcing the availability of the information required to be provided publicly with each risk evaluation, which is available online at *http://www.regulations.gov* in the dockets identified. 40 CFR 702.51. Specifically, EPA has provided:

- The scope document and problem formulation (in Docket ID No. EPA–HQ–OPPT–2016–0723);
- Draft risk evaluation, supplemental analysis to the draft risk evaluation, and final risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0238);
- All notices, determinations, findings, consent agreements, and orders (in Docket ID No. EPA–HQ–OPPT–2019–0238);
- Any information required to be provided to the Agency under 15 U.S.C. 2603 (in Docket ID No. EPA–HQ–OPPT–2016–0723 and Docket ID No. EPA–HQ–OPPT–2019–0238);
- A nontechnical summary of the risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0238);
- A list of the studies, with the results of the studies, considered in carrying out each risk evaluation (Risk Evaluation for 1, 4-dioxane) in Docket ID No. EPA–HQ–OPPT–2019–0238);
- The final peer review report, including the response to peer review and public comments received during peer review (in Docket ID No. EPA–HQ–OPPT–2019–0238); and
- Response to public comments received on the draft scope, the draft risk evaluation and the supplemental analysis to the draft risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0238).

## II. TSCA Risk Evaluation

*A. What is EPA's risk evaluation process for existing chemicals under TSCA?*

The risk evaluation process is the second step in EPA's existing chemical review process under TSCA, following prioritization and before risk management. As this chemical is one of the first ten chemical substances undergoing risk evaluation, the chemical substance was not required to go through prioritization (81 FR 91927, December 19, 2016) (FRL–9956–47). The purpose of conducting risk evaluations is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation. As part of this process, EPA must evaluate both hazard and exposure, not consider costs or other nonrisk factors, use reasonably available information and approaches in a manner that is consistent with the requirements in TSCA for the use of the best available science, and ensure decisions are based on the weight of the scientific evidence.

The specific risk evaluation process that EPA has established by rule to implement the statutory process is set out in 40 CFR part 702 and summarized on EPA's website at *http://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluations-existing-chemicals-under-tsca.* As explained in the preamble to EPA's final rule on procedures for risk evaluation (82 FR 33726, July 20, 2017) (FRL–9964–38), the specific regulatory process set out in 40 CFR part 702, subpart B is being followed for the first ten chemical substances undergoing risk evaluation to the maximum extent practicable.

Prior to the publication of this final risk evaluation, a draft risk evaluation was subject to peer review and public comment and a supplemental analysis to the draft risk evaluation was subject to public comment. EPA reviewed the report from the peer review committee and public comments and has amended the risk evaluation in response to these comments as appropriate. The public comments, peer review report, and EPA's response to comments is in Docket ID No. EPA–HQ–OPPT–2019–0238. Prior to the publication of the draft risk evaluation, EPA made available the scope and problem formulation, and solicited public input on uses and exposure. EPA's documents and the public comments are in Docket ID No. EPA–HQ–OPPT–2016–0723. Additionally, information about the scope, problem formulation, and draft risk evaluation phases of the TSCA risk evaluation for this chemical is available at EPA's website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluation-14-dioxane.*

*B. What is 1, 4-dioxane?*

1,4-dioxane is used primarily as a solvent in a variety of commercial and industrial applications like in the manufacture of other chemicals, as a processing aid, a laboratory chemical, and in adhesives and sealants. 2016 CDR data shows that there were two manufacturers producing or importing 1,059,980 pounds of 1,4-dioxane in the U.S. in 2015.

**Authority:** 15 U.S.C. 2601 *et seq.*

**Andrew Wheeler,**

*Administrator.*

[FR Doc. 2021–00114 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[ER–FRL–9054–7]**

### Environmental Impact Statements; Notice of Availability

*Responsible Agency:* Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed December 23, 2020 10 a.m. EST

Through January 4, 2021 10 a.m. EST

Pursuant to 40 CFR 1506.9.

**Notice**

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

*EIS No. 20210000, Draft, BOEM, NY,* South Fork Wind Farm and South Fork Export Cable Project, Comment Period Ends: 02/22/2021, Contact: Michelle Morin 703–787–1722.

Dated: January 4, 2021.

**Cindy S. Barger,**

*Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 2021–00116 Filed 1–7–21; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue,NW, Washington, DC 20551–0001, not later than February 8, 2021.

A. Federal Reserve Bank of Atlanta (Kathryn Haney, Assistant Vice President) 1000 Peachtree Street, NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *Commerce Bancshares, Inc., White Castle, Louisiana;* to retain Assumption Mortgage, LLC, Paincourtville, Louisiana, and thereby indirectly engage in mortgage brokerage activities (extending credit and servicing loans), pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, January 4, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021–00092 Filed 1–7–21; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 25, 2021.

*A. Federal Reserve Bank of Minneapolis* (Chris P. Wangen, Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Ann Fishback Rivlin, Madison, Wisconsin, individually and as trustee of the John T. Fishback Irrevocable Trust, the AFR Holdings Trust, the JTF Holdings Trust, the Patricia S. Fishback GRAT 2B Trust, the Patricia S. Fishback GRAT 2C Trust, the Patricia S. Fishback GRAT 4C Trust, the Patricia S. Fishback GRAT 8C Trust, and the Patricia S. Fishback GRAT 10C Trust (collectively, ''the Rivlin Trusts''), all of Brookings, South Dakota;* to retain voting shares of Fishback Financial Corporation, and thereby indirectly retain voting shares of First Bank & Trust, both of Brookings, South Dakota.

In addition, the Rivlin Trusts, Thomas M. Fishback, as trustee of the Oliver V. Fishback Trust, Patricia S. Fishback, as trustee of the Robert E. Fishback GRAT 2C Trust, Paul V. Fishback, as trustee of the PVF FFC Holdings Trust, and Van D. Fishback, as trustee of the Van D. Fishback Revocable FFC Holdings Trust, all of Brookings, South Dakota; and James N. Fishback, as trustee of the JNF FFC Holdings Trust, both of Sioux Falls, South Dakota; to join the Fishback family shareholder group, a group acting in concert, to retain voting shares of Fishback Financial Corporation and thereby indirectly retain voting shares of First Bank & Trust.

Board of Governors of the Federal Reserve System, January 4, 2021.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2021–00090 Filed 1–7–21; 8:45 am]

**BILLING CODE P**

## FEDERAL TRADE COMMISSION

**[File No. X160032]**

### Chemence, Inc.; Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement; request for comment.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before February 8, 2021.

**ADDRESSES:** Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Chemence, Inc.; File No. X160032'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:** Julia Solomon Ensor (202–326–2377), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website, at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 8, 2021. Write ''Chemence, Inc.; File No. X160032'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective measures in response to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you file your comment on paper, write ''Chemence, Inc.; File No. X160032'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 8, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

**Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission (''FTC'' or ''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Chemence, Inc. and James Cooke (''Respondents'').

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves Respondents' advertising, labeling, sale, and distribution of cyanoacrylate ''superglue'' products as made in the United States. According to the FTC's complaint, Respondents represented that the cyanoacrylate ''superglue'' products they manufactured and supplied to trade customers were all or virtually all made in the United States. In fact, significant proportions of the chemical inputs, and overall costs, to manufacture Respondents' cyanoacrylate ''superglues'' are attributable to foreign materials. In numerous instances, foreign materials accounted for more than 80% of materials costs and more than 50% of overall manufacturing costs for these

products. The complaint also alleges that, by distributing promotional materials containing misrepresentations regarding the U.S. origin of their products, Respondents provided trade customers the means and instrumentalities to commit deceptive acts or practices. Based on the foregoing, the complaint alleges that Respondents engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act, and violated a 2016 federal court order in the process.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts and practices in the future. Consistent with the FTC's Enforcement Policy Statement on U.S. Origin Claims, Part I prohibits Respondents from making U.S.-origin claims for their products unless either: (1) The final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States; (2) a clear and conspicuous qualification appears immediately adjacent to the representation that accurately conveys the extent to which the product contains foreign parts, ingredients or components, and/or processing; or (3) for a claim that a product is assembled in the United States, the product is last substantially transformed in the United States, the product's principal assembly takes place in the United States, and United States assembly operations are substantial.

Part II prohibits Respondents from making any country-of-origin claim about a product or service unless the claim is true, not misleading, and Respondents have a reasonable basis substantiating the representation.

Part III prohibits Respondents from providing third parties with the means and instrumentalities to make the claims prohibited in Parts I or II.

Parts IV through VI are monetary provisions. Part IV imposes a judgment of $1,200,000. Part V includes additional monetary provisions relating to collections. Part VI requires Respondents to provide sufficient customer information to enable the Commission to administer consumer redress, if appropriate.

Part VII is a notice provision requiring Respondents to identify and notify certain third-party trade customers of the FTC's action within 30 days after the issuance of the order, or within 30 days of the customer's identification, if identified later. Respondents are also required to submit reports regarding their notification program.

Parts VIII through XI are reporting and compliance provisions. Part VIII requires Respondents to acknowledge receipt of the order, to provide a copy of the order to certain current and future principals, officers, directors, and employees, and to obtain an acknowledgement from each such person that they have received a copy of the order. Part IX requires Respondents to file a compliance report within one year after the order becomes final and to notify the Commission within 14 days of certain changes that would affect compliance with the order. Part X requires Respondents to maintain certain records, including records necessary to demonstrate compliance with the order. Part XI requires Respondents to submit additional compliance reports when requested by the Commission and to permit the Commission or its representatives to interview Respondents' personnel.

Finally, Part XII is a ''sunset'' provision terminating the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

By direction of the Commission.

**April J. Tabor,**

*Acting Secretary.*

## Statement of Commissioner Rohit Chopra In the Matter of Chemence, Inc.

*Summary*

- Made in USA fraud harms both consumers and honest competitors. Yet for decades, FTC Commissioners pursued a no-money, no-fault settlement strategy to tackle this problem, ignoring Congressional authority to penalize bad actors.
- Over the last two years, the Commission has begun to turn the page on its checkered record, obtaining significant judgments for Made in USA fraud and initiating a rulemaking to trigger damages and penalties.
- Today's action against Chemence and a top executive is another step forward in protecting the Made in USA brand and restoring the Commission's law enforcement credibility.

For markets to function fairly, the Federal Trade Commission must be a credible watchdog, ensuring that companies have an incentive to follow the law and adhere to the agency's rules and orders. Corporate defendants that blatantly lie about their products have been able to convince Commissioners that their conduct caused no harm, allowing them to extract settlements with virtually no consequences whatsoever. Robert Pitofsky, who served as a Commissioner and later as the agency's Chairman, described these no-money, no-fault orders as ''scandalously weak.'' [1]

Longstanding FTC policies recognize that blatant deception harms consumers and diverts sales from honest competitors.[2] But, over the years, Commissioners quietly adopted a permissive approach toward corporate fraud, while bringing down the hammer on small, fly-by-night operations. Going hard on small businesses can give the appearance of active enforcement, even as more established companies face few consequences for their wrongdoing.

However, there are promising signs that this is changing. One of the best examples of our moving away from lax enforcement is our Made in USA fraud program. Today, the Commission is announcing another action against an established corporate actor, showing we are turning the page on our permissive policy of the past.

### *FTC's Flawed Made in USA Enforcement Strategy*

Consumers prefer goods that are produced domestically, and they are even willing to pay more for them.[3] This gives bad actors an incentive to unlawfully parade their products with the ''Made in USA'' brand. Government enforcement can ensure that this strategy does not pay off.

However, for decades, there was bipartisan consensus at the Federal Trade Commission that Made in USA fraud should not be penalized. Even in egregious cases, most matters were resolved with no-money, no-fault settlements, and many violators received nothing more than closing letters. In 1994, Congress authorized the Commission to do more—granting the agency new authority to trigger penalties and damages for Made in USA fraud—but past Commissioners declined to even propose implementing

[1] *See* Irving Scher et al., *Part II—FTC Improvement Act,* 45 Antitrust L.J. 96, 117 (1976).

[2] For example, the Commission's Policy Statement on Deception notes that ''[t]he prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers.'' FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (1984) (appended to Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984)), *https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.*

[3] *See, e.g.,* Kong, Xinyao and Rao, Anita (June 8, 2020). ''Do Made in USA Claims Matter?,'' University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2019–138, Available at SSRN: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468543.*

this new authority, allowing it to languish for a quarter century.[4]

This lack of deterrence contributed to brazen Made in USA fraud, as seen in some of the Commission's recent cases. In 2018, the FTC sued Patriot Puck, which branded its product as ''The Only American Made Hockey Puck.'' In fact, according to the Commission's lawsuit, these pucks were made in China.[5] That same year, the FTC sued a seller of military bags and other gear, charging the firm with inserting fraudulent Made in USA labels into imported products, and marketing these products on military bases.[6] These practices harmed both consumers and honest competitors.[7]

Even firms that the FTC warned were seemingly undeterred. In 2017, the FTC required iSpring Water Systems to stop mislabeling its products. Last year, iSpring violated this order.[8] In 2018, the FTC warned Williams-Sonoma to stop falsely marketing products as Made in USA;[9] earlier this year, they were charged with doing it anyway.[10] The fact that these repeat offenders were caught is a testament to our staff's vigilance, but offenders' willingness to break the law twice demonstrates the flaws of the strategy pursued by past Commissions.

Recently, we have seen how that strategy is changing. iSpring was ordered to pay a civil penalty, and the company admitted that it broke the law. Williams-Sonoma was required to pay $1 million to resolve the Commission's allegations—a small sum, perhaps, for Williams-Sonoma, but a record for the FTC's Made in USA enforcement program. And in July, the Commission *finally* proposed codifying the Made in USA standard into a rule.[11] This rule would help to end the agency's reliance on no-money settlements, allowing the Commission to seek civil penalties, damages, and other sanctions for Made in USA violations.[12]

*Turning the Page*

Today's action against Chemence and its top executive marks another turning point for the FTC's enforcement strategy. Chemence is an established player in the adhesives and sealants business. The order announced today imposes real consequences—a major difference from the Commission's past Made in USA settlements.

First, the proposed order requires Chemence to forfeit $1.2 million in revenue stemming from the company's failures. This is another record judgment for the FTC's Made in USA enforcement program, and it represents a sea change from the era of no-money settlements. It is encouraging to see the FTC reducing its reliance on no-money orders, both here and in other program areas.

Second, this order reminds businesses that FTC orders are not suggestions.[13] The FTC's complaint highlights false compliance reports filed by Chemence, and charges the company's president personally for his involvement in the alleged violations.[14] This stands in stark contrast to other actions against repeat offenders, where the FTC granted broad releases to executives who oversaw egregious violations. The approach in this matter is far more effective.[15]

Third, the proposed order requires Chemence to notify consumers of this action. Notice confers benefits in cases like this. It helps to erase any competitive advantage a firm realized through deception, and it accords consumers the dignity of knowing what happened. I have long argued we should seek notice in Made in USA and other matters,[16] and I am pleased to see this provision incorporated into this enforcement action.

Our new approach is a critical step forward for protecting the Made in USA brand, and a model for other FTC enforcement areas. There is more work to do, including finalizing a Made in USA fraud rule, but we are clearly moving in the right direction.

While it is tempting for any government agency to think that the status quo is working well, we do our best work when we engage in self-critical analysis and strive for continuous improvement. I congratulate all of the agency's staff who fought for this outcome, as well as the many stakeholders who have worked with us to turn the page on the policy inherited from our predecessor Commissioners.[17] These efforts to reboot the Made in USA enforcement program represent real progress.

[FR Doc. 2021–00083 Filed 1–7–21; 8:45 am]

**BILLING CODE 6750–01–P**

---

[4] *See generally* Statement of Commissioner Rohit Chopra Regarding Activating Civil Penalties for Made in USA Fraud (Apr. 17, 2019), *https://www.ftc.gov/public-statements/2019/04/statement-commissioner-rohit-chopra-regarding-activating-civil-penalties.* In fact, under pressure from interest groups in the 1990s, Commissioners tried to weaken the Made in USA standard in light of globalized supply chains. Request for Public Comment on Proposed Guides for the use of U.S. Origin Claims, 62 FR 25020 (May 7, 1997), *https://www.govinfo.gov/content/pkg/FR-1997-05-07/pdf/97-11814.pdf. See also* Bruce Ingersoll, *FTC May Ease Its Guidelines For the 'Made in USA' Label,* Wall Street J. (May 6, 1997), *https://www.wsj.com/articles/SB862863598530948000.* This effort was widely opposed, and it failed. *See* Matthew Bales, Jr., *Implications and Effects of the FTC's Decision to Retain the ''All or Virtually All'' Standard,* 30 U. Miami Inter-Am. L. Rev. 727 (1999).

[5] Press Release, Fed. Trade Comm'n, FTC Approves Final Consents Settling Charges that Hockey Puck Seller, Companies Selling Recreational and Outdoor Equipment Made False 'Made in USA' Claims (Apr. 17, 2020), *https://www.ftc.gov/news-events/press-releases/2019/04/ftc-approves-final-consents-settling-charges-hockey-puck-seller;* Statement of Commissioner Rohit Chopra In the Matter of Nectar Sleep, Sandpiper/PiperGear USA, and Patriot Puck (Sep. 12, 2018), *https://www.ftc.gov/public-statements/2018/09/statement-commissioner-chopra* (hereinafter Dissenting Statement on No-Consequences Made in USA Settlements).

[6] *Id.*

[7] In fact, one competitor formally complained to the FTC that it lost out on a valuable Army and Air Force exchange listing based on Sandpiper's deception. *See* Advantus, Corp. (Comment #5) at 3–4, *https://www.ftc.gov/system/files/documents/public_comments/2018/10/00005-155955.pdf.*

[8] Press Release, Fed. Trade Comm'n, Marketer of Water Filtration Systems to Pay $110,000 Civil Penalty for Deceptive Made-in-USA Advertisements in Violation of 2017 Order (Apr. 12, 2019), *https://www.ftc.gov/news-events/press-releases/2019/04/marketer-water-filtration-systems-pay-110000-civil-penalty.*

[9] Closing letter to Danielle M. Hohos, Esq., Deputy General Counsel for Williams-Sonoma, Inc. (June 13, 2018), *https://www.ftc.gov/system/files/documents/closing_letters/nid/musa_williams-sonoma_closing_letter.pdf.*

[10] Press Release, Fed. Trade Comm'n, Williams-Sonoma, Inc. Settles with FTC, Agrees to Stop Making Overly Broad and Misleading 'Made in USA' Claims about Houseware and Furniture Products (Mar. 30, 2020), *https://www.ftc.gov/news-events/press-releases/2020/03/williams-sonoma-inc-settles-ftc-agrees-stop-making-overly-broad.*

[11] Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), *https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop.*

[12] Of course, not every Made in USA violation requires a lawsuit, or justifies a large judgment. But seeking and accepting no money and no meaningful consequences undermines our credibility.

[13] Memorandum from Commissioner Chopra to FTC Staff Regarding Repeat Offenders (May 14, 2018), *https://www.ftc.gov/public-statements/2018/05/commissioners-memorandum-2018-01-repeat-offenders.*

[14] Compl. ¶¶ 13–16, *In the Matter of Chemence, Inc. et al.,* Docket No. X160032.

[15] In addition, by filing this case administratively, the Commission has triggered civil penalties for future violations, even if in the absence of a final Made in USA fraud rule.

[16] Dissenting Statement on No-Consequences Made in USA Settlements, *supra* note 4, *https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf.*

[17] *See, e.g.,* Press Release, Truth in Advertising, Inc. (*TINA.org*), Ad Watchdog TINA.org Petitions FTC for Made in USA Rule (Aug. 22, 2019), *https://www.truthinadvertising.org/made-in-usa-press-release/;* Consumer Reports (Comment #6), *https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00006-0;* Alliance for American Manufacturing (Comment #5), *https://www.ftc.gov/policy/public-comments/2018/10/12/comment-00005-0.*

## GENERAL SERVICES ADMINISTRATION

**[Notice-MA–2020–15; Docket No. 2020–0002, Sequence No. 43]**

### 2021 Privately Owned Vehicle (POV) Mileage Reimbursement Rates; 2021 Standard Mileage Rate for Moving Purposes

**AGENCY:** Office of Government-wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Notice.

**SUMMARY:** GSA is updating the mileage reimbursement rate for privately owned automobiles (POA), airplanes, and motorcycles as required by statute. This information will be available in FTR Bulletin 21–03, which can be found on GSA's website at *https://gsa.gov/ftrbulletins.*

**DATES:** *Applicability date:* This notice applies to travel and relocation performed on or after January 1, 2021 through December 31, 2021.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, please contact Ms. Cheryl D. McClain-Barnes, Program Analyst, Office of Government-wide Policy, Office of Asset and Transportation Management, at 202–208–4334, or by email at *travelpolicy@gsa.gov.* Please cite Notice of FTR Bulletin 21–03.

**SUPPLEMENTARY INFORMATION:** GSA is required by statute to set the mileage reimbursement rate for privately owned automobiles (POA) as the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS mileage rate for medical or moving purposes is used to determine the POA rate when a Government-furnished automobile is authorized and also represents the privately owned vehicle (POV) standard mileage reimbursement rate for official relocation. Finally, GSA conducts independent reviews of the cost of travel and the operation of privately owned airplanes and motorcycles on an annual basis to determine their corresponding mileage reimbursement rates. These reviews evaluate various factors, such as the cost of fuel, depreciation of the original vehicle cost, maintenance and insurance, state and Federal taxes, and consumer price index data. FTR Bulletin 21–03 establishes and announces the new CY 2021 POV mileage reimbursement rates for official temporary duty and relocation travel. This notice is the only notification to agencies of revisions to the POV mileage rates for official travel and relocation, other than the changes posted on GSA's website at *https://gsa.gov/mileage.*

**Authority:** 5 U.S.C. 5707

**Jessica Salmoiraghi,**

*Associate Administrator, Office of Government-Wide Policy.*

[FR Doc. 2021–00059 Filed 1–7–21; 8:45 am]

**BILLING CODE 6820–14–P**

## GOVERNMENT ACCOUNTABILITY OFFICE

### Request for Medicare Payment Advisory Commission (MedPAC) Nominations

**AGENCY:** Government Accountability Office (GAO).

**ACTION:** Request for letters of nomination and resumes.

**SUMMARY:** The Balanced Budget Act of 1997 established the Medicare Payment Advisory Commission (MedPAC) and gave the Comptroller General responsibility for appointing its members. GAO is now accepting nominations for MedPAC appointments that will be effective May 2021. Nominations should be sent to the email address listed below. Acknowledgement of submissions will be provided within a week of submission.

**DATES:** Letters of nomination and resumes should be submitted no later than February 12, 2021, to ensure adequate opportunity for review and consideration of nominees prior to appointment.

**ADDRESSES:** Submit letters of nomination and resumes to *MedPACappointments@gao.gov.*

**FOR FURTHER INFORMATION CONTACT:** Gregory Giusto at (202) 512–8268 or *giustog@gao.gov* if you do not receive an acknowledgement or need additional information. For general information, contact GAO's Office of Public Affairs, (202) 512–4800.

**Authority:** 42 U.S.C. 1395b–6.

**Gene L. Dodaro,**

*Comptroller General of the United States.*

[FR Doc. 2020–28480 Filed 1–7–21; 8:45 am]

**BILLING CODE 1610–02–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Meeting of the Community Preventive Services Task Force (CPSTF)

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice of meeting.

**SUMMARY:** The Centers for Disease Control and Prevention within the Department of Health and Human Services announces the next meeting of the Community Preventive Services Task Force (CPSTF) on February 10–11, 2021.

**DATES:** The meeting will be held on Wednesday, February 10, 2021, from 8:30 a.m. to 6:00 p.m. EDT, and Thursday, February 11, 2021, from 8:30 a.m. to 5:00 p.m. EDT.

**ADDRESSES:** The meeting will be held via web conference.

**FOR FURTHER INFORMATION CONTACT:** Onslow Smith, Office of the Associate Director for Policy and Strategy; Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–V–25–5, Atlanta, GA 30329, phone: (404)498–6778, email: *CPSTF@cdc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Meeting accessibility:* The CPSTF meeting will be held virtually via web conference.

CDC will send web conference information to registrants upon receipt of their registration. All meeting attendees must register by February 3, 2021 to receive the web conference information for the February meeting. CDC will email web conference information from the *CPSTF@cdc.gov* mailbox.

To register for the meeting, individuals should send an email to *CPSTF@cdc.gov* and include the following information: name, title, organization name, organization address, phone, and email.

*Public comment:* Individuals who would like to make public comments during the February meeting must state their desire to do so with their registration and provide their name and organizational affiliation and the topic to be addressed (if known). The requestor will receive instructions for the public comment process for this virtual meeting after the request is received. A public comment period follows the CPSTF's discussion of each systematic review and will be limited, up to three minutes per person. Public

comments will become part of the meeting summary.

*Background on the CPSTF:* The CPSTF is an independent, nonfederal panel whose members are appointed by the CDC Director. CPSTF members represent a broad range of research, practice, and policy expertise in prevention, wellness, health promotion, and public health. The CPSTF was convened in 1996 by the Department of Health and Human Services (HHS) to identify community preventive programs, services, and policies that increase health, longevity, save lives and dollars, and improve Americans' quality of life. CDC is mandated to provide ongoing administrative, research, and technical support for the operations of the CPSTF. During its meetings, the CPSTF considers the findings of systematic reviews of existing research and practice-based evidence and issues recommendations. CPSTF recommendations are not mandates for compliance or spending. Instead, they provide information about evidence-based options that decision makers and stakeholders can consider when they are determining what best meets the specific needs, preferences, available resources, and constraints of their jurisdictions and constituents. The CPSTF's recommendations, along with the systematic reviews of the evidence on which they are based, are compiled in the *The Community Guide.*

*Matters proposed for discussion:* The agenda will consist of deliberation on systematic reviews of literature and is open to the public. Topics will include Nutrition, Physical Activity, and Obesity and Health Equity/Social Determinants of Health. Information regarding the start and end times for each day, and any updates to agenda topics, will be available on the Community Guide website (*www.thecommunityguide.org*) closer to the date of the meeting.

The meeting agenda is subject to change without notice.

Dated: January 5, 2021.

**Sandra Cashman,**

*Executive Secretary, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00112 Filed 1–7–21; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Board of Scientific Counselors, National Center for Injury Prevention and Control, (BSC, NCIPC)

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, National Center for Injury Prevention and Control, (BSC, NCIPC). This is a virtual meeting and open to the public, limited only by the number of network conference access available, which is 500. Pre-registration is required by accessing the link at *https://dceproductions.zoom.us/webinar/register/WN_AQ70-aWpTqKvPX9Ftap_UA.*

**DATES:** The meeting will be held on February 16, 2021, from 10:00 a.m. to 4:15 p.m., EST.

**ADDRESSES:** Zoom Virtual Meeting. If you would like to attend the virtual meeting, please pre-register by accessing the link at *https://dceproductions.zoom.us/webinar/register/WN_AQ70-aWpTqKvPX9Ftap_UA.* Instructions to access the Zoom virtual meeting will be provided in the link following your registration.

*Meeting Information:* There will be a public comment period at the end of the meeting; from 3:45 p.m.–4:00 p.m. The public is encouraged to register to provide public comment using the registration form available at the link provided: *https://www.surveymonkey.com/r/cbyh878.*

Individuals registered to provide public comment will be called upon first to speak based on the order of registration, followed by others from the public. All public comments will be limited to two (2) minutes per speaker.

**FOR FURTHER INFORMATION CONTACT:** Gwendolyn H. Cattledge, Ph.D., M.S.E.H., Deputy Associate Director for Science, NCIPC, CDC, 4770 Buford Highway NE, Mailstop F–63, Atlanta, Georgia 30341, Telephone: (770) 488–1430, Email: *ncipcbsc@cdc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Purpose:* The Board will: (1) Conduct, encourage, cooperate with, and assist other appropriate public health authorities, scientific institutions, and scientists in the conduct of research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases, and other impairments; (2) assist States and their political subdivisions in preventing and suppressing communicable and non-communicable diseases and other preventable conditions and in promoting health and well-being; and (3) conduct and assist in research and control activities related to injury. The Board of Scientific Counselors makes recommendations regarding policies, strategies, objectives, and priorities; and reviews progress toward injury prevention goals and provides evidence in injury prevention-related research and programs. In addition, the Board provides advice on the appropriate balance of intramural and extramural research, the structure, progress and performance of intramural programs. The Board is designed to provide guidance on extramural scientific program matters, including the: (1) Review of extramural research concepts for funding opportunity announcements; (2) conduct of Secondary Peer Review of extramural research grants, cooperative agreements, and contracts applications received in response to the funding opportunity announcements as it relates to the Center's programmatic balance and mission; (3) submission of secondary review recommendations to the Center Director of applications to be considered for funding support; (4) review of research portfolios, and (5) review of program proposals.

*Matters to be Considered:* The agenda will discuss an update on the BSC Opioid workgroup, the NCIPC health equity activities, suicide prevention, firearm research awards and surveillance activities, as well as the NCIPC COVID–19 activities. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

**Kalwant Smagh,**

*Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.*

[FR Doc. 2021–00131 Filed 1–7–21; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier CMS–10589]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments on the collection(s) of information must be received by the OMB desk officer by *February 8, 2021.*

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

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html*

2. Call the Reports Clearance Office at (410) 786–1326.

**FOR FURTHER INFORMATION CONTACT:** William Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement without change of a currently approved collection; *Title of Information Collection:* QECP Annual Report Workbook Submission Requirement for Qualified Entities under ACA Section 10332; *Use:* This collection focuses on the expansion of qualified entities. This collection covers the requirement that a qualified entity must submit an annual report to CMS. In addition, this collection covers the requirement that a qualified entity must have a qualified entity data use agreement (QE DUA) or non-public analyses agreement in place with an authorized user prior to providing or selling data or analyses to that authorized user.

Section 10332 of the Patient Protection and Affordable Care Act (ACA) requires the Secretary to make standardized extracts of Medicare claims data under Parts A, B, and D available to ''qualified entities'' for the evaluation of the performance of providers of services and suppliers. The statute provides the Secretary with discretion to establish criteria to determine whether an entity is qualified to use claims data to evaluate the performance of providers of services and suppliers.

Section 105 of the Medicare Access and Reauthorization Act of 2015 (MACRA) expands how qualified entities will be allowed to use and disclose data under the qualified entity program consistent with other applicable laws, including information, privacy, security, and disclosure laws.

The information from the collection will be used by CMS to determine whether a qualified entity continues to meet the qualified entity certification requirements under section 10332 of the Affordable Care Act and Section 105 of MACRA. In addition, it will ensure that certain privacy and security requirements are met when qualified entities provide or sell data or sell non-public analyses that contains individually identifiable beneficiary information to authorized users. *Form Number:* CMS–10589 (OMB control number: 0938–1309); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for profits, and Not for profits institutions; *Number of Respondents:* 15; *Total Annual Responses:* 15; *Total Annual Hours:* 3,450. (For policy questions regarding this collection contact Kari Gaare at 410–786–8612.)

Dated: January 4, 2021.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2021–00080 Filed 1–7–21; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifiers: CMS–10198]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions,

the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments must be received by March 9, 2021.

**ADDRESSES:** When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

**FOR FURTHER INFORMATION CONTACT:** William N. Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:**

**Contents**

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10198—Creditable Coverage Disclosure to CMS On-Line Form and Instructions

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. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

**Information Collection**

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Creditable Coverage Disclosure to CMS On-Line Form and Instructions; *Use:* Most entities that currently provide prescription drug benefits to any Medicare Part D eligible individual must disclose whether their prescription drug benefit is creditable (expected to pay at least as much, on average, as the standard prescription drug plan under Medicare). The disclosure must be provided annually and upon any change that affects whether the coverage is creditable prescription drug coverage. *Form Number:* CMS–10198; *Frequency:* Annually; *Affected Public:* Individuals and Households, State, Local, or Tribal Governments, Federal Government; *Number of Respondents:* 110,217; *Number of Responses:* 110,217; *Total Annual Hours:* 9,185. (For questions regarding this collection, contact Tammie Hill at (410) 786–3317.)

Dated: January 4, 2021.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2021–00074 Filed 1–7–21; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–N–3728]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Collection of Information for Participation in the Food and Drug Administration Non-Employee Fellowship and Traineeship Programs

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on ''Collection of Information for Participation in FDA Non-Employee Fellowship and Traineeship Programs.''

**DATES:** Submit either electronic or written comments on the collection of information by March 9, 2021.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before March 9, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 9, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- Mail/Hand Delivery/Courier (for written/paper submissions): Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2018–N–3728 for ''Collection of Information for Participation in FDA Non-Employee Fellowship and Traineeship Programs.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–8867, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Collection of Information for Participation in FDA Non-Employee Fellowship and Traineeship Programs**

*OMB Control Number 0910—NEW*

In compliance with 44 U.S.C. 3507, FDA will submit to OMB a request to review and approve a new collection of information: ''Collection of Information for Participation in FDA Non-Employee Fellowship and Traineeship Programs.'' Section 746(b) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 379*l*(b)) allows FDA to conduct and support intramural training programs through fellowship and traineeship programs. These mandatory collection forms provide FDA with information from the non-employee to: (1) Begin the program, (2) administer the program, (3) coordinate training, and (4) end the program.

1. To begin the program, the non-employee must submit the following information: (A) New non-employee data form; (B) proof of health insurance; (C) emergency contact information; (D) unified financial management system (UFMS) supplier and site information for stipend payments, financial information; and (E) CONCUR GOV New Traveler Profile Form.

(A) New non-employee data form to begin onboarding process—The New Non-Employee Data form collects information that includes: (1) Name; (2) gender; (3) birthplace; (4) date of birth; (5) email; (6) home address; (7) FDA center/organization/supervisor; (8) citizenship; (9) Social Security number (SSN); (10) start date; (11) end date; (12) contract information; (13) location; and (14) question regarding current or previous Federal work experience.

(B) Proof of health insurance—Participants in FDA fellowship and traineeship programs will be asked for certain information to demonstrate proof of health insurance: (1) Name of health insurance plan provider; (2) name/contact information of primary member; (3) member identification number/group number; (4) begin date/policy expiration date; and (5) signature. The purpose of the health insurance information is for FDA to substantiate that participants of the program are covered by health insurance.

(C) Emergency contact information—Participants in FDA fellowship and traineeship programs will be asked for certain information about emergency contact demographics: (1) Name of fellow/trainee; (2) center; (3) name of emergency contact; (4) telephone number of emergency contact; and (5) relationship to contact. The purpose of emergency contact information of fellows/trainees is to ensure there is a primary contact should emergencies arise.

(D) UFMS supplier and site information for stipend payments, financial information—Participants in FDA fellowship and traineeship programs will be asked for their financial institution routing number and

account information for direct deposit of stipend payments: (1) Name; (2) taxpayer ID or SSN; (3) classification/vendor type; (4) payment options (electronic payment only); (5) mailing address; (6) bank/financial institution information (name, routing number, account number, account type); and (7) signature. The purpose of the financial information is for FDA to process a direct deposit transaction for a monthly stipend payment.

(E) CONCUR GOV new traveler profile form—Participants in FDA's non-employee scientist programs may be asked to travel and will need to complete an online profile for the Concur Government Edition (CGE) System, which requires the following information: (1) Personal information (name, Agency, office/operating division, residence city, residence state, signatures); (2) Agency information (ID #, title, center accounting number); (3) business contact information; (4) email addresses; emergency contact; (5) travel preferences (preferred airline, hotel, airline seats, frequent flyer number); (6) credit card number; (7) banking account for reimbursement; and (8) approving signatures. The CGE profile provides assistance to travel preparers who are booking travel for FDA program participants.

2. To administer the program, non-employee scientists must submit information for: (A) Absence recording form; (B) personal custody property record; (C) FDA health summary; and (D) discovery and invention.

(A) Absence recording form—Participants in FDA fellowship and traineeship programs will be asked for certain information about tracking attendance and absences: (1) Name of fellow/trainee; (2) office/division of placement; (3) mentor/sponsor name; (4) type of absence; (5) dates of absence; (6) reason for absence; and (7) mentor/sponsor approval. The purpose of tracking attendance and absences for fellows/trainees is to determine the monthly stipend payment and potential modifications to purchase orders for extended absences.

(B) Personal custody property record—Participants in FDA fellowship and traineeship programs will be required to sign the property request, acknowledging personal responsibility for government property. The plan collects the following information: (1) Fellow/trainee name; (2) operative division/division; (3) location; (4) telephone; (5) description of items; (6) items to be returned; (7) return date; (8) fellow/trainee signature; (9) custodial officer signature; and (10) issuing office. The purpose of this record is to acknowledge that an individual has received government property and accepts personal responsibility for items issued to perform their roles.

(C) FDA health summary—Participants in FDA fellowship and traineeship programs will be asked for information about health for laboratory activities. The FDA Occupational Health Services Health Summary form collects information that includes: (1) Name; (2) program; (3) email; (4) work phone; (5) FDA mentor; (6) center/office division; (7) location; (8) date; (9) primary care physician and contact information; (10) immunizations; (11) social history; (12) relationship history; (13) allergies; and (14) medical history.

(D) Discovery and invention—Participants in FDA fellowship and traineeship programs will be asked for information about discoveries and inventions at FDA. The discovery and invention report collects information that includes: (1) Title of discovery; (2) description of discovery; (3) identification of collaborators, cooperative research and development agreement, and human materials or subjects; (4) publications; (5) technology stage; (6) commercial potential; and (7) competition, potential users, and manufacturers.

3. For the coordination of training, non-employee scientists must complete information for the: (A) Training development plan; (B) final project report; (C) training request; (D) travel request; (E) Learning Management System (LMS) request; (F) standard operating procedures (SOP) verification; and (G) program evaluation.

(A) Training development plan—Participants in FDA fellowship and traineeship programs will be required to develop the individual plan in partnership with their mentor. The plan collects the following information: (1) Fellow/trainee name; (2) mentor(s)/preceptor(s) name; (3) sign-on date; (4) year 1 goals, courses/training, regulatory activities, and completion date; (5) year 2 goals, courses/trainings, regulatory activities, and completion date; (6) fellow/trainee signature; and (7) mentor(s)/preceptor(s) signature. The purpose of this individual development/training plan is to have a record of mandatory training and specific goals and tasks for the contributions and/or completion of a project.

(B) Final project report—Participants in FDA fellowship and traineeship programs will be required to complete the final report in partnership with their mentor. The plan collects the following information: (1) Fellow/trainee name; (2) mentor/preceptor name; (3) goals; (4) objectives; (5) alignment with center or FDA goals; (6) project summary/abstract; (7) accomplishments; and (8) impact on public health. The purpose of this report is to acknowledge the contributions to the overall project and identify performance successes or challenges. The collection of information is mandatory to participate in FDA's fellowship and traineeship programs.

(C) Training request—Participants in FDA fellowship and traineeship programs will be asked to identify the following for external training requests: (1) Name of fellow/trainee; (2) operating office/staff division; (3) title and topic of training; (4) name of hosting Agency/organization; (5) purpose/justification for external training; (6) dates; (7) location; and (8) approving signatures. The purpose of the external training request is to provide justification substantiating the benefits to the operating office/staff division and/or benefits to the fellow's/trainee's professional development and training. The collection of information is mandatory to participate in FDA's fellowship and traineeship programs.

(D) Travel request—Participants in FDA fellowship and traineeship programs will be asked for certain information about travel requests and authorizations/approvals: (1) Office/division; (2) research project title; (3) mentor/sponsor name; (4) mentor/sponsor email and telephone; (5) fellow/trainee name; (6) appointment period; (7) funding source and fiscal year; (8) brief description of travel; (9) anticipated travel dates; and (10) travel justification and relation to project. The purpose of authorization for travel of fellows/trainees is to determine if the travel has been approved by the sponsor/mentor and if the travel is a mission-related activity to the fellow/trainee training plan or appointment/assignment. The collection of information is mandatory to participate in FDA's fellowship and traineeship programs.

(E) LMS access—Participants in FDA fellowship and traineeship programs will be asked for information to obtain access to the LMS: (1) Name; (2) location; (3) organizational unit; and (4) email address. The purpose of LMS access request is to obtain information of non-employee scientists to ensure they have access to receive training and educational opportunities offered in the Health and Human Services LMS System.

(F) SOP verification—Participants in FDA fellowship and traineeship programs will be asked for certain information to verify that they have read and received instructional training on

the SOPs for said program. The form collects the following: (1) Name; (2) signature; (3) date; and (4) center.

(G) Program evaluation—Participants in FDA fellowship and traineeship programs will be asked to complete an evaluation providing program data that will be synthesized into program reports on the overall effectiveness of the program. The evaluation collects the following information: (1) Demographic data; (2) expectations of fellowship or training program; (3) administration processes and support to fellow or trainee; (4) FDA retention and plans of fellow or trainee; (5) training and education completed; and (6) professional/research goals. The purpose of this evaluation is to assess the effectiveness of the program and feedback from participants to improve the quality of the experience.

4. To end the program, a non-employee must submit the exit checklist—Participants in FDA fellowship and traineeship programs may be asked to complete the exit checklist to manage the exit process and return of FDA property. The exit checklist guides the exit process for the following operational components: (1) Access key/pass; (2) accountable property; (3) system applications inactive; (4) library materials; (5) government-issued documents (*i.e.,* passports); (6) personal identity verification card/badge; (7) borrowed records; (8) employee records; and (9) information technology accounts.

All exit information will be entered to terminate access to any FDA information.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Activity | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| New Non-Employee Data Form | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| Proof of Health Insurance | 600 | 1 | 1 | 0.25 (15 minutes) | 150 |
| Emergency Contact Information | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| UFMS Supplier and Site Information for Stipend Payments, Financial Information. | 600 | 1 | 1 | 0.25 (15 minutes) | 150 |
| CONCUR GOV New Traveler Profile | 620 | 1 | 1 | 0.25 (15 minutes) | 155 |
| Absence Recording Form | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| Personal Custody Property Record | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| FDA Health Summary | 1,220 | 1 | 1 | 1 | 1,220 |
| Discovery and Invention Form | 1,220 | 1 | 1 | 1 | 1,220 |
| Training Development Plan | 1,220 | 1 | 1 | 1 | 1,220 |
| Final Project Report | 1,220 | 1 | 1 | 1 | 1,220 |
| Training Request | 610 | 1 | 1 | 0.5 (30 minutes) | 305 |
| Travel Request | 610 | 1 | 1 | 0.5 (30 minutes) | 305 |
| LMS Access | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| SOP Verification | 1,220 | 1 | 1 | 0.25 (15 minutes) | 305 |
| Program Evaluation | 1,220 | 1 | 1 | 0.5 (30 minutes) | 610 |
| Exit Checklist | 1,220 | 1 | 1 | 1 | 1,220 |
| Total | 9,605 | | | | |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA published a 60-day notice for this information collection on November 22, 2019 (84 FR 64536). FDA is reopening the 60-day comment period in order to satisfy PRA requirements. No changes have been made to the information collection.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00120 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–N–0417]**

### Request for Nominations on the National Mammography Quality Assurance Advisory Committee

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting that any industry organizations interested in participating in the selection of nonvoting industry representatives to serve on the National Mammography Quality Assurance Advisory Committee in the Center for Devices and Radiological Health notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to serve on the National Mammography Quality Assurance Advisory Committee. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current vacancies effective with this notice.

**DATES:** Any industry organization interested in participating in the selection of appropriate nonvoting members to represent industry interests must send a letter stating that interest to FDA by February 8, 2021 (see sections I and II of this document for further details). Concurrently, nomination materials for prospective candidates should be sent to FDA by February 8, 2021.

**ADDRESSES:** All statements of interest from industry organizations interested in participating in the selection process of nonvoting industry representative nominations should be sent to Margaret Ames (see **FOR FURTHER INFORMATION**

**CONTACT**). All nominations for nonvoting industry representatives should be submitted electronically by accessing the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm* or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002. Information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm.*

**FOR FURTHER INFORMATION CONTACT:** Margaret Ames, Division of Management Services, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5213, Silver Spring, MD 20993, 301–796–5960, email: *margaret.ames@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** The Agency is requesting nominations for nonvoting industry representative on the National Mammography Quality Assurance Advisory Committee:

### I. General Description of the Committee Duties

The Committee shall advise FDA on: (1) Developing appropriate quality standards and regulations for mammography facilities; (2) developing appropriate standards and regulations for bodies accrediting mammography facilities under this program; (3) developing regulations with respect to sanctions; (4) developing procedures for monitoring compliance with standards; (5) establishing a mechanism to investigate consumer complaints; (6) reporting new developments concerning breast imaging that should be considered in the oversight of mammography facilities; (7) determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in these areas; (8) determining whether there will exist a sufficient number of medical physicists after October 1, 1999; and (9) determining the costs and benefits of compliance with these requirements.

### II. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current résumés. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for the committee. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within 60 days, the Commissioner will select the nonvoting member to represent industry interests.

### III. Nomination Procedure

Individuals may self-nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Nominations must include a current, complete résumé or curriculum vitae for each nominee including current business address and telephone number, email address if available, and a signed copy of the Acknowledgement and Consent form available at the FDA Advisory Nomination Portal (see **ADDRESSES**). Nominations must also specify the advisory committee for which the nominee is recommended. Nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process.)

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and therefore encourages nominations of appropriately qualified candidates from these groups. Specifically, in this document, nominations for a nonvoting representative of industry interests are encouraged from the mammography manufacturing industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00122 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2014–N–1031]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Food and Drug Administration Recall Regulations

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection provisions associated with FDA recalls for products regulated by the Agency.

**DATES:** Submit either electronic or written comments on the collection of information by March 9, 2021.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before March 9, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 9, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to

the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2014–N–1031 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; FDA Recall Regulations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**FDA Recall Regulations—21 CFR Part 7**

*OMB Control Number 0910–0249—Extension*

This information collection helps support implementation of section 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371) pertaining to product recalls, and regulations in part 7 (21 CFR part 7), subpart C promulgated to clarify and explain associated practices and procedures. Regulations in part 7, subpart C §§ 7.49, 7.50, and 7.59 (21 CFR 7.49, 7.50, and 7.59) apply specifically to product recalls, which may be undertaken voluntarily and at any time by manufacturers and distributors, or at the request of the Agency. Recalls are terminated when all reasonable efforts have been made to remove or correct the product in accordance with the recall strategy. The regulations also provide for corrective actions to be taken regarding violative products and establish specific requirements that enable us to monitor and assess the adequacy of a firm's efforts in this regard. The provisions include reporting to FDA on the initiation and termination of a recall, as well as submitting recall status reports and making required communication disclosures. Specific guidance regarding recalls is set forth in § 7.59, although product-specific guidance documents may also be developed to assist respondents to the information collection. Agency guidance documents are issued in accordance with our good guidance regulations in 21 CFR 10.115, which provide for public comment at any time.

Consistent with § 7.50, all recalls monitored by FDA are included in an ''Enforcement Report'' once they are classified and may be listed prior to classification when FDA determines the firm's removal or correction of a marketed product(s) meets the definition of a recall. Recall data in the Enforcement Report can be accessed through the weekly report publication, the quick and advanced search functionalities, and an Application

Programming Interface (API). Instructions for navigating the report, accessing and using the API, and definitions of the report contents are found at *https://www.fda.gov/safety/enforcement-reports/enforcement-report-information-and-definitions.com.*

We estimate the burden of the collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| Activity; 21 CFR section | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|---|---|---|---|---|---|
| Firm initiated recall; § 7.46 | 2,779 | 1 | 2,779 | 25 | 69,475 |
| Termination of recall; § 7.55 | 2,095 | 1 | 2,095 | 10 | 20,950 |
| Recall status reports; § 7.53 | 2,779 | 13 | 36,127 | 10 | 361,270 |
| Total | | | 41,001 | | 451,695 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

A review of Agency data shows that 8,337 recalls were conducted during fiscal years 2017 through 2019, for an average of 2,779 recalls annually. We assume an average of 25 hours is needed to submit the requisite notification to FDA, for a total annual burden of 69,475 hours. Similarly, during the same period, 6,287 recalls were terminated, for an average of 2,095 recall terminations annually, and we assume an average of 10 hours is needed for the corresponding information collection activity. To determine burden associated with recall status reports we divided the average number of annual submissions (36,127) by the average number of annual respondents (2,779) and assume 10 hours is necessary for the corresponding information collection, resulting in 361,270 hours annually.

TABLE 2—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

| Activity; 21 CFR part | Number of respondents | Number of disclosures per respondent | Total annual disclosures | Average burden per disclosure | Total hours |
|---|---|---|---|---|---|
| Recall communications; § 7.49. | 2,779 | 445 | 1,236,655 | 0.05 (3 minutes) | 61,832.75 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

To determine burden associated with recall communication disclosures described in § 7.49, we calculated an average of 445 disclosures per recall and attribute 3 minutes for each disclosure, resulting in 61,832.75 burden hours annually.

These estimates reflect an overall decrease in the average number of annual responses by 245,846 and a decrease in the average number of annual burden hours by 70,949.25 since our last submission for OMB review and approval of the information collection.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00125 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2020–N–0008]**

### Request for Nominations for Individuals and Consumer Organizations for Advisory Committees

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is requesting that any consumer organizations interested in participating in the selection of voting and/or nonvoting consumer representatives to serve on its advisory committees or panels notify FDA in writing. FDA is also requesting nominations for voting and/or nonvoting consumer representatives to serve on advisory committees and/or panels for which vacancies currently exist or are expected to occur in the near future. Nominees recommended to serve as a voting or nonvoting consumer representative may be self-nominated or may be nominated by a consumer organization. FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

**DATES:** Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests on an FDA advisory committee or panel may send a letter or email stating that interest to FDA (see **ADDRESSES**) by January 29, 2021, for vacancies listed in this notice. Concurrently, nomination materials for prospective candidates should be sent to FDA (see **ADDRESSES**) by February 8, 2021. Nominations will be accepted for current vacancies and for those that will or may occur through December 31, 2021.

**ADDRESSES:** All statements of interest from consumer organizations interested in participating in the selection process should be submitted electronically to *ACOMSSubmissions@fda.hhs.gov,* by

mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration,10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993–0002.

Consumer representative nominations should be submitted electronically by logging into the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm,* by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993–0002. Additional information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

**FOR FURTHER INFORMATION CONTACT:** For questions relating to participation in the selection process: Kimberly Hamilton, Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993–0002, 301–796–8220, email: *kimberly.hamilton@fda.hhs.gov.*

For questions relating to specific advisory committees or panels, contact the appropriate Contact Person listed in table 1.

TABLE 1—ADVISORY COMMITTEE CONTACTS

| Contact person | Committee/panel |
|---|---|
| Rakesh Raghuwanshi, Office of the Chief Scientist, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 3309, Silver Spring, MD 20993–0002, 301–796–4769, email: *Rakesh.Raghuwanshi@fda.hhs.gov*. | FDA Science Board Advisory Committee. |
| Christina Vert, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6268, Silver Spring, MD 20993–0002, 240–402–8054, email: *Christina.Vert@fda.hhs.gov*. | Blood Products Advisory Committee. |
| Kathleen Hayes, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6307C, Silver Spring, MD 20993–0002, 301–796–7864, email: *Kathleen.Hayes@fda.hhs.gov*. | Cellular, Tissue and Gene Therapies Advisory Committee, Vaccines and Related Biological Products Advisory Committee. |
| LaTonya Bonner, Center for Drugs Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2428, Silver Spring, MD 20992–0002, 301–796–2855, email: *Latoya.Bonner@fda.hhs.gov*. | Dermatologic and Ophthalmic Drugs Advisory Committee. |
| Yinghua Wang, Center for Drugs Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2412, Silver Spring, MD 20992–002, 301–796–9033, email: *Yinghua.Wang@fda.hhs.gov*. | Gastrointestinal Drugs Advisory Committee, Pharmaceutical Science and Clinical Pharmacology Advisory Committee. |
| Yvette Waples, Center for Drugs Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2510, Silver Spring, MD 20993–0002, 301–796–9034, email: *Yvette.Waples@fda.hhs.gov*. | Psychopharmacologic Drugs Advisory Committee. |
| James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5211, Silver Spring, MD 20993–0002, 301–796–6313, email: *James.Swink@fda.hhs.gov*. | Anesthesiology and Respiratory Therapy Devices Panel, Circulatory Systems Devices Panel, Dental Products Devices Panel, General Hospital and Personal Use Devices Panel, Hematology and Pathology Devices Panel, Radiological Devices Panel. |
| Patricio Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993–0002, 301–796–6875, email: *Patricio.Garcia@fda.hhs.gov*. | Clinical Chemistry and Clinical Toxicology Devices Panel, Gastroenterology and Urology Devices Panel, General and Plastic Surgery Devices Panel, Obstetrics and Gynecology Devices Panel. |
| Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993–0002, 301–796–0400, email: *Aden.Asefa@fda.hhs.gov*. | Immunology Devices Panel, Microbiology Devices Panel, Molecular and Clinical Genetics Devices Panel, Neurological Devices Panel. |
| Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993–0002, 301–796–0400, email: *Aden.Asefa@fda.hhs.gov*. | National Mammography Quality Assurance Advisory Committee. |
| Letise Williams, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5407, Silver Spring, MD 20993–0002, 301–796–8398, email: *Letise.Williams@fda.hhs.gov*. | Patient Engagement Advisory Committee. |

**SUPPLEMENTARY INFORMATION:** FDA is requesting nominations for voting and/or nonvoting consumer representatives for the vacancies listed in table 2:

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE DATE NEEDED

| Committee/panel/areas of expertise needed | Type of vacancy | Approximate date needed |
|---|---|---|
| FDA Science Board Advisory Committee—The Science Board shall provide advice to the Commissioner and other appropriate officials on specific complex scientific and technical issues important to FDA and its mission, including emerging issues within the scientific community. Additionally, the Science Board will provide advice that supports the Agency in keeping pace with technical and scientific developments, including in regulatory science; and input into the Agency's research agenda; and on upgrading its scientific and research facilities and training opportunities. It will also provide, where requested, expert review of Agency sponsored intramural and extramural scientific research programs | 1—Voting ..... | January 1, 2021. |

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE DATE NEEDED—Continued

| Committee/panel/areas of expertise needed | Type of vacancy | Approximate date needed |
|---|---|---|
| Blood Products Advisory Committee—Knowledgeable in the fields of clinical and administrative medicine, hematology, immunology, blood banking, surgery, internal medicine, biochemistry, engineering, biological and physical sciences, biotechnology, computer technology, statistics, epidemiology, sociology/ethics, and other related professions | 1—Voting ..... | October 1, 2021. |
| Cellular, Tissue and Gene Therapies Advisory Committee—Knowledgeable in the fields of cellular therapies, tissue transplantation, gene transfer therapies and xenotransplantation (biostatistics, bioethics, hematology/oncology, human tissues and transplantation, reproductive medicine, general medicine and various medical specialties including surgery and oncology, immunology, virology, molecular biology, cell biology, developmental biology, tumor biology, biochemistry, rDNA technology, nuclear medicine, gene therapy, infectious diseases, and cellular kinetics) | 1—Voting ..... | April 1, 2021. |
| Vaccines and Related Biologic Advisory Committee—Knowledgeable in the fields of immunology, molecular biology, rDNA, virology, bacteriology, epidemiology or biostatistics, allergy, preventive medicine, infectious diseases, pediatrics, microbiology, and biochemistry | 1—Voting ..... | September 1, 2021. |
| Dermatologic and Ophthalmic Drugs Advisory Committee—Knowledgeable in the fields of dermatology, ophthalmology, internal medicine, pathology, immunology, epidemiology or statistics, and other related professions | 1—Voting ..... | September 1, 2021. |
| Gastrointestinal Drugs Advisory Committee—Knowledgeable in the fields of gastroenterology, endocrinology, surgery, clinical pharmacology, physiology, pathology, liver function, motility, esophagitis, and statistics | 1—Voting ..... | July 1, 2021. |
| Pharmaceutical Science and Clinical Pharmacology Advisory Committee—Knowledgeable in the fields of pharmaceutical manufacturing, clinical pharmacology, pharmacokinetics, bioavailability and bioequivalence research, the design and evaluation of clinical trials, laboratory analytical techniques, pharmaceutical chemistry, physiochemistry, biochemistry, biostatistics, and related biomedical and pharmacological specialties | 1—Voting ..... | November 1, 2021. |
| Psychopharmacologic Drugs Advisory Committee—Knowledgeable in the fields of psychopharmacology, psychiatry, epidemiology or statistics, and related specialties | 1—Voting ..... | Immediately |
| Clinical Chemistry and Clinical Toxicology Devices Panel—Doctor of Medicine or philosophy with experience in clinical chemistry (e.g., cardiac markers), clinical toxicology, clinical pathology, clinical laboratory medicine, and endocrinology | 1—Non-Voting | Immediately. |
| Anesthesiology and Respiratory Therapy Devices Panel—Anesthesiologists, pulmonary medicine specialists, or other experts who have specialized interests in ventilator support, pharmacology, physiology, or the effects and complications of anesthesia | 1—Non-Voting | December 1, 2021. |
| Circulatory Systems Devices Panel—Interventional cardiologists, electrophysiologists, invasive (vascular) radiologists, vascular and cardiothoracic surgeons, and cardiologists with special interest in congestive heart failure | 1—Non-Voting | Immediately. |
| Dental Products Devices Panel—Dentists, engineers and scientists who have expertise in the areas of dental implants, dental materials, periodontology, tissue engineering, and dental anatomy | 1—Non-Voting | Immediately. |
| General Hospital and Personal Use Devices Panel—Internists, pediatricians, neonatologists, endocrinologists, gerontologists, nurses, biomedical engineers, or microbiologists/infection control practitioners, or experts | 1—Non-Voting | Immediately. |
| Hematology and Pathology Devices Panel—Hematologists (benign and/or malignant hematology), hematopathologists (general and special hematology, coagulation and hemostasis, and hematological oncology), gynecologists with special interests in gynecological oncology, cytopathologists, and molecular pathologists with special interests in development of predictive biomarkers | 1—Non-Voting | March 1, 2021. |
| Radiological Devices Panel—Physicians with experience in general radiology, mammography, ultrasound, magnetic resonance, computed tomography, other radiological subspecialties and radiation oncology; scientists with experience in diagnostic devices, radiation physics, statistical analysis, digital imaging and image analysis | 1—Non-Voting | Immediately. |
| Clinical Chemistry and Clinical Toxicology Devices Panel—Doctor of medicine or philosophy with experience in clinical chemistry (e.g., cardiac markers), clinical toxicology, clinical pathology, clinical laboratory medicine, and endocrinology | 1—Non-Voting | Immediately. |
| Gastroenterology and Urology Devices Panel—Gastroenterologists, urologists and nephrologists | 1—Non-Voting | Immediately. |
| General and Plastic Surgery Devices Panel—Surgeons (general, plastic, reconstructive, pediatric, thoracic, abdominal, pelvic and endoscopic); dermatologists; experts in biomaterials, lasers, wound healing, and quality of life; and biostatisticians | 1—Non-Voting | Immediately. |
| Obstetrics and Gynecology Devices Panel—Experts in perinatology, embryology, reproductive endocrinology, pediatric gynecology, gynecological oncology, operative hysteroscopy, pelviscopy, electro-surgery, laser surgery, assisted reproductive technologies, contraception, postoperative adhesions, and cervical cancer and colposcopy; biostatisticians and engineers with experience in obstetrics/gynecology devices; urogynecologists; experts in breast care; experts in gynecology in the older patient; experts in diagnostic (optical) spectroscopy; experts in midwifery; labor and delivery nursing | 1—Non-Voting | Immediately. |
| Immunology Devices Panel—Persons with experience in medical, surgical, or clinical oncology, internal medicine, clinical immunology, allergy, molecular diagnostics, or clinical laboratory medicine | 1—Non-Voting | Immediately. |
| Microbiology Devices Panel—Clinicians with an expertise in infectious disease, e.g., pulmonary disease specialists, sexually transmitted disease specialists, pediatric infectious disease specialists, experts in tropical medicine and emerging infectious diseases, mycologists; clinical microbiologists and virologists; clinical virology and microbiology laboratory directors, with expertise in clinical diagnosis and in vitro diagnostic assays, e.g., hepatologists; molecular biologists | 1—Non-Voting | Immediately. |

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE DATE NEEDED—Continued

| Committee/panel/areas of expertise needed | Type of vacancy | Approximate date needed |
|---|---|---|
| Molecular and Clinical Genetics Devices Panel—Experts in human genetics and in the clinical management of patients with genetic disorders, e.g., pediatricians, obstetricians, neonatologists. The Agency is also interested in considering candidates with training in inborn errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology and related statistical training. Additionally, individuals with experience in genetic counseling, medical ethics as well as ancillary fields of study will be considered | 1—Non-Voting | June 1, 2021. |
| Dental Products Devices Panel—Dentists, engineers and scientists who have expertise in the areas of dental implants, dental materials, periodontology, tissue engineering, and dental anatomy | 1—Non-Voting | Immediately. |
| Neurological Devices Panel—Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians | 1—Non-Voting | December 1, 2021. |
| National Mammography Quality Assurance Advisory Committee—Physician, practitioner, or other health professional whose clinical practice, research specialization, or professional expertise includes a significant focus on mammography | 4—Voting ..... | 2—Immediately<br>2—February 1, 2021. |
| Patient Engagement Advisory Committee—Experts who are knowledgeable in areas such as clinical research, primary care patient experience, and health care needs of patient groups in the United States. Selected Committee members may also be experienced in the work of patient and health professional organizations; methodologies for eliciting patient preferences; and strategies for communicating benefits, risks and clinical outcomes to patients and research subjects | 1—Voting ..... | May 1, 2021. |

**I. Functions and General Description of the Committee Duties**

*A. FDA Science Board Advisory Committee*

The Science Board shall provide advice to the Commissioner and other appropriate officials on specific complex scientific and technical issues important to FDA and its mission, including emerging issues within the scientific community. Additionally, the Science Board will provide advice that supports the Agency in keeping pace with technical and scientific developments, including in regulatory science; and input into the Agency's research agenda; and on upgrading its scientific and research facilities and training opportunities. It will also provide, where requested, expert review of Agency sponsored intramural and extramural scientific research programs.

*B. Blood Products Advisory Committee*

Reviews and evaluates available data concerning the safety, effectiveness, and appropriate use of blood products derived from blood and serum or biotechnology which are intended for use in the diagnosis, prevention, or treatment of human diseases as well as the safety, effectiveness, and labeling of the products, on clinical and laboratory studies involving such products, on the affirmation or revocation of biological product licenses, and on the quality and relevance of FDA's research program which provides the scientific support for regulating these products.

*C. Cellular, Tissue and Gene Therapies Advisory Committee*

Reviews and evaluates available data relating to the safety, effectiveness, and appropriate use of human cells, human tissues, gene transfer therapies and xenotransplantation products which are intended for transplantation, implantation, infusion and transfer in the prevention and treatment of a broad spectrum of human diseases and in the reconstruction, repair or replacement of tissues for various conditions, as well as considers the quality and relevance of FDA's research program which provides scientific support for the regulation of these products.

*D. Vaccines and Related Biologic Products Advisory Committee*

Reviews and evaluates data concerning the safety, effectiveness, and appropriate use of vaccines and related biological products which are intended for use in the prevention, treatment, or diagnosis of human diseases, as well as considers the quality and relevance of FDA's research program which provides scientific support for the regulation of these products.

*E. Dermatologic and Ophthalmic Drugs Advisory Committee*

Reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of dermatologic and ophthalmic disorders.

*F. Gastrointestinal Drugs Advisory Committee*

Reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of gastrointestinal diseases.

*G. Pharmaceutical Science and Clinical Pharmacology Advisory Committee*

Provides advice on scientific and technical issues concerning the safety, and effectiveness of human generic drug products for use in the treatment of a broad spectrum of human diseases, and as required, any other product for which the FDA has regulatory responsibility. The committee may also review Agency sponsored intramural and extramural biomedical research programs in support of FDA's generic drug regulatory responsibilities.

*H. Psychopharmacologic Drugs Advisory Committee*

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human products for use in the practice of psychiatry and related fields.

*I. Certain Panels of the Medical Devices Advisory Committee*

Reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, advises on the classification or reclassification of devices into one of three regulatory categories; advises on

any possible risks to health associated with the use of devices; advises on formulation of product development protocols; reviews premarket approval applications for medical devices; reviews guidelines and guidance documents; recommends exemption of certain devices from the application of portions of the Federal Food, Drug, and Cosmetic Act; advises on the necessity to ban a device; and responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner of Food and Drugs on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The Panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

*J. National Mammography Quality Assurance Advisory Committee*

Advises the Agency on the following development of appropriate quality standards and regulations for mammography facilities; standards and regulations for bodies accrediting mammography facilities under this program; regulations with respect to sanctions; procedures for monitoring compliance with standards; establishing a mechanism to investigate consumer complaints; reporting new developments concerning breast imaging which should be considered in the oversight of mammography facilities. As well as determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; determining whether there will exist a sufficient number of medical physicists after October 1, 1999; and determining the costs and benefits of compliance with these requirements.

*K. Patient Engagement Advisory Committee*

Advises the Agency, on complex issues relating to medical devices, the regulation of devices, and their use by patients. The Committee may consider topics such as: Agency guidance and policies, clinical trial or registry design, patient preference study design, benefit-risk determinations, device labeling, unmet clinical needs, available alternatives, patient reported outcomes and device-related quality of life or health status issues, and other patient-related topics. The Committee will provide relevant skills and perspectives, in order to improve communication of benefits, risks, clinical outcomes, and increase integration of patient perspectives into the regulatory process for medical devices. It will perform its duties by discussing and providing advice and recommendation in ways such as: Identifying new approaches, promoting innovation, recognizing unforeseen risks or barriers, and identifying unintended consequences that could result from FDA policy.

## II. Criteria for Members

Persons nominated for membership as consumer representatives on committees or panels should meet the following criteria: (1) Demonstrate an affiliation with and/or active participation in consumer or community-based organizations, (2) be able to analyze technical data, (3) understand research design, (4) discuss benefits and risks, and (5) evaluate the safety and efficacy of products under review. The consumer representative should be able to represent the consumer perspective on issues and actions before the advisory committee; serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations; and facilitate dialogue with the advisory committees on scientific issues that affect consumers.

## III. Selection Procedures

Selection of members representing consumer interests is conducted through procedures that include the use of organizations representing the public interest and public advocacy groups. These organizations recommend nominees for the Agency's selection. Representatives from the consumer health branches of Federal, State, and local governments also may participate in the selection process. Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests should send a letter stating that interest to FDA (see **ADDRESSES**) within 30 days of publication of this document.

Within the subsequent 30 days, FDA will compile a list of consumer organizations that will participate in the selection process and will forward to each such organization a ballot listing at least two qualified nominees selected by the Agency based on the nominations received, together with each nominee's current curriculum vitae or résumé. Ballots are to be filled out and returned to FDA within 30 days. The nominee receiving the highest number of votes ordinarily will be selected to serve as the member representing consumer interests for that particular advisory committee or panel.

## IV. Nomination Procedures

Any interested person or organization may nominate one or more qualified persons to represent consumer interests on the Agency's advisory committees or panels. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee and a signed copy of the *Acknowledgement and Consent* form available at the FDA Advisory Nomination Portal (see **ADDRESSES** section of this document), and a list of consumer or community-based organizations for which the candidate can demonstrate active participation.

Nominations must also specify the advisory committee(s) or panel(s) for which the nominee is recommended. In addition, nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest. Members will be invited to serve for terms up to 4 years.

FDA will review all nominations received within the specified timeframes and prepare a ballot containing the names of qualified nominees. Names not selected will remain on a list of eligible nominees and be reviewed periodically by FDA to determine continued interest. Upon selecting qualified nominees for the ballot, FDA will provide those

consumer organizations that are participating in the selection process with the opportunity to vote on the listed nominees. Only organizations vote in the selection process. Persons who nominate themselves to serve as voting or nonvoting consumer representatives will not participate in the selection process.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00124 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2018–N–3240]**

### List of Bulk Drug Substances for Which There Is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act; Reopening of the Comment Period

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) is reopening the comment period for a notice that appeared in the **Federal Register** of July 31, 2020, in which FDA identified certain bulk drug substances (active pharmaceutical ingredients) that FDA has considered and proposes to include or not include on the list of bulk drug substances for which there is a clinical need (the 503B Bulks List). The Agency is taking this action in response to a request received during the initial comment period, which asked the Agency to allow interested persons additional time to submit comments.

**DATES:** FDA is reopening the comment period on the notice published on July 31, 2020 (85 FR 46126). Submit either electronic or written comments by February 8, 2021.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before February 8, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 8, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

*Instructions:* All submissions received must include the Docket No. FDA–2018–N–3240 for ''List of Bulk Drug Substances for Which There is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

**FOR FURTHER INFORMATION CONTACT:** Dominic Markwordt, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5104, Silver Spring, MD 20993, 301–796–9349.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of July 31, 2020 (85 FR 46126), FDA published a notice that identified four bulk drug substances that FDA considered and proposed to include on the 503B Bulks List: diphenylcyclopropenone (DPCP), glycolic acid, squaric acid dibutyl ester (SADBE), and trichloroacetic acid (TCA). The July 31, 2020, notice also identified 19 bulk drug substances that FDA considered and proposed not to include on the 503B Bulks List: Diazepam, dobutamine hydrochloride

(HCl), dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl. Interested persons were originally given until September 29, 2020, to comment on FDA's proposals.

During the comment period for the July 31, 2020, notice, FDA received a request to allow interested persons additional time to comment. The requester asserted that the time period of 60 days was insufficient to respond fully to FDA's specific requests for comments and noted the commenter's obligations to respond to the exigencies of COVID–19 pandemic.

FDA has considered the request and other relevant factors, and accordingly is reopening the comment period for the July 31, 2020, notice for 30 days, until February 8, 2021. The Agency believes that an additional 30 days will allow adequate time for interested persons to submit comments.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00123 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2020–N–2300]**

### Determination That ARALEN (Chloroquine Phosphate) Oral Tablets, 500 Milligrams, and Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs that refer to the products as long as they meet relevant legal and regulatory requirements.

**FOR FURTHER INFORMATION CONTACT:** Stacy Kane, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6236, Silver Spring, MD 20993–0002, 301–796–8363, *Stacy.Kane@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, a drug is removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the Agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved, (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved, and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for safety or effectiveness reasons, the Agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in the table are no longer being marketed.

| Application No. | Drug name | Active ingredient(s) | Strength(s) | Dosage form/route | Applicant |
|---|---|---|---|---|---|
| NDA 006002 | ARALEN | Chloroquine Phosphate. | 500 milligrams (mg) | Tablet; Oral | Sanofi-Aventis U.S. LLC. |
| NDA 006134 | DOLOPHINE HYDROCHLORIDE. | Methadone Hydrochloride. | 5 mg; 10 mg | Tablet; Oral | Hikma Pharmaceuticals PLC. |
| NDA 007409 | BENTYL | Dicyclomine Hydrochloride. | 10 mg | Capsule; Oral | Allergan Pharmaceuticals. |
| | | Dicyclomine Hydrochloride. | 20 mg | Tablet; Oral. | |
| NDA 008085 | Methotrexate Sodium | Methotrexate Sodium | Equivalent to (EQ) 2.5 mg Base | Tablet; Oral | DAVA Pharmaceuticals, Inc. |
| NDA 008678 | Isoniazid | Isoniazid | 100 mg; 300 mg | Tablet; Oral | Sandoz. |
| NDA 012945 | DIAMOX | Acetazolamide | 500 mg | Extended-Release Capsule; Oral. | Teva Branded Pharmaceutical Products. |
| NDA 014103 | ONCOVIN | Vincristine Sulfate | 1 mg/milliliter (mL); 1 mg/Vial; 5 mg/Vial. | Injectable; Injection | Eli Lilly and Co. |
| NDA 016792 | SURMONTIL | Trimipramine Maleate | EQ 25 mg/Base; EQ 50 mg/Base; EQ 100 mg/Base. | Capsule; Oral | Teva Women's Health, Inc. |

| Application No. | Drug name | Active ingredient(s) | Strength(s) | Dosage form/route | Applicant |
|---|---|---|---|---|---|
| NDA 016801 | XYLOCAINE PRESERVATIVE FREE. | Lidocaine Hydrochloride. | 1%; 2%; 4%; 10%; 20% | Injectable; Injection | Fresenius Kabi USA, LLC. |
| NDA 018238 | MICRO–K | Potassium Chloride | 8 milliequivalents (mEq); 10 mEq. | Extended-Release Capsule; Oral. | Nesher Pharmaceuticals LLC. |
| NDA 019568 | DERMATOP | Prednicarbate | 0.10% | Ointment; Topical | Valeant Pharmaceuticals. |
| NDA 020192 | LAMISIL | Terbinafine Hydrochloride. | 1% | Cream; Topical | Novartis. |
| NDA 020482 | PRECOSE | Acarbose | 25 mg; 50 mg; 100 mg | Tablet; Oral | Bayer Healthcare. |
| NDA 020591 | TARKA | Trandolapril; Verapamil Hydrochloride. | 1 mg; 240 mg | Extended-Release Tablet; Oral. | AbbVie Inc. |
| NDA 020635 | LEVAQUIN | Levofloxacin | EQ 500 mg/20 mL; EQ 750 mg/30 mL. | Injectable; Injection | Janssen Pharmaceuticals, Inc. |
| NDA 020823 | EXELON | Rivastigmine Tartrate | EQ 1.5 mg Base; EQ 3 mg Base; EQ 4.5 mg Base; EQ 6 mg Base. | Capsule; Oral | Novartis. |
| NDA 020920 | NATRECOR | Nesiritide | 1.5 mg/Vial | For Solution; Intravenous. | Scios Inc. |
| NDA 021549 | EMEND | Aprepitant | 40 mg | Capsule; Oral | Merck. |
| NDA 021590 | FAZACLO ODT | Clozapine | 12.5 mg; 25 mg; 100 mg; 150 mg; and 200 mg. | Orally Disintegrating Tablet; Oral. | Jazz Pharmaceuticals PLC. |
| NDA 202535 | PREPOPIK | Citric Acid, Magnesium Oxide, and Sodium Picosulfate. | 12 grams (g)/Packet; 3.5 g/Packet; 10 mg/Packet. | For Solution; Oral | Ferring Pharmaceuticals Inc. |

FDA has reviewed its records and, under § 314.161, has determined that the drug products listed were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the Agency will continue to list the drug products in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the NDAs and ANDAs listed are unaffected by the discontinued marketing of the products subject to those NDAs and ANDAs. Additional ANDAs that refer to these products may also be approved by the Agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: January 4, 2021.

**Lauren K. Roth,**

*Acting Principal Associate Commissioner for Policy.*

[FR Doc. 2021–00118 Filed 1–7–21; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Meeting of the National Advisory Committee on the National Health Service Corps

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice announces that the National Advisory Committee on the National Health Service Corps (NACNHSC) will hold public meetings for the 2021 calendar year (CY). Information about NACNHSC, agendas, and materials for these meetings can be found on the NACNHSC website at *https://nhsc.hrsa.gov/about/national-advisory-council-nhsc/index.html.*

**DATES:** NACNHSC meetings will be held on

- March 16, 2021, 9:00 a.m.–5:00 p.m. Eastern Time (ET) and March 17, 2021, 9:00 a.m.–2:00 p.m. ET;
- June 22, 2021, 9:00 a.m.–5:00 p.m. ET and June 23, 2021, 9:00 a.m.–2:00 p.m. ET;
- November 9, 2021, 9:00 a.m.–5: 00 p.m. ET and November 10, 2021, 9:00 a.m.–2:00 p.m. ET.

**ADDRESSES:** Meetings may be held in-person, by teleconference, and/or Adobe Connect webinar. For updates on how the meeting will be held, visit the NACNHSC website 30 business days before the date of the meeting, where instructions for joining meetings either in-person or remotely will also be posted. In-person NACNHSC meetings will be held at 5600 Fishers Lane, Rockville, Maryland 20857. For meeting information updates, go to the NACNHSC website meeting page at *https://nhsc.hrsa.gov/nac/meetings.html.*

**FOR FURTHER INFORMATION CONTACT:** Diane Fabiyi-King (DFO), Division of National Health Service Corps, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; 301–443–3609; or *NHSCAdvisoryCouncil@hrsa.gov.*

**SUPPLEMENTARY INFORMATION:** NACNHSC provides advice and recommendations to the Secretary of HHS (Secretary) on policy, program development, and other matters of significance concerning the activities under Subpart II, Part D of Title III of the Public Health Service Act (42 U.S.C. 254d–254k). NACNHSC designates areas of the United States with health professional shortages and assigns National Health Service Corps clinicians to improve the delivery of health services in health professional shortage areas. Since priorities dictate meeting times and agenda items, be advised that start times, end times, and agenda items are subject to change. For CY 2021 meetings, agenda items may include, but are not limited to, the identification of NACNHSC priorities for future

program issues and concerns; propose policy changes using the varying levels of expertise represented on the Council to advise on specific program areas; updates from clinician workforce experts; and education and practice improvement in the training development of primary care clinicians. More general items may include: Presentations and discussions on the current and emerging needs of health workforce; public health priorities; healthcare access and evaluation; NACNHSC-approved sites; HRSA priorities and other federal health workforce and education programs that impact the NACNHSC.

Refer to the NACNHSC website listed above for all current and updated information concerning the CY 2021 NACNHSC meetings, including draft agendas and meeting materials that will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to the NACNHSC should be sent to Diane Fabiyi-King using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Diane Fabiyi-King using the contact information listed above at least 10 business days before the meeting(s) they wish to attend.

If a meeting is held in-person, it will occur in a federal government building and attendees must go through a security check to enter. Non-U.S. Citizen attendees must notify HRSA of their planned attendance at an in-person meeting at least 20 business days prior to the meeting in order to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2021–00093 Filed 1–7–21; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Meeting of the Council on Graduate Medical Education

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice announces that the Council on Graduate Medical Education (COGME or Council) will hold public meetings for the 2021 calendar year (CY). Information about COGME, agendas, and materials for these meetings can be found on the COGME website at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/index.html.*

**DATES:** COGME meetings will be held on

- April 14, 2021, 8:30 a.m.–5:00 p.m. Eastern Time (ET) and April 15, 2021, 8:30 a.m.–2:00 p.m. ET;
- August 19, 2021, 10:00 a.m.–5:00 p.m. ET.

**ADDRESSES:** Meetings may be held in-person, by teleconference, and/or Adobe Connect webinar. For updates on how the meeting will be held, visit the COGME website 30 business days before the date of the meeting where instructions for joining meetings either in-person or remotely will also be posted. In-person meetings will be held at 5600 Fishers Lane, Rockville, Maryland 20857. For meeting information updates, go to the COGME website meeting page at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/meetings/index.html.*

**FOR FURTHER INFORMATION CONTACT:** Shane Rogers, Designated Federal Official, Division of Medicine and Dentistry, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Room 15N142, Rockville, Maryland 20857; 301–443–5260; or *SRogers@hrsa.gov.*

**SUPPLEMENTARY INFORMATION:** COGME makes recommendations to the Secretary of HHS (Secretary) and Congress on policy, program development, and other matters of significance as specified by section 762 of Title VII of the Public Health Service (PHS) Act. Issues addressed by COGME include the supply and distribution of the physician workforce in the United States, including any projected shortages or excesses; foreign medical school graduates; the nature and financing of undergraduate and graduate medical education; appropriation levels for certain programs under Title VII of the PHS Act; and deficiencies in databases of the supply and distribution of the physician workforce and postgraduate programs for training physicians. COGME submits reports to the Secretary of HHS; the Senate Committee on Health, Education, Labor and Pensions; and the House of Representatives Committee on Energy and Commerce. Additionally, COGME encourages entities providing graduate medical education to conduct activities to voluntarily achieve the recommendations of the Council. Since priorities dictate meeting times, be advised that start times, end times, and agenda items are subject to change. For CY 2021 meetings, agenda items may include, but are not limited to, discussion on topics surrounding rural health workforce and training. Refer to the COGME website listed above for all current and updated information concerning the CY 2021 COGME meetings, including draft agendas and meeting materials that will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to COGME should be sent to Shane Rogers using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Shane Rogers using the contact information listed above at least 10 business days before the meeting(s) they wish to attend.

If a meeting is held in-person, it will occur in a federal government building and attendees must go through a security check to enter. Non-U.S. citizen attendees must notify HRSA of their planned attendance at an in-person meeting at least 20 business days prior to the meeting in order to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2021–00058 Filed 1–7–21; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Meeting of the Advisory Committee on Heritable Disorders in Newborns and Children

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** In accordance with section 1111(g) of the Public Health Service (PHS) Act, and the Federal Advisory Committee Act, this notice announces that the Advisory Committee on Heritable Disorders in Newborns and Children (ACHDNC or Committee) has scheduled a public meeting to be held on Thursday, February 11, 2021, and Friday, February 12, 2021. Information about the ACHDNC and the agenda for this meeting can be found on the ACHDNC website at *https://www.hrsa.gov/advisory-committees/heritable-disorders/index.html.*

**DATES:** Thursday, February 11, 2021, 10:00 a.m.–3:00 p.m. Eastern Time (ET), and Friday, February 12, 2021, 10:00 a.m.–2:00 p.m. ET.

**ADDRESSES:** This meeting will be held via webinar. While this meeting is open to the public, advance registration is required. Please visit the ACHDNC website for information on registration: *https://www.hrsa.gov/advisory-committees/heritable-disorders/index.html.* The deadline for registration is 12:00 p.m. ET on February 10, 2021. Instructions for accessing the meeting via webcast will be provided upon registration.

**FOR FURTHER INFORMATION CONTACT:** Alaina Harris, Maternal and Child Health Bureau, HRSA, 5600 Fishers Lane, Room 18W66, Rockville, Maryland 20857; 301–443–0721; or *ACHDNC@hrsa.gov.*

**SUPPLEMENTARY INFORMATION:** ACHDNC provides advice and recommendations to the Secretary of HHS (Secretary) on the development of newborn screening activities, technologies, policies, guidelines, and programs for effectively reducing morbidity and mortality in newborns and children having, or at risk for, heritable disorders. The ACHDNC reviews and reports regularly on newborn and childhood screening practices, recommends improvements in the national newborn and childhood screening programs, and fulfills requirements stated in the authorizing legislation. In addition, ACHDNC's recommendations regarding inclusion of additional conditions for screening, following adoption by the Secretary, are evidence-informed preventive health services provided for in the comprehensive guidelines supported by HRSA through the Recommended Uniform Screening Panel (RUSP) pursuant to section 2713 of the PHS Act (42 U.S.C. 300gg-13). Under this provision, non-grandfathered group health plans and health insurance issuers offering group or individual health insurance are required to provide insurance coverage without cost-sharing (a co-payment, co-insurance, or deductible) for preventive services for plan years (*i.e.,* policy years) beginning on or after the date that is one year from the Secretary's adoption of the condition for screening.

During the February 11–12, 2021, meeting, ACHDNC will hear from experts in the fields of public health, medicine, heritable disorders, rare disorders, and newborn screening. Agenda items include the following:

(1) A presentation on potential processes for reviewing conditions on the RUSP;

(2) Potential revisions to the condition nomination form;

(3) Continuity of operations planning (within the context of COVID–19);

(4) Innovations in long-term follow-up for conditions identified through newborn screening; and,

(5) Workgroup updates.

The agenda for this meeting does not include any plans for recommending a condition for inclusion in the RUSP. Agenda items are subject to change as priorities dictate. Information about the ACHDNC, including a roster of members and past meeting summaries, are also available on the ACHDNC website.

Members of the public also will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting. Oral comments will be taken in the order they are requested and may be limited as time allows. Requests to provide a written statement or make oral comments to the ACHDNC must be submitted via the registration website by Friday, February 5, 2021, at 12:00 p.m. ET.

Individuals who need special assistance or another reasonable accommodation should notify Alaina Harris at the address and phone number listed above at least 10 business days prior to the meeting.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2021–00095 Filed 1–7–21; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Review Subcommittee Member Conflict Applications.

*Date:* March 3, 2021.

*Time:* 2:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700 B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Luis Espinoza, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2109, Bethesda, MD 20892, (301) 443–8599, *espinozala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: January 4, 2021.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2021–00087 Filed 1–7–21; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Ocean Energy Management

**[Docket No. BOEM–2020–0066]**

### Notice of Public Meetings and of Availability of a Draft Environmental Impact Statement for Deepwater South Fork LLC's Proposed Wind Energy Facility Offshore Rhode Island

**AGENCY:** Bureau of Ocean Energy Management, Interior.

**ACTION:** Notice of availability of a Draft Environmental Impact Statement and public meetings.

**SUMMARY:** In accordance with regulations issued under the National Environmental Policy Act, the Bureau of Ocean Energy Management (BOEM) is announcing the availability of the South Fork Wind Farm (SFWF) and South Fork Export Cable (SFEC) Project Draft Environmental Impact Statement (DEIS) prepared for a construction and operations plan (COP) submitted by Deepwater South Fork LLC (South Fork). The DEIS analyzes reasonably foreseeable effects from the construction, operation and maintenance, and eventual decommissioning of up to 15 wind turbine generators, an offshore substation, inter-array cables in lease area OCS–A 0517, and the installation of an export cable from the lease area to Suffolk County, Long Island (collectively, the ''Project''). This notice of availability (NOA) announces the start of the public review and comment period, as well as the times and dates for virtual public meetings, on the DEIS. After BOEM holds the public meetings and addresses comments provided, BOEM will publish a final environmental impact statement.

**DATES:** Comments should be submitted no later than February 22, 2021. BOEM's virtual public meetings will be held at the following dates and times (Eastern):

Tuesday, February 9, 2021; 1:00–3:00 p.m.;

Thursday, February 11, 2021; 5:00–7:00 p.m.; and

Tuesday, February 16, 2021; 5:00–7:00 p.m.

Registration for the virtual public meetings may be completed here: *https://www.boem.gov/renewable-energy/south-fork-wind-farm-deis-virtual-meetings* or by calling (703) 787–1662.

**ADDRESSES:** The DEIS and detailed information about the proposed wind energy facility, including the COP, can be found on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/south-fork.* Comments can be submitted in any of the following ways:

- In written form by mail, enclosed in an envelope labeled ''South Fork COP DEIS'' and addressed to Program Manager, Office of Renewable Energy, Bureau of Ocean Energy Management, 45600 Woodland Road, Sterling, Virginia 20166. Comments must be received or postmarked no later than February 22, 2021; or
- Through the regulations.gov web portal: Navigate to htttp://*www.regulations.gov* and search for Docket No. BOEM–2020–0066. Click on the ''Comment Now!'' button to the right of the document link. Enter your information and comment, then click ''Submit.''

**FOR FURTHER INFORMATION CONTACT:** For information on the DEIS or BOEM's policies associated with this notice, please contact: Michelle Morin, Chief, Environment Branch for Renewable Energy, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787–1722 or *michelle.morin@boem.gov.*

**SUPPLEMENTARY INFORMATION:**

*Proposed Action:* South Fork seeks approval to construct, operate, maintain, and eventually decommission the Project—a wind energy facility on the Outer Continental Shelf (OCS) offshore Rhode Island and an associated export cable. The Project would be developed within the range of design parameters outlined in the South Fork COP, subject to applicable mitigation measures. The SFWF includes up to 15 wind turbine generators with a nameplate capacity of 6 to 12 megawatts per turbine, submarine cables between the wind turbine generators (inter-array cables), and an offshore substation, all located entirely on the OCS in Federal waters in Lease Area OCS–A 0517, approximately 19 miles southeast of Block Island, Rhode Island, and 35 miles east of Montauk Point, New York. The SFEC is an alternating current electric cable that will connect the wind farm to the existing mainland electric grid in East Hampton, New York. The Project also includes an operations and maintenance facility located onshore at either Montauk in East Hampton, New York, or Quonset Point in North Kingstown, Rhode Island, and a new facility that will interconnect the SFEC with the Long Island Power Authority electric transmission and distribution system in the town of East Hampton, New York.

The DEIS analyzes reasonably foreseeable effects from the Project. The analysis includes a review of resource-specific baseline conditions and future offshore wind activities, and, using the methodology and assumptions outlined in the document, assesses cumulative impacts that could result from the incremental impact of the proposed action and action alternatives as defined in the DEIS when combined with past, present, or reasonably foreseeable activities, including other potential future offshore wind activities.

*Alternatives:* BOEM considered 22 alternatives when preparing the DEIS and carried forward four for further analysis in the DEIS. These four alternatives include three action alternatives and the No Action alternative. Eighteen alternatives were not further analyzed because they did not meet the purpose and need for the proposed action or did not meet screening criteria. The screening criteria included consistency with law and regulations; operational, technical, and economic feasibility; environmental impact; and geographical considerations.

*Availability of the DEIS:* The DEIS, South Fork COP, and associated information are available on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/south-fork.* BOEM distributed digital copies of the DEIS to all parties listed in Appendix B, which includes the location of all libraries receiving a copy. If you require a paper copy, BOEM will provide one upon request, if copies are available. You may request a DVD or paper copy of the DEIS by calling (703) 787–1662.

*Cooperating Agencies:* Ten agencies or governmental entities participated as cooperating agencies in preparing the DEIS: Bureau of Safety and Environmental Enforcement; U.S. Environmental Protection Agency; National Oceanic and Atmospheric Administration; U.S. Army Corps of Engineers; U.S. Coast Guard; Massachusetts Office of Coastal Zone Management; Rhode Island Department of Environmental Management; Rhode Island Coastal Resource Management Council; Town of East Hampton, and the Trustees of the Freeholders and Commonality of the Town of East Hampton.

BOEM does not consider anonymous comments. Please include your name and address as part of your submittal. BOEM makes all comments, including the names and addresses of respondents, available for public review during regular business hours. Individual respondents may request that BOEM withhold their names or addresses from the public record; however, BOEM cannot guarantee that it will be able to do so. If you wish your name or address to be withheld, you

must state your preference prominently at the beginning of your comment. All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public inspection in their entirety.

**Authority:** This NOA was prepared under Council on Environmental Quality NEPA regulations, 40 CFR 1500–1508 (as in place before July 16, 2020) and published in accordance with 40 CFR 1506.6 and 43 CFR 46.435.

**William Yancey Brown,**

*Chief Environmental Officer, Bureau of Ocean Energy Management.*

[FR Doc. 2021–00100 Filed 1–7–21; 8:45 am]

**BILLING CODE 4310–MR–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Safety and Environmental Enforcement

**[Docket ID BSEE–2020–0015; 21XE8370SD// EEGG600000//ED1OS0000.ERD000]**

### Notice of Public Comment Period

**AGENCY:** Bureau of Safety and Environmental Enforcement (BSEE), Interior.

**ACTION:** Notice of public comment period.

**SUMMARY:** The U.S. Department of the Interior (DOI), Bureau of Safety and Environmental Enforcement (BSEE) is conducting an independent external peer review of a recent study titled, *OSRR 1063: Bureau of Safety and Environmental Enforcement (BSEE) Report: Computational Fluid Dynamics (CFD) Model for Predicting Wellhead Oil-Burning Efficiency at Bench and Intermediate Scales: Interim Report* (July 30, 2020). This peer review will aid BSEE gather input from the scientific community on the technical methodologies and results in this interim final report. Background information on BSEE's Oil Spill Response Research (OSRR) 1063 study is provided in the **SUPPLEMENTARY INFORMATION** section below. Information regarding BSEE's peer-review process is available at: *https://www.bsee.gov/what-we-do/research/peer review.*

**DATES:** Interested persons are invited to submit comments on or before February 8, 2021.

**ADDRESSES:** Send your comments on this notice by either of the following methods listed below:

• Electronically go to *http://www.regulations.gov.* In the Search box, enter BSEE–2020–0015 then click search. Follow the instructions to submit public comments and view all related materials. We will post all comments.

Written comments should be submitted on or before February 8, 2021. Relevant public comments within the BSEE Charge for the scope of this peer review (outline below) and directly addressing the scientific and technical issues in BSEE's 13 Charge Questions (outlined below) will be provided to the peer reviewers. BSEE may not be able to fully consider comments submitted after February 8, 2021.

Submit your comments, identified by name, contact (phone, and/or email) by one of the following methods:

• *Mail:* Karen N. Stone, Program Manager, U.S. Department of the Interior, Bureau of Safety and Environmental Enforcement, Oil Spill Preparedness Division, Response Research Branch, 45600 Woodland Road, VAE–OSPD, Sterling, VA 20166.

*Email: karen.stone@bsee.gov.* Do not submit information considered to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute to BSEE electronically through email. Please contact the BSEE staff listed under the **FOR FURTHER INFORMATION CONTACT** section for special instructions before submitting comments considered to be CBI or otherwise protected.

To provide public involvement in this peer-review process, BSEE is announcing and inviting written public comments on the scientific and technical merit of the interim OSRR 1063 report. The interim OSRR 1063 report is available on BSEE's OSRR website located at: *https://www.bsee.gov/what-we-do/research/oil-spill-preparedness/oil-spill-response-research.*

**FOR FURTHER INFORMATION CONTACT:** Karen N. Stone, Program Manager, U.S. Department of the Interior, Bureau of Safety and Environmental Enforcement, Oil Spill Preparedness Division, Response Research Branch, 45600 Woodland Road, VAE–OSPD, Sterling, VA 20166.

*Telephone number:* (703) 787–1810.

*Email address: karen.stone@bsee.gov.*

**SUPPLEMENTARY INFORMATION:**

### BSEE Charge for the Scope of This Peer Review

In order to focus the peer-review process effectively on the 13 Charge Questions, BSEE has carefully defined the scope of this peer review for the Interim report of the BSEE Study titled, *OSRR 1063: Bureau of Safety and Environmental Enforcement (BSEE) Report: Computational Fluid Dynamics (CFD) Model for Predicting Wellhead Oil-Burning Efficiency at Bench and Intermediate Scales: Interim Report* (July 30, 2020). Written comments should stay within the BSEE Scope defined below.

The scope of this peer review focuses only on the scientific and technical merit of the assumptions, inputs, methodologies, modeling with experimental validation, and results for the BSEE study titled, *OSRR 1063: BSEE Report: Computational Fluid Dynamics (CFD) Model for Predicting Wellhead Oil-Burning Efficiency at Bench and Intermediate Scales: Interim Report* (July 30, 2020). This peer review is scientific and technical in nature and includes reviewing the methods, assumptions, data quality, the strengths of any inferences made, and the overall strengths and limitations of the study. The peer-review scope includes the material, fabrication, computations, testing, engineering factors, modeling with experimental validation, results, and final recommendations generated from the OSRR 1063 study.

The following are considered Out-of-Scope for this peer review and will not be considered during this peer-review process:

• General comments related to intentional wellhead ignition as a primary response method, because this peer review is focused only on the methods and approach for predicting wellhead burn efficiency at the bench and intermediate scales.

• Comments on, or suggestions for, alternate modeling methods to predict wellhead burn efficiencies except for comments on any omissions or errors identified in the specific methods used for modeling and experimental validations of the model in the OSRR 1063 study referenced above because this peer review focuses on the research already completed for this OSRR 1063 study.

• Comments related to BSEE policies, decisions, or current or proposed BSEE regulations.

Public comments should focus on the scientific and technical merit of the OSRR 1063 study and be organized under BSEE's 13 Charge Questions.

### BSEE Charge Questions

1. Were the objectives of the study clearly defined? If not, what are your recommendations for improving the description of this study's objectives?

2. Were the assumptions regarding wellhead conditions and two-phase wellbore flow (including film thickness and instability, liquid entrainment, and

droplet diameter and its influence on wellhead ejection behavior) adequately characterized? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

3. Was the physical model for multi-phase flow adequately developed to capture the liquid droplet phase and the gas-phase flow field? Were the soot and radiation models adequately characterized? Were Lagrangian droplet dynamics and thermophysics adequately incorporated into the model? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

4. Does the droplet injection model adequately simulate realistic diameters and velocities of two-phase, high-speed flows that would occur during a wellhead blowout event? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

5. Does the validation process capture the controlling physical properties to a sufficient level of accuracy, including transport and boundary conditions at the bench- and intermediate-scales for both gas-phase and two-phase turbulent spray? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

6. Were the phase doppler anemometry and diffuse back-light illumination imaging diagnostic methods (6.1.1 and 6.1.2 below) for the droplet behavior measurements appropriately designed, clearly described, and adequate to capture droplet behavior for the Gas Phase and Two-Phase Spray Flame? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

6.1.1. Phase Doppler Anemometry

6.1.2. Diffuse Back-Illumination Imaging

7. Were the diagnostic methods (7.1.1 and 7.1.2 below) for the temperature measurements appropriately designed, clearly described, and adequate to capture temperature for the Gas Phase and Two-Phase Spray Flame? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

7.1.1. Coherent Anti-Stokes Raman Spectrometry-based Thermometry (CARS)

7.1.2. 3-Color High-Speed Pyrometry

8. Do the results adequately characterize evidence of the droplet characteristics, including droplet breakup, the droplet size (diameter), droplet speed, and the duration of a droplet in fire (bench- and intermediate-scales)? Does the research product accurately expand predictions of droplet diameters beyond current limited validated ranges? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

9. Does the research product accurately characterize the impact of two-phase flow regimes (bubble, slug, and churn) on the effluent plume (bench- and intermediate-scales)? Were there any apparent strengths, weaknesses, omissions, or errors? Provide an explanation for your answers.

10. Does the research product adequately address how the wellbore flow would influence the ejected spray plume behavior, which directly influences how the oil and gas burns and how much will either fall back to the surface or remain vapor? Were there any apparent strengths, weaknesses, omissions, or errors? Explain your answers.

11. Does the research product accurately predict the length of fire plume, location of flame anchoring, height of flame, width/angle, expansion, etc.? Were there any apparent strengths, weaknesses, omissions, or errors? Explain your answers.

12. Does the research product determine the primary mechanism driving burn efficiency?

13. Were the conclusions based on the OSRR 1063 study findings in the report logical and appropriate based on the results? What other conclusions related to the study were made and are appropriate? Are there any additional study findings or conclusions that could be drawn from the study? Provide an explanation for your answers.

**Background on OSRR 1063 Study**

BSEE oversees oil spill planning and preparedness for oil and gas exploration, development, and production facilities in both state and Federal offshore waters of the United States. BSEE's Oil Spill Preparedness Division (OSPD) is responsible for promulgating regulations pursuant to BSEE's delegated authority under the Clean Water Act, as amended by the Oil Pollution Act of 1990 (33 U.S.C. 1321), and implementing those regulations (30 CFR part 254).

To receive the necessary approvals under 30 CFR part 254, operators of oil and gas facilities operating seaward of the coastline must demonstrate that they are prepared to respond to a loss of well control event and a ''worst case'' discharge release (30 CFR 254.26; 254.51–.53). For decades, intentional wellhead ignition has been viewed as a possible source control method for well-head blowouts in ice-bound environments. BSEE is researching this response method to better understand its efficiencies and limitations in the North Slope area of Alaska. As part of this review process, BSEE contracted the U.S. Naval Research Laboratory (NRL) to first conduct a review of an interested party's report and related scientific literature and provide preliminary technical guidance on the feasibility of wellhead burning as a mitigation method. The review suggests scientific evidence is lacking to fully support claims that wellhead burning would be highly efficient and would result in little to no unburned oil fallout for the proposed project. BSEE then contracted NRL to conduct a scientific research project. The research project's primary objective was to develop a CFD model of wellhead burning validated with experimental data at multiple scales. BSEE is seeking an independent peer review of the interim final NRL report for this research program titled *OSRR 1063: BSEE Report: CFD Model for Predicting Wellhead Oil-Burning Efficiency at Bench and Intermediate Scales: Interim Report* (July 30, 2020).

BSEE considers this study to be a highly influential scientific assessment.

**Scott A. Angelle,**

*Director, Bureau of Safety and Environmental Enforcement.*

[FR Doc. 2021–00148 Filed 1–7–21; 8:45 am]

**BILLING CODE 4310–VH–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 731–TA–1469 (Final)]**

### Wood Mouldings and Millwork Products From Brazil; Termination of Investigation

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** On January 4, 2021, the Department of Commerce published notice in the **Federal Register** of a negative final determination of sales at less than fair value in connection with the subject investigation concerning Brazil (86 FR 70). Accordingly, the antidumping duty investigation concerning wood mouldings and millwork products from Brazil (Investigation No. 731–TA–1469 (Final)) is terminated.

**DATES:** January 4, 2021.

**FOR FURTHER INFORMATION CONTACT:** Keysha Martinez (202–205–2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

*Authority:* This investigation is being terminated under authority of title VII of the Tariff Act of 1930 and pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)). This notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: January 5, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–00140 Filed 1–7–21; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1184]**

## Certain Shaker Screens for Drilling Fluids, Components Thereof, and Related Materials; Commission Determination To Review-nn-Part an Initial Determination Granting Summary Determination of Violation of Section 337; Request for Written Submissions on Remedy, the Public Interest, and Bonding

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part an initial determination (''ID'') (Order No. 20) issued by the presiding administrative law judge (''ALJ'') granting a motion for summary determination of violation of section 337. The Commission requests written submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below.

**FOR FURTHER INFORMATION CONTACT:** Benjamin S. Richards, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5453. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 21, 2019, based on a complaint, as amended, filed by M–I L.L.C. of Houston, Texas (''M–I''). 84 FR 64339 (Nov. 21, 2019). The amended 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 shaker screens for drilling fluids, components thereof, and related marketing materials by reason of infringement of: (1) Certain claims of U.S. Patent Nos. 7,210,582 (''the '582 patent''), 7,810,649 (''the '649 patent''), and (''the '735 patent'');; and (2) U.S. Trademark Registration Nos. 2,151,736 and 2,744,891. *Id.* The Commission's notice of investigation named six respondents, including Anping Shengjia Hardware Mesh Co., Ltd. (''SJ Screen'') and Hebei Hengying Wire Cloth Co. Ltd (''Hengying Wire Cloth'') (collectively the ''Defaulting Respondents''). *Id.* at 64339–40. The Office of Unfair Import Investigations (''OUII'') is participating in this investigation. *Id.* at 64340.

On February 5, 2020, the Commission found SJ Screen and Hengying Wire Cloth in default. Order No. 10, *unreviewed,* Notice, EDIS Doc. ID 704161 (Mar. 5, 2020). Thereafter, and after the termination of the other remaining respondents by consent order, *see* Order No. 8, *unreviewed,* Notice, EDIS Doc. ID 701736 (Feb. 6, 2020); Order No. 14, *unreviewed,* Notice, EDIS Doc. ID 708798 (Apr. 23, 2020), M–I withdrew all of its trademark-based allegations, as well as claims 2–11 of the '582 patent; claims 2–7 and 9 of the '649 patent; and claims 2–9, 13, 16, and 18–19 of the '735 patent from the investigation. *See* Order No. 19, *unreviewed,* Notice, EDIS Doc. ID 720447 (Sept. 24, 2020).

On August 27, 2020, M–I filed a motion for summary determination that the Defaulting Respondents violated section 337 and that M–I satisfies the domestic industry requirement of section 337. The motion sought issuance of a general exclusion order (''GEO'') and imposition of a one hundred percent (100%) bond on accused products imported during the Presidential review period. On September 16, 2020, OUII filed a response supporting M–I's motion, including the remedial relief requested therein.

On November 19, 2020, the ALJ issued the subject ID granting M–I's motion and recommending issuance of a GEO and imposition of a bond in the amount of 100 percent of the entered value of infringing products. Specifically, the ID found that (1) the Commission has jurisdiction over the products, the parties, and the investigation; (2) the importation requirement is satisfied; (3) M–I has standing to bring this investigation; (4) all of the remaining asserted claims are infringed by one or more of the Defaulting Respondents' products; and (5) M–I has satisfied the domestic industry requirement of section 337. Additionally, the ALJ recommended that the Commission issue a GEO and impose a bond in the amount of one hundred percent (100%) of the entered value of infringing articles imported during the period of Presidential review.

The Commission has determined to review the ID's finding that M–I's investments in plant and equipment and M–I's employment of labor and capital are significant under section 337(a)(3)(A) and (B). The Commission has determined not to review the remainder of the ID.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia,* (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving

other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843, Comm'n Op. at 7–10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order 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. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

*Written Submissions:* Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In its initial submission, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the Asserted Patents expire, the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on January 19, 2021. Reply submissions must be filed no later than the close of business on January 26, 2021. 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. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337–TA–1184) in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/documents/handbook_on_filing_procedures.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 any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on January 4, 2021.

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: January 4, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–00086 Filed 1–7–21; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Electronic Devices with Wireless Connectivity, Components Thereof, and Products Containing Same, DN 3520;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Ericsson Inc., Telefonaktiebolaget LM Ericsson, and Ericsson AB on January 4, 2021. The complaint alleges violations of section 337 of the Tariff Act of 1930 (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 electronic devices with wireless

connectivity, components thereof, and products containing same. The complaint names as respondents: Samsung Electronics, Co. Ltd. of Korea; Samsung Electronics America, Inc. of Ridgefield Park, NJ; Samsung Electronics Thai Nguyen Co., Ltd. of Vietnam; Samsung Electronics Vietnam Co., Ltd. of Vietnam; and Samsung Electronics HCMC CE Complex, Co., Ltd. of Vietnam. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3520'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov).* No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

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. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, [2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS, [3].

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 4, 2021.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2021–00091 Filed 1–7–21; 8:45 am]

**BILLING CODE 7020–02–P**

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov*

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Bankruptcy Rules; Hearing of the Judicial Conference

**AGENCY:** Judicial Conference of the United States, Advisory Committee on the Federal Rules of Bankruptcy Procedure.

**ACTION:** Notice of cancellation of open hearing.

**SUMMARY:** The following remote public hearing on proposed amendments to the Federal Rules of Bankruptcy Procedure has been canceled: Bankruptcy Rules Hearing on January 29, 2021.

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**SUPPLEMENTARY INFORMATION:** Announcements for this hearing were previously published in 85 FR 48562.

**Authority:** 28 U.S.C. 2073.

Dated: January 4, 2021.

**Rebecca A. Womeldorf,**

*Chief Counsel, Rules Committee Staff.*

[FR Doc. 2021–00104 Filed 1–7–21; 8:45 am]

**BILLING CODE 2210–55–P**

## JUDICIAL CONFERENCE OF THE UNITED STATES

### Advisory Committee on Criminal Rules; Hearing of the Judicial Conference

**AGENCY:** Judicial Conference of the United States, Advisory Committee on

the Federal Rules of Criminal Procedure.

**ACTION:** Notice of cancellation of open hearing.

**SUMMARY:** The following remote public hearing on proposed amendments to the Federal Rules of Criminal Procedure has been canceled: Criminal Rules Hearing on January 25, 2021.

**FOR FURTHER INFORMATION CONTACT:** Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7–300, Washington, DC 20544, Telephone (202) 502–1820, *RulesCommittee_Secretary@ao.uscourts.gov.*

**SUPPLEMENTARY INFORMATION:** Announcements for this hearing were previously published in 85 FR 48562.

**Authority:** 28 U.S.C. 2073.

Dated: January 4, 2021.

**Rebecca A. Womeldorf,**

*Chief Counsel, Rules Committee Staff.*

[FR Doc. 2021–00103 Filed 1–7–21; 8:45 am]

**BILLING CODE 2210–55–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993 —ASTM International Standards

Notice is hereby given that on December 14, 2020 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *etseq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM activities originating between September 22, 2020 and December 14, 2020 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification with the Department was filed on September 24, 2020. A notice was filed in the **Federal Register** on October 30, 2020 (85 FR 68917).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

[FR Doc. 2021–00138 Filed 1–7–21; 8:45 am]

**BILLING CODE 4410–11–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Digital Manufacturing Design Innovation Institute

Notice is hereby given that, on December 18, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Digital Manufacturing Design Innovation Institute (''DMDII'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ubisense, Denver, CO; EmpowerXR, Chicago, IL; ProshopERP, Bellingham, WA; Supply Chain Risk Management Consortium (SCRMC), Flemington, NJ; Formic Technologies, Chicago, IL; Supply Chain Operations Preparedness Education, Fairfax, VA; Y–12, Oak Ridge, TN; Uncomn, Scott AFB, IL; University of Houston, Houston, TX; Illinois Institute of Technology (IIT), Chicago, IL; Innovation Quality Business Solutions, Bethlehem, PA; Frontier Aerospace, Simi Valley, CA; ActivTech, Dunwoody, GA; SquareOne PD, Chicago, IL; Atomus Printing, Los Angeles, CA; CANA LLC, Gainsville, VA; Imprimis, Colorado Springs, CO; Rutgers, New Brunswick, NJ; and Simio, Sewickley, PA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DMDII intends to file additional written notifications disclosing all changes in membership.

On January 5, 2016, DMDII filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 9, 2016 (81 FR 12525).

The last notification was filed with the Department on September 30, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65425).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

[FR Doc. 2021–00143 Filed 1–7–21; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on ROS-Industrial Consortium Americas

Notice is hereby given that, on December 29, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on ROS-Industrial Consortium-Americas (''RIC-Americas'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Surface Intelligent Science and Technology (Shanghai) Co., Ltd., Shanghai, CHINA and Georgia Institute of Technology, Atlanta, GA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RIC-Americas intends to file additional written notifications disclosing all changes in membership.

On April 30, 2014, RIC-Americas filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on October 20, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the

Act on November 19, 2020 (85 FR 73750).

**Suzanne Morris,**

*Chief, Premerger and Division Statistics, Antitrust Division.*

[FR Doc. 2021–00139 Filed 1–7–21; 8:45 am]

**BILLING CODE 4410–11–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Agency Information Collection Activities; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Consideration will be given to all written comments received by March 9, 2021.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Heather Fleck by telephone at 202–693–2956 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *fleck.heather@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Division of Adult Services and Governance, U.S. Department of Labor, 200 Constitution Avenue NW, Room S4209, Washington, DC 20210; by email: *fleck.heather@dol.gov;* or by fax 202–693–3015.

**FOR FURTHER INFORMATION CONTACT:** Contact Heather Fleck by telephone at 202–693–2956 (this is not a toll-free number) or by email at *fleck.heather@dol.gov.*

**Authority:** 44 U.S.C. 3506(c)(2)(A).

**SUPPLEMENTARY INFORMATION:** DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Section 190 of the Workforce Innovation and Opportunity Act (WIOA) (Public Law 113–128, July 22, 2014) permits states to apply for Workflex waiver authority. The Act and 20 CFR 679.630 provide that the Secretary may grant Workflex waiver authority for up to five years pursuant to a Workflex plan submitted by a state. Under Workflex, governors are granted the authority to approve requests submitted by their local areas to waive certain statutory and regulatory provisions of WIOA Title I programs. States may request waivers from the Secretary of certain requirements of the Wagner-Peyser Act (Sections 8–10) as well as certain provisions of the Older American Act of 1965 (OAA) (42 U.S.C. 305d(b)) for state agencies on aging with respect to activities carried out using funds allotted under OAA section 506(b). One of the underlying principles for granting Workflex waivers is that the waivers will result in improved performance outcomes for persons served and that the waiver authority will be granted in consideration of improved performance.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Number:1205–0432.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (*e.g.,* permitting electronic submission of responses).

*Agency:* DOL–ETA.

*Type of Review:* Extension without changes.

*Title of Collection:* Workflex Plan Submission and Reporting Requirements.

*Form:* Workforce Flexibility (Workflex) Plan Collection Form.

*OMB Control Number:* 1205–0432.

*Affected Public:* State, Local, and Tribal Governments.

*Estimated Number of Respondents:* 5.

*Frequency:* 5 state plans annually; 20 quarterly reports.

*Total Estimated Annual Responses:* 25.

*Estimated Average Time per Response:* 23 hours.

*Estimated Total Annual Burden Hours:* 235 hours.

*Total Estimated Annual Other Cost Burden:* $0.

**John Pallasch,**

*Assistant Secretary for Employment and Training.*

[FR Doc. 2021–00082 Filed 1–7–21; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Agency Information Collection Activities; Submission for OMB Review; Comment Request, Job Corps Evidence Building Portfolio, New Collection

**AGENCY:** Office of the Assistant Secretary for Policy, Chief Evaluation Office, Department of Labor.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The Department of Labor (DOL), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed. Currently, the Department of Labor is soliciting comments concerning the collection of data about the Job Corps Evidence Building Portfolio. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 9, 2021.

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

*Email: ChiefEvaluationOffice@dol.gov; Mail or Courier:* Jessica Lohmann, Chief Evaluation Office, OASP, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and OMB Control Number identified above for this information collection. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for OMB approval of the information collection request.

**FOR FURTHER INFORMATION CONTACT:** Jessica Lohmann by email at *ChiefEvaluationOffice@dol.gov* or by phone at (202)693–5087.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The Chief Evaluation Office (CEO) of the U.S. Department of Labor (DOL) intends to design and conduct an evaluation to assess the implementation and outcomes of three Job Corps demonstration pilots. The goals of the implementation and outcomes evaluation are to understand who the pilots enroll, what services they provide, how these services are implemented, and how the pilots compare with traditional Job Corps. The evaluation will also assess outcomes of participants in the demonstration pilots, as well as identify any best practices. The project also includes impact feasibility assessments of each of the demonstration pilots to assess the potential for conducting an impact evaluation of the pilot's effectiveness or similar future pilots. This **Federal Register** Notice provides the opportunity to comment on proposed data collection instruments that will be used in the implementation and impact feasibility evaluation: Semi-structured program staff and stakeholder interview topic guide, participant interview or focus group topic guide, program survey of Job Corps centers and demonstration pilot grantees, and impact feasibility topic guide.

1. *Semi-structured interviews with program staff and staff from selected community partner organizations topic guide.* Interviews will be conducted over the phone or video or during in-person site visits in 2022. Each of the pilot demonstration projects draw on a range of staff and partners that deliver services; thus, interviews may include pilot staff, partner staff, employers, and training and education providers. We estimate that approximately 175 interviews will be conducted across all pilots. We will also observe program activities, either in person or virtually via phone or video, to help us describe key program components and participant engagement. The observations will not involve additional burden.

*2. Participant interviews or focus group topic guide.* We will also interview demonstration pilot participants through one-on-one interviews or focus groups. Focus groups or interviews will be conducted with approximately 25 interviewees to 175 interviewees across all pilots. These interviews or focus groups may be conducted in person, online, or over the phone.

3. *Program survey of Job Corps centers and demonstration pilot grantees.* The project will field a program survey to each of the Job Corps centers and demonstration pilots to gather information about program implementation, service offerings, and staffing. The survey will be fielded to 131 Job Corps centers, and up to 30 pilot demonstration sites in spring 2022.

4. *Impact feasibility assessment interviews with demonstration pilot staff topic guide.* In addition to the implementation and outcome study, the evaluation will gather information from select grantee staff about topics related to feasibility of conducting an impact study of the demonstration pilot. The team will conduct phone, video or in person interviews with grantee staff who are involved in management, enrollment, and program services in fall 2021/winter 2022. The project will conduct 25 interviews across the three pilots.

#### II. Desired Focus of Comments

Currently, the Department of Labor is soliciting comments concerning the above data collection for the Job Corps Evidence Building Project. DOL is particularly interested in comments that do the following:

- Evaluate whether the proposed collection of information is necessary for the proper performance functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology—for example, permitting electronic submissions of responses.

#### III. Current Actions

At this time, the Department of Labor is requesting clearance for the semi-structured program and partner staff topic guide, participant interview and focus group topic guide, grantee program survey, and impact feasibility study topic guide.

*Type of Review:* New information collection request.

*OMB Control Number:* 1290–0NEW.

*Affected Public:* Job Corp centers and demonstration pilots, partners and participants.

Comments submitted in response to this request will be summarized and-or included in the request for Office of

Management and Budget approval of the information collection request; they will also become a matter of public record.

ESTIMATED ANNUAL BURDEN HOURS

| Type of Instrument (form-activity) | Number of respondents | Number of responses per respondent | Total number of responses | Average burden time per response (hours) | Estimated burden hours |
|---|---|---|---|---|---|
| Semi-structured interview with staff, partners, and stakeholders topic guide | 175 | 1 | 175 | 1.5 | 262.5 |
| Participant interview or focus group protocol | 175 | 1 | 175 | 1.5 | 262.5 |
| Program survey of JC Centers and pilots | 161 | 1 | 161 | 2 | 322 |
| Impact feasibility topic guide | 30 | 1 | 30 | 1.5 | 45 |
| Total | 541 | | 541 | | 892 |

**Christina Yancey,**

*Chief Evaluation Officer, U.S. Department of Labor.*

[FR Doc. 2021–00078 Filed 1–7–21; 8:45 am]

**BILLING CODE 4510–HX–P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

**[Docket No. WCPO–2020–0002]**

### Guidance on Black Lung Benefits Act Self-Insurance

**AGENCY:** Office of Workers' Compensation Programs, Labor.

ACTION: Notice of availability; request for comments.

**SUMMARY:** The Office of Workers' Compensation Programs (OWCP) is announcing publication of a preliminary program bulletin titled ''DCMWC Self-Insurance Process Guidelines'' describing the agency's updated process for evaluating self-insurance applications under the Black Lung Benefits Act (BLBA). The BLBA requires coal mine operators to secure the payment of benefits by either purchasing commercial insurance or obtaining the Department's authorization to self-insure those liabilities. Authorization to self-insure may be granted or denied at the Department's discretion. OWCP is making the programmatic changes and preliminary bulletin available for public comment pursuant to the Department of Labor's PRO Good Guidance Rule.

**DATES:** The Department invites written comments on the self-insurance program and the bulletin from interested parties. Written comments must be received by February 8, 2021.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the website for submitting comments.

*Instructions.* Include the docket number WCPO–2020–0002 in your comments. All comments received will be posted without change to *http://www.regulations.gov.* Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

**FOR FURTHER INFORMATION CONTACT:** Michael Chance, Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3464, Washington, DC 20210. Telephone: 1–800–347–2502. This is a toll-free number. TTY/TDD callers may dial toll-free 1–800–877–8339 for further information.

**SUPPLEMENTARY INFORMATION:**

#### I. Overview

The BLBA provides benefits to coal miners who are totally disabled by pneumoconiosis (commonly known as black lung disease) and to certain of their survivors. The BLBA requires coal mine operators to secure the payment of benefits by either purchasing commercial insurance or obtaining the Department's authorization to self-insure those liabilities. 30 U.S.C. 933(a). Authorization to self-insure may be granted or denied at the Department's discretion. 20 CFR 726.101(a). When a self-insurer is unable (or unwilling) to meet its payment obligations, the Black Lung Disability Trust Fund (Trust Fund) makes those payments. Although the Trust Fund acts as a backstop, Congress intended ''to ensure that individual coal operators rather than the trust fund bear the liability for [black lung] claims arising out of such operators' mines to the maximum extent feasible.'' *See Old Ben Coal Co.* v. *Luker,* 826 F.2d 688, 693 (7th Cir. 1987) (quoting S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977), *reprinted in* House Comm. on Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979)); 20 CFR 725.1(e). To help ensure that self-insured operators' liabilities do not fall on the Trust Fund, OWCP created new forms CM–2017, CM–2017a, and CM–2017b and now seeks to update its process for evaluating the information collected through those forms to determine whether a coal mine operator should be allowed to self-insure and to determine the security amount each operator must provide to guarantee payment of current and future liabilities. OWCP has set forth the updated process in its preliminary bulletin titled ''DCMWC Self-Insurance Process Guidelines.'' OWCP now seeks public comment on the bulletin and the process discussed in the bulletin.

#### II. Bulletin Publication

Out of an abundance of caution, OWCP is requesting comments on the bulletin and its underlying programmatic changes, in line with the requirements of the Department's PRO Good Guidance Rule, *see* 29 CFR part 89, and also because OWCP believes the public's input on the self-insurance process could be very helpful to the program's administration. OWCP's request for comments is also consistent with the openness and transparency goals of the Department's guidance regulations; E.O. 13891, 84 FR 55235 (Oct. 15, 2019); and OMB's Final Bulletin for Agency Good Guidance Practices, 72 FR 3432 (Jan. 25, 2007).

### III. Internet Availability

Persons with internet access may view the preliminary bulletin at *https://www.dol.gov/sites/dolgov/files/OWCP/dcmwc/blba/indexes/BL21-01OCR.pdf* or at *http://www.regulations.gov.* The relevant forms are available at: *https://www.dol.gov/sites/dolgov/files/owcp/regs/compliance/cm-2017.pdf; https://www.dol.gov/sites/dolgov/files/owcp/regs/compliance/cm-2017a.pdf; https://www.dol.gov/sites/dolgov/files/owcp/regs/compliance/cm-2017b.pdf.* Additional information about the programmatic changes are available on the OWCP website at: *https://www.dol.gov/sites/dolgov/files/owcp/dcmwc/ActuarialAssumptions.pdf.* Persons who do not have electronic access to the bulletin, forms, and other information may request a copy using the contact information above.

Dated: January 4, 2021.

**Julia K. Hearthway,**

*Director, Office of Workers' Compensation Programs.*

[FR Doc. 2021–00097 Filed 1–7–21; 8:45 am]

**BILLING CODE 4510–CR–P**

## LIBRARY OF CONGRESS

### Copyright Royalty Board

**[Docket No. 20–CRB–0017–AU (Music Choice)]**

### Notice of Intent To Audit

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Public notice.

**SUMMARY:** The Copyright Royalty Judges (Judges) announce receipt from SoundExchange, Inc., (SoundExchange) of a notice of intent to audit Music Choice to verify royalties paid by Commercial Webcasters, Preexisting Subscription Services, and Business Establishment Services in 2017, 2018, and 2019 pursuant to two statutory licenses.

**FOR FURTHER INFORMATION CONTACT:** Anita Blaine, Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

**SUMMARY INFORMATION:** The Copyright Act, title 17 of the United States Code, grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate the digital transmission of the sound recording, including for transmissions to business establishments. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Judges. The rates and terms for the section 112 and 114 licenses are set forth in 37 CFR parts 380, 382, and 384.

As part of the terms set for these licenses, the Judges designated SoundExchange as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by eligible licensees and with distributing royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See, e.g.,* 37 CFR 380.4(d).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years in order to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See, e.g.,* 37 CFR 380.6.

On December 18, 2020, SoundExchange filed with the Judges a notice of intent to audit Music Choice for royalties paid by Commercial Webcasters, Preexisting Subscription Services, and Business Establishment Services for the years 2017, 2018, and 2019. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See id.* Today's notice fulfills this requirement with respect to SoundExchange's notice of intent to audit filed December 18, 2020.

Dated: January 5, 2021.

**Jesse M. Feder,**

*Chief Copyright Royalty Judge.*

[FR Doc. 2021–00182 Filed 1–7–21; 8:45 am]

**BILLING CODE 1410–72–P**

## LIBRARY OF CONGRESS

### Copyright Royalty Board

**[Docket Nos. 20–CRB–0014–AU (Cumulus Media, Inc.), 20–CRB–0015–AU (Emmis Communications Corp.), 20–CRB–0016–AU (IMVU, Inc.), 20–CRB–0018–AU (Pandora Media), 20–CRB–0020–AU (Urban One)]**

### Notice of Intent To Audit

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Public Notice.

**SUMMARY:** The Copyright Royalty Judges announce receipt from SoundExchange, Inc., (SoundExchange) of notices of intent to audit the 2017, 2018, and 2019 statements of account submitted by commercial webcasters Cumulus Media, Emmis Communications, IMVU, Inc., Pandora Media, LLC, and Urban One, Inc. concerning the royalty payments they made pursuant to two statutory licenses.

**FOR FURTHER INFORMATION CONTACT:** Anita Blaine, Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

**SUMMARY INFORMATION:** The Copyright Act, title 17 of the United States Code, grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and pre-existing satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate the digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are set forth in 37 CFR parts 380 and 382–84.

As part of the terms set for these licenses, the Judges designated SoundExchange, as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by eligible nonexempt noninteractive digital subscription services such as Commercial Webcasters and with distributing the royalties to the copyright owners and performers entitled to receive them under the

section 112 and 114 licenses. *See* 37 CFR 380.4(d).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years in order to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6.

On December 18, 2020, SoundExchange filed with the Judges notices of intent to audit Cumulus Media, Emmis Communications, IMVU, Inc., Pandora Media, LLC, and Urban One, Inc. for the years 2017—2019. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c). Today's notice fulfills this requirement with respect to SoundExchange's December 18, 2020 notices of intent to audit.

Dated: January 5, 2021.

**Jesse M. Feder,**

*Chief Copyright Royalty Judge.*

[FR Doc. 2021–00180 Filed 1–7–21; 8:45 am]

**BILLING CODE 1410–72–P**

## LIBRARY OF CONGRESS

### Copyright Royalty Board

**[Docket No. 20–CRB–0019–AU (Rockbot)]**

### Notice of Intent To Audit

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Public notice.

**SUMMARY:** The Copyright Royalty Judges announce receipt from SoundExchange, Inc., (SoundExchange) of a notice of intent to audit the 2017, 2018, and 2019 statements of account submitted by Rockbot, Inc.'s Business Establishment Service concerning royalty payments they made pursuant to statutory license.

**FOR FURTHER INFORMATION CONTACT:** Anita Blaine, Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

**SUMMARY INFORMATION:** The Copyright Act, title 17 of the United States Code, grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 112, which allows a service to make necessary ephemeral reproductions to facilitate the digital transmission of the sound recording, including for transmissions to business establishments. 17 U.S.C. 112(e).

Licensees may operate under this license provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112(e) license applicable to business establishment services is set forth in 37 CFR 384.

As part of the terms set for this license, the Judges designated SoundExchange as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by eligible licensees and with distributing royalties to the copyright owners and performers entitled to receive them under the section 112 license. *See, e.g.,* 37 CFR 384.4.

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years in order to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See, e.g.,* 37 CFR 384.6.

On December 18, 2020, SoundExchange filed with the Judges a notice of intent to audit Rockbot, Inc.'s Business Establishment Service for the years 2017, 2018, and 2019. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See id.* Today's notice fulfills this requirement with respect to SoundExchange's notice of intent to audit filed December 18, 2020.

Dated: January 5, 2021.

**Jesse M. Feder,**

*Chief Copyright Royalty Judge.*

[FR Doc. 2021–00181 Filed 1–7–21; 8:45 am]

**BILLING CODE 1410–72–P**

## NATIONAL SECURITY COMMISSION ON ARTIFICIAL INTELLIGENCE

**[Docket No.: 1–2021–01]**

### National Security Commission on Artificial Intelligence; Notice of Federal Advisory Committee Meeting

**AGENCY:** National Security Commission on Artificial Intelligence.

**ACTION:** Notice of Federal Advisory Committee virtual public meeting.

**SUMMARY:** The National Security Commission on Artificial Intelligence (the ''Commission'') is publishing this notice to announce that the following Federal Advisory Committee virtual public meeting—held over two days—will take place.

**DATES:** Monday, January 25, 2021, 12:00 p.m. to 3:00 p.m. Eastern Standard Time (EST), Tuesday, January 26, 2021, 12:00 p.m. to 3:00 p.m. EST.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angela Ponmakha, 703–614–6379 (Voice), *nscai-dfo@nscai.gov. Mailing address:* Designated Federal Officer, National Security Commission on Artificial Intelligence, 2530 Crystal Drive, Box 45, Arlington, VA 22202. *website: https://www.nscai.gov.* The most up-to-date information about the meeting and the Commission can be found on the website.

**SUPPLEMENTARY INFORMATION:** This two-day meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) (5 U.S.C., Appendix), the Government in the Sunshine Act (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150.

*Purpose of the Meeting:* The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY19 NDAA), Sec. 1051, Public Law 115–232, 132 Stat. 1636, 1962–65 (2018), created the Commission to ''consider the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies by the United States to comprehensively address the national security and defense needs of the United States.'' The Commission will consider and deliberate on potential recommendations to Congress and the Executive Branch, and review the Commission's draft Final Report.

*Agenda:* The first instance of the two-day meeting will begin on January 25, 2021 at 12:00 p.m. EST with opening remarks by the Designated Federal Officer, Ms. Angela Ponmakha; the Executive Director, Mr. Yll Bajraktari; the Commission Chair, Dr. Eric Schmidt; and the Commission Vice Chair, Mr. Robert Work. Chairs of the working groups studying each of the Commission's lines of effort (LOEs) will present specific chapters of the Final Report and the associated recommendations from their respective LOEs for consideration by the entire Commission. The Commission's LOEs are: LOE 1—Invest in AI Research & Development and Software; LOE 2—Apply AI to National Security Missions; LOE 3—Train and Recruit AI Talent; LOE 4—Protect and Build Upon U.S. Technological Advantages & Hardware; LOE 5—Marshal Global AI Cooperation; and LOE 6—Ethics and Responsible AI.

The Commission will deliberate on the draft Final Report chapters and recommendations and consider them for inclusion in the Commission's final report to Congress and the

Administration. The first day will adjourn at 3:00 p.m. EST. The second day of the meeting will begin on January 26, 2021 at 12:00 p.m. EST and continue the Commissioners' deliberations on the draft Final Report chapters and recommendations to be included in the final report. This second day will adjourn at 3:00 p.m. EST.

*Meeting Accessibility:* Pursuant to Federal statutes and regulations (the FACA, the Sunshine Act, and 41 CFR 102–3.140 through 102–3.165) and the availability of space, the virtual meeting is open to the public January 25, 2021, and January 26, 2021 from 12:00 p.m. to 3:00 p.m. EST. Members of the public wishing to receive a link to the live stream webcast for viewing and audio access to the virtual meeting should register on the Commission's website, *https://www.nscai.gov.* Registration will be available from January 12, 2021 through January 22, 2021. Members of the media should RSVP to the Commission's press office at *press@nscai.gov.*

*Special Accommodations:* Individuals requiring special accommodations to access the public meeting should contact the DFO, see the **FOR FURTHER INFORMATION CONTACT** section for contact information, no later than January 19, 2021, so that appropriate arrangements can be made.

*Access to Records of the Meeting:* Pursuant to FACA requirements, the meeting materials for the virtual meetings will be available for public inspection on the Commission's website at *https://www.nscai.gov* on January 19, 2021.

*Written Statements:* Written comments may be submitted to the DFO via email to: *nscai-dfo@nscai.gov* in either Adobe Acrobat or Microsoft Word format. The DFO will compile all written submissions and provide them to the Commissioners for consideration. Please note that all submitted comments will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Commission's website.

Dated: January 5, 2021.

**Michael Gable,**

*Chief of Staff.*

[FR Doc. 2021–00126 Filed 1–7–21; 8:45 am]

**BILLING CODE 3610–Y8–P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Request for Information on NCUA Communications and Transparency

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Notice; request for information (RFI).

**SUMMARY:** The NCUA is seeking comments and information from interested parties on the NCUA's communication methods and related initiatives to promote efficiency and increase transparency.

**DATES:** Comments must be received on or before March 9, 2021.

**ADDRESSES:** Comments may be submitted using *one* of the methods below (Please do not send comments through multiple methods). *Mail:* Please direct written comments to Melane Conyers-Ausbrooks, Acting Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Public Inspection:* You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures, the usual opportunity to inspect paper copies of comments is unavailable. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6330 or emailing *oeacmail@ncua.gov.*

All comments received must include the agency name for this rulemaking. All comments received will be posted without change to the NCUA's websites (*www.ncua.gov* and *www.mycreditunion.gov*)—including any personal information provided—for public inspection. Spam or marketing materials will be discarded without publication.

**FOR FURTHER INFORMATION CONTACT:** Ben Hardaway, National Credit Union Administration, Office of External Affairs and Communications, 1775 Duke Street, Alexandria, VA 22314, telephone (703) 518–6333, and email *bhardaway@ncua.gov.* Media inquiries should be directed to NCUA's Office of External Affairs and Communications at (703) 518–6330 or *oeacmail@ncua.gov.*

**SUPPLEMENTARY INFORMATION:** The NCUA's examination and supervision of federally insured credit unions and enforcement of applicable rules and regulations is designed to protect the safety and soundness of the credit union system and ensure consumer financial protection. To accomplish this mission, the NCUA must be able to communicate efficiently and effectively with financial institutions.

Stakeholders learn about the agency's mission, values, policies, initiatives, and strategic goals primarily through *NCUA.gov.* While the NCUA's audience is diverse, each user has the same basic need: To obtain information to make important financial and business decisions quickly and easily. Outdated, duplicative, or hard-to-find content reduces the effectiveness of the NCUA's communications with federally insured credit unions and increases their overall regulatory burden as they must spend time and staff resources sorting through the NCUA's communications in order to comply with regulatory and supervisory guidance.

**Overview of Request for Information**

The NCUA is seeking public input on how to make its communications with federally insured credit unions more effective, consistent, and clear to minimize unnecessary regulatory and operation burdens as much as possible and promote compliance with all applicable laws and regulations. While the NCUA's communications are essential to fulfill its statutory mandate, the agency recognizes the amount of information it provides to credit unions can create challenges and may impose unintended burdens for institutions. The agency intends to remove outdated, duplicative and superseded regulatory and supervisory guidance from its website.

Additionally, the NCUA is asking its stakeholders to suggest initiatives that would maximize efficiency and minimize burdens associated with obtaining information on federal laws, regulations, policies, guidance, and other materials relevant to federally insured credit unions.

*Forms of Communication*

The NCUA uses many forms of communication to inform credit unions about regulations, policies and guidance, industry data and educational materials, and other news and updates. The agency's primary communications channel is its website, *NCUA.gov*, which provides information on many agency activities. Some forms of communication may be used to disseminate more than one type of information, and some materials may be distributed through multiple channels.

These forms of communication include, but are not limited to:

Regulations, Policies, Procedures, and Guidance

- ***Federal Register:*** The NCUA publishes in the **Federal Register** proposed and final rules, requests for information, and other notices, including statements of policy and certain guidance or interpretations.
- *Unified Agenda:* Biannually through the Unified Agenda process, the NCUA publicizes an agenda of regulations to inform the public of its regulatory actions and to enhance public participation in the rulemaking process.
- *Letters to Credit Unions:* These provide guidance on specific NCUA policies and procedures, compliance, governance, and other timely issues that affect all federally insured credit unions.
- *Letters to Federal Credit Unions:* These provide guidance on specific NCUA policies and procedures, compliance, governance, and other timely issues that affect only credit unions with a federal charter.
- *Risk Alerts:* These detail practices or external threats that potentially are significant risks to the safety and soundness of the credit union system.
- *Regulatory Alerts:* The NCUA uses regulatory alerts to provide guidance on rules and regulations from other agencies that all credit unions must comply with.
- *Supervisory Letters:* While geared towards the NCUA's examiners to provide instructions and information on a range of supervisory and regulatory issues, these letters are posted on the NCUA's website for the benefit of credit unions and the public.
- *Accounting Bulletins:* The NCUA uses Accounting Bulletins to provide guidance and instructions on how changes in generally accepted accounting principles and other regulatory initiatives affect how credit unions report these items in their financial statements.
- *Corporate Credit Union Guidance Letters:* The NCUA's Office of National Examinations and Supervision issues letters to inform corporate credit unions about specific NCUA policies and procedures, compliance, governance, and other timely issues.
- *Consumer Financial Protection Updates:* These are used to announce new activity on consumer compliance laws, regulations and guidance.
- *Examination Manuals*

▪ Online Examiners Guide
▪ National Supervision Policy Manual
▪ Chartering and Field of Membership Manual
▪ Fair Lending Guide
▪ Federal Consumer Financial Protection Guide

- Frequently Asked Questions (FAQs) or Questions and Answers (Q&As)
- NCUA Open Board Meetings and Associated Documents.

▪ Board Meeting Agendas
▪ Board Action Memorandum
▪ Board Action Bulletins

News and Updates

- Press Releases
- Speeches
- Testimony
- Statements
- Annual Reports to Congress
- Events Calendar

Industry Data, Educational Materials, and Outreach

- Credit Union and Corporate Call Report Data
- Quarterly State Map Reviews
- Industry at a Glance
- CUSO at a Glance
- Chartering and Merger Activity Reports
- Manuals and Guides
- NCUA Videos, Webcasts, Webinars

General Communications

- NCUA.gov website and MyCreditUnion.gov
- Social Media (such as Twitter, Facebook, LinkedIn, and YouTube)
- NCUA Express Email Subscriptions

**Request for Comment**

To reduce the burden for institutions and others seeking information, both in terms of expending fewer resources to find relevant information and decreasing the amount of information that requires review, the NCUA is seeking input on how best to streamline and improve communication with its stakeholders. The NCUA encourages comments from all interested members of the public, including but not limited to, federally insured credit unions, other financial institutions or companies, credit union service organizations, vendors, individual credit union members and consumers, consumer groups, and other members of the financial services industry. Please be as specific as possible to allow the NCUA to evaluate comments more effectively.

In addition to general feedback on the NCUA's communication practices and related initiatives, the agency requests input on the following specific topics and questions related to its communications and transparency:

▪ The NCUA issues, or has issued, regulatory and supervisory guidance under a variety of different letterheads, including Letters to Credit Unions, Letters to Federal Credit Unions, Corporate Credit Union Guidance Letters, Accounting Bulletins, Risk Alerts, Regulatory Alerts, Consumer Financial Protection Updates, and Supervisory Letters. Is this practice effective? Should the agency consider consolidating its supervisory guidance into fewer letterheads?

▪ How effective are the NCUA's current forms of communication, such as press releases, social media content, and email distributions? Which of these are the most or the least effective? Are there other methods of communication the NCUA should consider?

▪ Which communications vehicles are best suited for informing federally insured credit unions about new policy initiatives, laws and regulations, guidance, background or educational materials, news and other updates?

▪ How appropriate is the timing and frequency of the NCUA's communication?

▪ Is it clear to federally insured credit unions which of the agency's communication is supervisory in nature and which is purely informational?

*Questions Related To Improving the Agency's Websites and Online Resources*

▪ How can the NCUA improve the *NCUA.gov* and *MyCreditUnion.gov* websites? Does the website search function provide helpful and relevant results? What aspects of the *NCUA.gov* and *MyCreditUnion.gov* websites are the most helpful?

▪ How often do you access the financial performance, chartering and merger data available on NCUA.gov? Is the current format useful to you? How can we improve the presentation of data online?

▪ What other financial, business, or economic data websites do you use? What do you like about how they present their financial or economic data? What features should the NCUA consider when improving its presentation of financial performance and other data to stakeholders online?

Commenters are also encouraged to discuss any other relevant issues they believe the NCUA should consider with respect to the agency's communications and websites.

**Authority:** 67 FR 63452 (October 11, 2002).

By the National Credit Union Administration on December 30, 2020.

**Melane Conyers-Ausbrooks,**

*Secretary of the Board.*

[FR Doc. 2020–29270 Filed 1–7–21; 8:45 am]

**BILLING CODE 7535–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS National Leadership Grants for Museums and IMLS Museums for America Program Notices of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning a plan to offer two grant programs targeting the needs of museums nationwide: IMLS National Leadership Grants for Museums and IMLS Museums for America Program. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Helen Wechsler, Supervisory Grants Management Specialist, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Wechsler can be reached by telephone at 202–653–4779, or by email at *hwechsler@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

### I. Background

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

### II. Current Actions

The goal of IMLS National Leadership Grants for Museums is to support projects that address critical needs of the museum field and that have the potential to advance practice in the profession so that museums can improve services for the American public.

The goal of IMLS Museums for America is to support projects that strengthen the ability of an individual museum to serve its public. It has three project categories: Lifelong Learning, Community Engagement, and Collections Stewardship and Access.

This action is to renew the content, forms, and instructions for each of the two Notices of Funding Opportunity for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS National Leadership Grants for Museums and IMLS Museums for America Program Notices of Funding Opportunity.

*OMB Number:* 3137–0094.

*Frequency:* Once per year.

*Affected Public:* Museum organization applicants.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00073 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 Grant Performance Report Forms

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the three-year approval of the forms necessary to report on grant and cooperative agreement activities on interim and final bases for all IMLS grant programs.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

**II. Current Actions**

To administer the IMLS processes associated with grants and cooperative agreements, IMLS uses standardized application forms, guidelines, and reporting forms for eligible libraries, museums, and other organizations to apply for its funding and to report on performance of funded projects. The forms submitted for public review in this Notice are the Interim Performance Report and the Final Performance Report, with the instructions associated with each one. The collection of information using these forms is core to IMLS grant performance reporting requirements and monitoring processes.

This action is to renew the content, forms, and instructions for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Grant Performance Report Forms.

*OMB Number:* 3137–0100.

*Frequency:* Once per year.

*Affected Public:* Library and Museum grant program awardees.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00066 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS National Leadership Grants for Libraries and the IMLS Laura Bush 21st Century Librarian Program Notices of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning a plan to offer two grant programs targeting the needs of libraries and their communities nationwide: IMLS National Leadership Grants for Libraries and the IMLS Laura Bush 21st Century Librarian Program.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Anthony D. Smith, Associate Deputy Director, Office of Library Services Discretionary Programs, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Mr. Smith can be reached by telephone at 202–653–4716, or by email at *asmith@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

**II. Current Actions**

IMLS National Leadership Grants for Libraries support projects that enhance the quality of library and archive services nationwide by advancing theory and practice and by generating results such as new tools, research findings, models, services, practices, or collaborative approaches that can be widely used, adapted, scaled, or replicated to extend the benefits of federal investment.

The IMLS Laura Bush 21st Century Librarian Program supports developing a diverse workforce of librarians to better meet the changing learning and information needs of the American public by enhancing the training and professional development of library and archives professionals; developing faculty and library leaders; and recruiting educating, and retaining the next generation of library and archives professionals.

This action is to renew the content, forms, and instructions for each of the two Notices of Funding Opportunity for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS National Leadership Grants for Libraries and the IMLS Laura Bush 21st Century Librarian Program Notices of Funding Opportunity.

*OMB Number:* 3137–0091.

*Frequency:* Twice per year.

*Affected Public:* Library organization applicants.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00068 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 National Medal for Museum and Library Service Nomination Form

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the nomination form for the annual IMLS National Medal for Museum and Library Service Program designed to recognize outstanding libraries and museums that have made significant contributions in service to improve the wellbeing of their communities.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Katherine Maas, Project Specialist, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Maas can be reached by telephone at 202–653–4798, or by email at *kmaas@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

The National Medal for Museum and Library Service is the nation's highest honor for institutions that make significant and exceptional contributions to their communities. Since 1994, IMLS has presented the award to institutions that demonstrate extraordinary and innovative approaches to community service. Recipient institutions are honored at an awards ceremony that is held in Washington, DC.

**II. Current Actions**

To administer the IMLS processes associated with the National Medal for Museum and Library Service, IMLS uses a standardized nomination form to collect administrative information about nominated organizations, their communities, and their programs.

This action is to renew the content, form, and instructions for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* National Medal for Museum and Library Service Program Nomination Form.

*OMB Number:* 3137–0097.

*Frequency:* Once per year.

*Affected Public:* Library and Museum applicants.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00071 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Inspire! Grants for Small Museums Notice of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning the initiative targeting the needs of small museums and their communities nationwide: IMLS Inspire! Grants for Small Museums Program.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Reagan Moore, Senior Program Officer, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Moore can be reached by telephone at 202–653–4637, or by email at *rmoore@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

**II. Current Actions**

The goal of IMLS Inspire! Grants for Small Museums is to help small museums implement projects that address priorities identified in their strategic plans. It has three project categories: Lifelong Learning, Institutional Capacity, and Collections Stewardship and Access.

This action is to renew the content, forms, and instructions for the Notice of Funding Opportunity for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Inspire! Grants for Small Museums Notice of Funding Opportunity.

*OMB Number:* 3137–0111.

*Frequency:* Once per year.

*Affected Public:* Eligible museum organizations.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00067 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Museums Empowered Notice of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning a plan to offer a special initiative of the Museums for America grant program that will target professional development needs for museums: Museums Empowered.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark Isaksen, Supervisory Grants Management Specialist, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Mr. Isaksen can be reached by telephone at 202–653–4667, or by email at *misaksen@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

#### I. Background

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

#### II. Current Actions

The goal of Museums Empowered is to strengthen the ability of an individual museum to serve its public through professional development activities that cross-cut various departments to generate systemic change within the museum. It has four project categories: Diversity and Inclusion, Digital Technology, Evaluation, and Organizational Management.

This action is to renew the content, forms, and instructions for the Notice of Funding Opportunity for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Museums Empowered Notice of Funding Opportunity.

*OMB Number:* 3137–0107.

*Frequency:* Annually.

*Affected Public:* Museums that meet the IMLS Museums for America institutional eligibility criteria.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00070 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Library and Museum Reviewer Forms

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the annual IMLS Library and Museum Reviewer Forms which are used by library and museum professionals to submit their interest and expertise to be considered for selection as an IMLS peer reviewer.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

**II. Current Actions**

All proposals submitted for IMLS competitive awards are reviewed by library and museum professionals who know the needs of communities, can share promising practices, and are well versed in the issues and concerns of museums and libraries today. Peer reviewers dedicate their time and expertise to advance the highest professional practices in the field. The IMLS review process is well respected, and the success of our grant programs is largely due to the expertise of our reviewers. These peer reviewer forms, accessed through the IMLS website, allow library and museum professionals to indicate their interest and expertise to be considered for selection as an IMLS peer reviewer.

This action is to renew the content, forms, and instructions for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Library and Museum Reviewer Forms.

*OMB Number:* 3137–0099.

*Frequency:* Once per year.

*Affected Public:* Library and Museum professionals.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00069 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Native American Library Services Basic Grants Program—Final Performance Report Form

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the three year approval of the IMLS Native American Basic Library Grant Program Final Performance Report Form. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information

including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**I. Background**

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

**II. Current Actions**

To administer the IMLS processes associated with Native American Library Services Basic Grants, IMLS uses standardized application forms, guidelines, and reporting forms for eligible Native American tribes. The form submitted for public review in this Notice is the Final Performance Report Form with instructions. The collection of information using this form is core to IMLS grant performance reporting requirements and monitoring processes.

This action is to renew the content, form, and instructions for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Native American Library Services Basic Grants Program—Final Performance Report Form.

*OMB Number:* 3137–0198.

*Frequency:* Once per year.

*Affected Public:* Native American tribe grant program awardees.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Annual Costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00072 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Submission for OMB Review, Comment Request, Proposed Collection: 2023–2027 IMLS Grants to States Program Five-Year State Plan Guidelines for State Library Administrative Agencies

**AGENCY:** Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

**ACTION:** Submission for OMB Review, comment request.

**SUMMARY:** The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. This notice proposes the clearance of the 2023–2027 IMLS Grants to States Program Five-Year State Plan Guidelines for State Library Administrative Agencies.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before February 7, 2021.

OMB is particularly interested in comments that help the agency to:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this Notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Institute of Museum and Library Services'' under ''Currently Under Review;'' then check ''Only Show ICR for Public Comment'' checkbox. Once you have found this information collection request, select ''Comment,'' and enter or upload your comment and information. Alternatively, please mail your written comments to Office of Information and Regulatory Affairs, Attn.: OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, or call 202–395–7316.

**FOR FURTHER INFORMATION CONTACT:** Teresa DeVoe, Associate Deputy Director of State Programs, Office of Library Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. DeVoe can be reached by telephone at 202–653–4778, or by email at *tdevoe@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

*Current Actions:* This notice proposes the clearance of the 2023–2027 IMLS Grants to States Program Five-Year State Plan Guidelines for State Library Administrative Agencies. The 60-day Notice was published in the **Federal Register** on November 3, 2020 (85 FR 69649). The agency has taken into consideration the one comment that was received under this notice.

The Grants to States program is the largest source of Federal funding

support for library services in the U.S. Using a population based formula, more than $150 million is distributed among the State Library Administrative Agencies (SLAAs) every year. SLAAs are official agencies charged by law with the extension and development of library services, and they are located in:

- Each of the 50 States of the United States, and the District of Columbia;
- The Territories (the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands); and
- The Freely Associated States (the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau).

Each year, more than 1,500 Grants to States projects support the purposes and priorities outlined in the Library Services and Technology Act (LSTA). (See 20 U.S.C. 9121 *et seq.*) SLAAs may use the funds to support statewide initiatives and services, and they may also distribute the funds through competitive subawards (*e.g.* subgrants or cooperative agreements) to public, academic, research, school, or special libraries or library consortia (for-profit and Federal libraries are not eligible). Each SLAA must submit a plan that details library services goals for a five-year period. (20 U.S.C § 9134). SLAAs must also conduct a five-year evaluation of library services based on that plan. These plans and evaluations are the foundation for improving practice and informing policy. Each SLAA receives IMLS funding to support the five year period through a series of overlapping, two year grant awards.

*Agency:* Institute of Museum and Library Services.

*Title:* 2023–2027 IMLS Grants to States Program Five-Year State Plan Guidelines for State Library Administrative Agencies.

*OMB Number:* 3137–0029.

*Frequency:* Once every five years.

*Affected Public:* State and Territory Library Administrative Agencies.

*Number of Respondents:* 59.

*Estimated Average Burden per Response:* 90 hours.

*Estimated Total Burden:* 5,310 hours.

*Total Annualized Capital/Startup Costs:* n/a.

*Total Five Year Costs:* $158,078.70.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00094 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### Institute of Museum and Library Services

### Notice of Proposed Information Collection Requests: 2022–2024 IMLS Museum Grants for African American History and Culture Program and IMLS Native American/Native Hawaiian Museum Services Program Notices of Funding Opportunity

**AGENCY:** Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. By this Notice, IMLS is soliciting comments concerning a plan to offer two grant programs targeting the needs of specific museums and their communities nationwide: IMLS Museum Grants for African American History and Culture Program and IMLS Native American/Native Hawaiian Museum Services Program.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before March 8, 2021.

**ADDRESSES:** Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone at 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For IMLS Museum Grants for African American History and Culture Program, contact Mark Isaksen, Supervisory Grants Management Specialist, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Mr. Isaksen can be reached by telephone at 202–653–4667, or by email at *misaksen@imls.gov.* For IMLS Native American/Native Hawaiian Museum Services Program, contact Mark Feitl, Senior Program Officer, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Mr. Feitl can be reached by telephone at 202–653–4635, or by email at *mfeitl@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

#### I. Background

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

#### II. Current Actions

The goals of Museums Grants for African American History and Culture (AAHC) are to build the capacity of African American museums and to support the growth and development of museum professionals at African American museums.

The goal of Native American/Native Hawaiian Museum Services (NANH) grants is to support Indian tribes and organizations that primarily serve and represent Native Hawaiians in sustaining heritage, culture, and knowledge through exhibitions, educational services and programing, professional development, and collections stewardship.

This action is to renew the content, forms, and instructions for each of the two Notices of Funding Opportunity for the next three years.

*Agency:* Institute of Museum and Library Services.

*Title:* 2022–2024 IMLS Museum Grants for African American History and Culture Program and IMLS Native American/Native Hawaiian Museum Services Program Notices of Funding Opportunity.

*OMB Number:* 3137–0095.

*Frequency:* Annual.

*Affected Public:* Eligible museum organizations; Historically Black Colleges and Universities; Federally recognized Native American tribes; non-profits that primarily serve Native Hawaiians.

*Number of Respondents:* TBD.

*Estimated Average Burden per Response:* TBD.

*Estimated Total Annual Burden:* TBD.

*Total Annualized capital/startup costs:* n/a.

*Total Annual costs:* TBD.

*Public Comments Invited:* Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 4, 2021.

**Kim Miller,**

*Senior Grants Management Specialist, Institute of Museum and Library Services.*

[FR Doc. 2021–00065 Filed 1–7–21; 8:45 am]

**BILLING CODE 7036–01–P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permits Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit issued.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

**FOR FURTHER INFORMATION CONTACT:** Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8030; email: *ACApermits@nsf.gov.*

**SUPPLEMENTARY INFORMATION:** On November 24, 2020, the National Science Foundation published a notice in the **Federal Register** of a permit application received. The permit was issued on December 28, 2020 to:

1. Ari S. Friedlaender Permit No. 2021–006

**Erika N. Davis,**

*Program Specialist, Office of Polar Programs.*

[FR Doc. 2021–00075 Filed 1–7–21; 8:45 am]

**BILLING CODE 7555–01–P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit modification request received and permit issued.

**SUMMARY:** The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated and permits issued under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of a requested permit modification and permit issued.

**FOR FURTHER INFORMATION CONTACT:** Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8224; email: *ACApermits@nsf.gov.*

**SUPPLEMENTARY INFORMATION:** The National Science Foundation (NSF), as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541, 45 CFR 671), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection.

NSF issued a permit (ACA 2017–013) to George Watters on October 21, 2016. The issued permit allows the applicant to conduct waste management associated with ship- and shore-based research and logistic activities conducted by the National Oceanic and Atmospheric Administration's (NOAA) Antarctic Marine Living Resources (AMLR) Program. The permit covers the deployment of a variety of oceanographic instruments.

On March 30, 2018, a permit modification was issued providing further details about two types of oceanographic instruments that would be deployed during future research cruises. Up to six moorings would be deployed, as described in the original permit, and up to three Slocum gliders would be deployed and retrieved.

Now, the permit holder has requested to a further modification to deploy up to seven (7) subsurface moorings of the type previously described.

The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

*Dates of permitted activities:* December 29, 2020–July 30, 2021.

The permit modification was issued on December 29, 2020.

**Erika N. Davis,**

*Program Specialist, Office of Polar Programs.*

[FR Doc. 2021–00076 Filed 1–7–21; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2019–0102]**

### Information Collection: Public Records

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Renewal of existing information collection; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Public Records.'' NRC updated one form integral to the agency's Freedom of Information Act (FOIA) process, NRC Form 507, ''Freedom of Information—Privacy Act Record Request Form.''

**DATES:** Submit comments by March 9, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0102. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2019–0102 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0102. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2019–0102 on this website.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession Nos. ML20203M081 and ML20203M082. The supporting statement is available in ADAMS under Accession No. ML20203M073.

• *NRC's PDR:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

• *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

*B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal Rulemaking Website (*https://www.regulations.gov*). Please include Docket ID NRC–2019–0102 in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

## II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Part 9 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Public Records.''

2. *OMB approval number:* 3150–0043.

3. *Type of submission:* Revision.

4. *The form number, if applicable:* NRC Forms 507 and 509.

5. *How often the collection is required or requested:* On Occasion.

6. *Who will be required or asked to respond:* FOIA requesters who have requests that require identification verification or third-party release authorization for FOIA or Privacy Act requests.

7. *The estimated number of annual responses:* 3,803.

8. *The estimated number of annual respondents:* 3,803.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 2,082.

10. *Abstract:* The information collection activity provides communication with FOIA requesters to have the opportunity to be notified about any fees to process their FOIA requests. Providing NRC Form 509 to a requester serves as notification of the processing fees as it relates to search, review, and duplication. Pursuant to NRC's regulations, 10 CFR 9.40, when fees exceed $25.00 the requester has the opportunity to re-scope their request. Additionally, in response to the FOIA Improvement Act of 2016, in accordance with 10 CFR 9.39, the revised form notifies the requester that if the agency fails to comply with statutory time limits, the agency cannot charge the requester any fees (except in unusual circumstances). In the event that fees are required, the requester can verify their willingness to pay on this form and must submit payment within ten working days of the receipt of the form.

The revised information collection removes the need for requesters to provide the information they are requesting under FOIA, since it would be duplicative. NRC Form 507 will accompany acknowledgement letters, at which point we are requesting additional information, if necessary, for FOIA requesters to submit proof of identification or third-party release authorizations.

## III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: January 4, 2021.

For the Nuclear Regulatory Commission.

**David C. Cullison,**

*NRC Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2021–00111 Filed 1–7–21; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2020–0185]**

## Information Collection: Voluntary Reporting of Performance Indicators

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Renewal of existing information collection; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, ''Voluntary Reporting of Performance Indicators.''

**DATES:** Submit comments by March 9, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0185. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail Comments to:* David Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2020–0185 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0185. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2020–0185 on this website.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The supporting statement is available in ADAMS under Accession No. ML20220A570.
- *Attention*: The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer*: A copy of the collection of information and related instructions may be obtained without charge by contacting NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

*B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0185 in the subject line of your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

### II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* Voluntary Reporting of Performance Indicators.
2. *OMB approval number:* 3150–0195.
3. *Type of submission:* Revision.
4. *The form number, if applicable:* N/A.
5. *How often the collection is required or requested:* Quarterly for Performance Indicator reporting and on occasion for the Frequently Asked Question process.
6. *Who will be required or asked to respond:* Power reactor licensees.
7. *The estimated number of annual responses:* 359.
8. *The estimated number of annual respondents:* 89.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* The total reporting and recordkeeping burden is 72,712 (71,320 hours reporting + 1,392 hours recordkeeping).
10. *Abstract:* As part of a joint industry-NRC initiative, the NRC receives information submitted voluntarily by power reactor licensees regarding selected performance attributes known as performance indicators (PIs). Performance indicators are objective measures of the performance of licensee systems or programs. The NRC uses PI information and inspection results in its Reactor Oversight Process to make decisions about plant performance and regulatory response. Licensees transmit PIs electronically to reduce burden on themselves and the NRC. Licensees also participate in the ROP Performance Indicator Frequently Asked Question (FAQ) process that it is used to resolve interpretation issues with NEI 99–02. The FAQ process and white papers may also be used to propose changes to NEI 99–02 guidance and the PI Program. The NRC and industry review FAQs and white papers and work to achieve resolution during periodic public meetings.

### III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the estimate of the burden of the information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: January 4, 2021.

For the Nuclear Regulatory Commission.

**David C. Cullison,**

*NRC Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 2021–00077 Filed 1–7–21; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–391; NRC–2020–0281]**

## Tennessee Valley Authority, Watts Bar Nuclear Plant, Unit 2

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License amendment request; opportunity to provide comment, request a hearing, and petition for leave to intervene; order imposing procedures.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Facility Operating License No. NPF–96, issued to Tennessee Valley Authority (TVA), for operation of the Watts Bar Nuclear Plant (Watts Bar or WBN), Unit 2. The proposed amendment would revise the Watts Bar Updated Final Safety Analysis Report (UFSAR) to apply alternate eddy current probabilities of detection (POD) to indications of axial outer diameter stress corrosion cracking (ODSCC) at tube support plates (TSPs) in the Watts Bar, Unit 2, steam generators for the beginning-of-cycle (BOC) voltage distribution in support of the Watts Bar, Unit 2, operational assessment. The proposed POD values will only be used until the Watts Bar, Unit 2, steam generators are replaced. For this amendment request, the NRC proposes to determine that it involves no significant hazards consideration. Because this amendment request contains sensitive unclassified non-safeguards information (SUNSI), an order imposes procedures to obtain access to SUNSI for contention preparation.

**DATES:** Submit comments by February 8, 2021. Requests for a hearing or petition for leave to intervene must be filed by March 9, 2021. Any potential party as defined in § 2.4 of title 10 of the *Code of Federal Regulations* (10 CFR), who believes access to SUNSI is necessary to respond to this notice, must request document access by January 19, 2021.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0281. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Green, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1627, email: *Kimberly.Green@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2020–0281 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0281.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ''Expedited Application for Approval to Use an Alternate Method of Determining Probability of Detection for the Watts Bar Nuclear Plant, Unit 2 Steam Generators (WBN TS–391–20–024),'' is available in ADAMS under Accession No. ML20358A141.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. Eastern Standard Time (EST), Monday through Friday, except Federal holidays.

*B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0281 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

### II. Introduction

The NRC is considering issuance of an amendment to Facility Operating License No. NPF–96, issued to TVA, for operation of the Watts Bar Nuclear Plant, Unit 2, located in Rhea County, Tennessee.

The proposed amendment would revise the Watts Bar UFSAR to apply alternate POD values to indications of axial ODSCC at TSPs in the Watts Bar, Unit 2, steam generators for the BOC voltage distribution in support of the Watts Bar, Unit 2, operational assessment until the steam generators are replaced.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the

Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequence of an accident previously evaluated?

*Response:* No.

The use of the alternate POD values for the bobbin indications measuring ≥3.2 volts for the BOC voltage distribution for the WBN, Unit 2 OA [operational assessment] does not pose a significant increase in the probability of a steam generator tube rupture (SGTR) event. Based on industry and plant specific bobbin detection data for ODSCC within the SG [steam generator] TSP region, large voltage bobbin indications can be detected with a POD greater than 0.6. Because large voltage ODSCC bobbin indications within the SG TSP can be detected, they will not be left in service; therefore, these indications should not be included in the voltage distribution for the purpose of OA [operational assessment]. An eddy current POD of 0.9 to indications of axial ODSCC at TSP with bobbin voltage amplitudes of ≥3.2 volts, but <6.0 volts and a POD of 0.95 to indications of ≥6.0 volts in the WBN, Unit 2 SG for the BOC voltage distribution is justified. The use of the proposed step change POD methodology offers no significant increase in steam line break (SLB) tube burst probability because it will be utilized in conjunction with the GL [Generic Letter] 95–05 methodology that predicts a conservative operational cycle in terms of effective full power days in compliance with the acceptance criteria for tube burst in the faulted SG.

Therefore, TVA concludes that this 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.

The use of the alternate POD values for the limited number of bobbin indications for WBN, Unit 2 for the BOC voltage distribution for the WBN, Unit 2 OA [operational assessment] concerns the SG tubes and can only affect the SGTR accident. Because the SGTR accident is already considered in the UFSAR, there in [is] no possibility to create a design basis accident, which has not, been previously evaluated.

Therefore, TVA concludes that this 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.

The use of the alternate POD values for the limited number of bobbin indications for WBN, Unit 2 for the BOC voltage distribution for the WBN, Unit 2 OA does not involve a significant reduction in a margin of safety. The applicable margin of safety potentially impacted is the WBN, Unit 2 TS [Technical Specification] 5.9.9 projected end-of-cycle leakage for a main steam line break (MSLB) accident and the projected end-of-cycle probability of burst. Based on industry and plant specific bobbin detection data for ODSCC within the SG TSP region, large voltage bobbin indications can be detected and will not be left in service. Therefore, these indications should not be included in the voltage distribution for the purpose of operational assessments. This results in a reduction in numbers of larger indications potentially left in service at the BOC and will not result in a significant increase in the actual end-of-cycle leakage for an MSLB accident or the actual end-of-cycle probability of burst.

Therefore, TVA concludes that this 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 license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 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 notice period if the Commission concludes 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 if 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. If the Commission takes 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. If the Commission makes 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.

## III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d), the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the 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 petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions that the petitioner seeks to have litigated in 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 petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion that support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be

limited to matters within the scope of the proceeding. The contention must be one that, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) 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. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section, except that under 10 CFR 2.309(h)(2) a State, local governmental body, or Federally recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a petition is submitted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

## IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), 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 that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). 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. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* 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 (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the 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 website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. (EST) 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 document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-*

*submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., (EST), 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 stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted 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, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents 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 *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. 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. For further details with respect to this action, see the application for license amendment dated December 23, 2020.

*Attorney for licensee:* Sherry Quirk, Executive Vice President and General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 6A, Knoxville, TN 37902.

*NRC Branch Chief:* Undine Shoop.

**Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation**

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing SUNSI.

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request access to SUNSI. A ''potential party'' is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication of this notice will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Deputy General Counsel for Hearings and Administration, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The email address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *RidsOgcMailCenter.Resource@nrc.gov,* respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1); and

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order[2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after receipt of (or access to) that information. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's ''E-Filing Rule,'' the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff after a determination on standing and requisite need, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

(3) Further appeals of decisions under this paragraph must be made pursuant to 10 CFR 2.311.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed within 5 days of the notification by the NRC staff of its grant of access and must be filed with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an Administrative Law Judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. The attachment to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

*It is so ordered.*

Dated: January 5, 2021.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

| Day | Event/activity |
|---|---|
| 0 | Publication of **Federal Register** notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests. |
| 10 | Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: Supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding. |
| 60 | Deadline for submitting petition for intervention containing: (i) Demonstration of standing; and (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply). |
| 20 | U.S. Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents). |
| 25 | If NRC staff finds no ''need'' or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds ''need'' for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access. |
| 30 | Deadline for NRC staff reply to motions to reverse NRC staff determination(s). |
| 40 | (Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI. |
| A | If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff. |
| A + 3 | Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order. |
| A + 28 | Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of opportunity to request a hearing and petition for leave to intervene), the petitioner may file its SUNSI contentions by that later deadline. |
| A + 53 | (Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI. |
| A + 60 | (Answer receipt +7) Petitioner/Intervenor reply to answers. |
| >A + 60 | Decision on contention admission. |

[3] Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

[FR Doc. 2021–00153 Filed 1–7–21; 8:45 am]
**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–472, OMB Control No. 3235–0531]**

## Proposed Collection; Comment Request, Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

*Extension:*
Rule 0–1

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 350l *et seq.*), the Securities and Exchange Commission (''Commission'') plans to submit to the Office of Management and Budget a request for extension of the previous approved collection of information discussed below.

The Investment Company Act of 1940 (the ''Act'') [1] establishes a comprehensive framework for regulating the organization and operation of investment companies (''funds''). A principal objective of the Act is to protect fund investors by addressing the conflicts of interest that exist between funds and their investment advisers and other affiliated persons. The Act places significant responsibility on the fund board of directors in overseeing the operations of the fund and policing the relevant conflicts of interest.[2]

In one of its first releases, the Commission exercised its rulemaking authority pursuant to sections 38(a) and 40(b) of the Act by adopting rule 0–1 (17 CFR 270.0–1).[3] Rule 0–1, as subsequently amended on numerous occasions, provides definitions for the terms used by the Commission in the rules and regulations it has adopted pursuant to the Act. The rule also contains a number of rules of construction for terms that are defined either in the Act itself or elsewhere in the Commission's rules and regulations. Finally, rule 0–1 defines terms that serve as conditions to the availability of certain of the Commission's exemptive rules. More specifically, the term ''independent legal counsel,'' as defined in rule 0–1, sets out conditions that funds must meet in order to rely on any of ten exemptive rules (''exemptive rules'') under the Act.[4]

The Commission amended rule 0–1 to include the definition of the term ''independent legal counsel'' in 2001.[5] This amendment was designed to enhance the effectiveness of fund boards of directors and to better enable investors to assess the independence of those directors. The Commission also amended the exemptive rules to require that any person who serves as legal counsel to the independent directors of any fund that relies on any of the exemptive rules must be an ''independent legal counsel.'' This requirement was added because independent directors can better perform the responsibilities assigned to them under the Act and the rules if they have the assistance of truly independent legal counsel.

If the board's counsel has represented the fund's investment adviser, principal underwriter, administrator (collectively, ''management organizations'') or their ''control persons'' [6] during the past two years, rule 0–1 requires that the board's independent directors make a determination about the adequacy of the counsel's independence. A majority of the board's independent directors are required to reasonably determine, in the exercise of their judgment, that the counsel's prior or current representation of the management organizations or their control persons was sufficiently limited to conclude that it is unlikely to adversely affect the counsel's professional judgment and legal representation. Rule 0–1 also requires that a record for the basis of this determination is made in the minutes of the directors' meeting. In addition, the independent directors must have obtained an undertaking from the counsel to provide them with the information necessary to make their determination and to update promptly that information when the person begins to represent a management organization or control person, or when he or she materially increases his or her representation. Generally, the independent directors must re-evaluate their determination no less frequently than annually.

Any fund that relies on one of the exemptive rules must comply with the requirements in the definition of ''independent legal counsel'' under rule 0–1. We assume that approximately 3035 funds rely on at least one of the exemptive rules annually.[7] We further assume that the independent directors of approximately one-third (1,010) of those funds would need to make the required determination in order for their counsel to meet the definition of independent legal counsel.[8] We estimate that each of these 1,010 funds would be required to spend, on average, 0.75 hours annually to comply with the recordkeeping requirement associated with this determination, for a total annual burden of approximately 758 hours. Based on this estimate, the total annual cost for all funds' compliance with this rule is approximately $175,523. To calculate this total annual cost, the Commission staff assumed that approximately two-thirds of the total annual hour burden (505 hours) would be incurred by a compliance manager with an average hourly wage rate of $312 per hour,[9] and one-third of the annual hour burden (253 hours) would be incurred by compliance clerk with an average hourly wage rate of $71 per hour.[10]

These burden hour estimates are based upon the Commission staff's experience and discussions with the fund industry. The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction

[1] 15 U.S.C. 80a.

[2] For example, fund directors must approve investment advisory and distribution contracts. *See* 15 U.S.C. 80a–15(a), (b), and (c).

[3] Investment Company Act Release No. 4 (Oct. 29, 1940) (5 FR 4316 (Oct. 31, 1940)). Note that rule 0–1 was originally adopted as rule N–1.

[4] The relevant exemptive rules are: Rule 10f–3 (17 CFR 270.10f–3), rule 12b–1 (17 CFR 270.12b–1), rule 15a–4(b)(2) (17 CFR 270.15a–4(b)(2)), rule 17a–7 (17 CFR 270.17a–7), rule 17a–8 (17 CFR 270.17a–-8), rule 17d–1(d)(7) (17 CFR 270.17d–1(d)(7)), rule 17e–1(c) (17 CFR 270.17e–1(c)), rule 17g–1 (17 CFR 270.17g–1), rule 18f–-3 (17 CFR 270.18f–3), and rule 23c-3 (17 CFR 270.23c–3).

[5] *See* Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 2, 2001) (66 FR 3735 (Jan. 16, 2001)).

[6] A ''control person'' is any person—other than a fund—directly or indirectly controlling, controlled by, or under common control, with any of the fund's management organizations. *See* 17 CFR 270.01(a)(6)(iv)(B).

[7] Based on statistics compiled by Commission staff, we estimate that there are approximately 3373 funds that could rely on one or more of the exemptive rules (this figure reflects the three-year average of open-end and closed-end funds (3,329) and business development companies (104)). Of those funds, we assume that approximately 90 percent (3,035) actually rely on at least one exemptive rules annually.

[8] We assume that the independent directors of the remaining two-thirds of those funds will choose not to have counsel, or will rely on counsel who has not recently represented the fund's management organizations or control persons. In both circumstances, it would not be necessary for the fund's independent directors to make a determination about their counsel's independence.

[9] The estimated hourly wages used in this PRA analysis were derived from the Securities Industry and Financial Markets Association's Reports on Management and Professional Earnings in the Securities Industry (2013) (modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead) (adjusted for inflation), and Office Salaries in the Securities Industry (2013) (modified to account for an 1800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead) (adjusted for inflation).

[10] (505 × $312/hour) + (253 × $71hour) = $175,523.

Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O Cynthia Roscoe, 100 F Street, NE Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 5, 2021.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00144 Filed 1–7–21; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting; Cancellation

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 85 FR 157, January 4, 2021.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Wednesday, January 6, 2021 at 2:00 p.m.

**CHANGES IN THE MEETING:** The closed meeting scheduled for Wednesday, January 6, 2021 at 2:00 p.m., has been cancelled.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: January 6, 2021.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2021–00319 Filed 1–6–21; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[SEC File No. 270–305, OMB Control No. 3235–0346]**

### Proposed Collection; Comment Request

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

*Extension:*
Rule 34b–1

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 34b–1 under the Investment Company Act (17 CFR 270.34b–1) governs sales material that accompanies or follows the delivery of a statutory prospectus (''sales literature''). Rule 34b–1 deems to be materially misleading any investment company (''fund'') sales literature required to be filed with the Securities and Exchange Commission (''Commission'') by Section 24(b) of the Investment Company Act (15 U.S.C. 80a–24(b)) that includes performance data, unless the sales literature also includes the appropriate uniformly computed data and the legend disclosure required in investment company advertisements by rule 482 under the Securities Act of 1933 (17 CFR 230.482). Requiring the inclusion of such standardized performance data in sales literature is designed to prevent misleading performance claims by funds and to enable investors to make meaningful comparisons among funds.

The Commission estimates that on average approximately 351 respondents file 7,362 [1] responses that include the information required by rule 34b–1 each year. The burden resulting from the collection of information requirements of rule 34b–1 is estimated to be 6 hours per response. The total hourly burden for rule 34b–1 is approximately 46,278 hours per year in the aggregate.[2]

[1] The estimated number of responses to rule 34b–1 is composed of 7,362 responses filed with FINRA and 351 responses filed with the Commission in 2019.

[2] 7,713 responses × 6 hours per response = 46,278 hours.

The collection of information under rule 34b–1 is mandatory. The information provided under rule 34b–1 is not kept confidential. The Commission 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.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proposed performance of the functions of the agency, including whether information will 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 collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, C/O Cynthia Roscoe, 100 F Street NE, Washington, DC 20549; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 5, 2021.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00145 Filed 1–7–21; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 34161; 812–15106]**

### Esoterica Thematic Trust and Esoterica Capital LLC; Notice of Application

January 4, 2021.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from section 15(a) of the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934 (''1934 Act''), and sections 6–07(2)(a), (b), and (c) of

Regulation S–X (''Disclosure Requirements'').

*Applicants:* Esoterica Thematic Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, which includes Esoterica NextG Economy ETF (each a ''Fund''), and Esoterica Capital LLC (''Initial Adviser''), a New York limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') that serves an investment adviser to the Funds (collectively with the Trust, the ''Applicants'').

*Summary of Application:* The requested exemption would permit Applicants to enter into and materially amend subadvisory agreements with subadvisers without shareholder approval and would grant relief from the Disclosure Requirements as they relate to fees paid to the subadvisers.

*Filing Dates:* The application was filed on March 11, 2020, and amended on August 19, 2020, and December 11, 2020.

*Hearing or Notification of Hearing:* An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on January 29, 2021, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

**ADDRESSES:** The Commission: *Secretarys-Office@sec.gov.* The Trust and the Initial Adviser: *Bruce.Liu@EsotericaCap.com* (with a copy to *JoAnn.Strasser@ThompsonHine.com*).

**FOR FURTHER INFORMATION CONTACT:** Christine Y. Greenlees, Senior Counsel, at (202) 551–6879, or Lisa Reid Ragen, Branch Chief at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number or an Applicant using the ''Company'' name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

## I. Requested Exemptive Relief

1. Applicants request an order to permit the Adviser,[1] subject to the approval of the board of trustees of the Trust (collectively, the ''Board''),[2] including a majority of the trustees who are not ''interested persons'' of the Trust or the Adviser, as defined in section 2(a)(19) of the Act (the ''Independent Trustees''), without obtaining shareholder approval, to: (i) Select investment subadvisers (''Subadvisers'') for all or a portion of the assets of one or more of the Funds pursuant to an investment subadvisory agreement with each Subadviser (each a ''Subadvisory Agreement''); and (ii) materially amend Subadvisory Agreements with the Subadvisers.

2. Applicants also request an order exempting the Subadvised Funds (as defined below) from the Disclosure Requirements, which require each Fund to disclose fees paid to a Subadviser. Applicants seek relief to permit each Subadvised Fund to disclose (as a dollar amount and a percentage of the Fund's net assets): (i) The aggregate fees paid to the Adviser and any Wholly-Owned Subadvisers; and (ii) the aggregate fees paid to Affiliated and Non-Affiliated Subadvisers (''Aggregate Fee Disclosure'').[3] Applicants seek an exemption to permit a Subadvised Fund to include only the Aggregate Fee Disclosure.[4]

3. Applicants request that the relief apply to Applicants, as well as to any future Fund and any other existing or future registered open-end management investment company or series thereof that intends to rely on the requested order in the future and that: (i) Is advised by the Adviser; (ii) uses the multi-manager structure described in the application; and (iii) complies with the terms and conditions of the application (each, a ''Subadvised Fund'').[5]

## II. Management of the Subadvised Funds

4. The Adviser serves or will serve as the investment adviser to each Subadvised Fund pursuant to an investment advisory agreement with the Fund (each an ''Investment Advisory Agreement''). Each Investment Advisory Agreement has been or will be approved by the Board, including a majority of the Independent Trustees, and by the shareholders of the relevant Subadvised Fund in the manner required by sections 15(a) and 15(c) of the Act. The terms of these Investment Advisory Agreements comply or will comply with section 15(a) of the Act. Applicants are not seeking an exemption from the Act with respect to the Investment Advisory Agreements. Pursuant to the terms of each Investment Advisory Agreement, the Adviser, subject to the oversight of the Board, will provide continuous investment management for each Subadvised Fund. For its services to each Subadvised Fund, the Adviser receives or will receive an investment advisory fee from that Fund as specified in the applicable Investment Advisory Agreement.

5. Consistent with the terms of each Investment Advisory Agreement, the Adviser may, subject to the approval of the Board, including a majority of the Independent Trustees, and the shareholders of the applicable Subadvised Fund (if required by applicable law), delegate portfolio management responsibilities of all or a portion of the assets of a Subadvised Fund to a Subadviser. The Adviser will retain overall responsibility for the management and investment of the assets of each Subadvised Fund. This

[1] The term ''Adviser'' means (i) the Initial Adviser, (ii) its successors, and (iii) any entity controlling, controlled by or under common control with, the Initial Adviser or its successors that serves as the primary adviser to a Subadvised Fund (as defined below). For the purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] The term ''Board'' also includes the board of trustees or directors of a future Subadvised Fund (as defined below), if different from the board of trustees of the Trust.

[3] A ''Wholly-Owned Subadviser'' is any investment adviser that is (1) an indirect or direct ''wholly-owned subsidiary'' (as such term is defined in section 2(a)(43) of the 1940 Act) of the Adviser, (2) a ''sister company'' of the Adviser that is an indirect or direct ''wholly-owned subsidiary'' of the same company that indirectly or directly wholly owns the Adviser (the Adviser's ''parent company''), or (3) a parent company of the Adviser. A ''Non-Affiliated Subadviser'' is any investment adviser that is not an ''affiliated person'' (as defined in the 1940 Act) of a Fund or the Adviser, except to the extent that an affiliation arises solely because the Subadviser serves as a subadviser to one or more Funds. Section 2(a)(43) of the 1940 Act defines ''wholly-owned subsidiary'' of a person as a company 95 per centum or more of the outstanding voting securities of which are, directly or indirectly, owned by such a person.

[4] Applicants note that all other items required by sections 6–07(2)(a), (b) and (c) of Regulation S–X will be disclosed.

[5] All registered open-end investment companies that currently intend to rely on the requested order are named as Applicants. Any entity that relies on the requested order will do so only in accordance with the terms and conditions contained in the application.

responsibility includes recommending the removal or replacement of Subadvisers, allocating the portion of that Subadvised Fund's assets to any given Subadviser and reallocating those assets as necessary from time to time.[6] The Subadvisers will be ''investment advisers'' to the Subadvised Funds within the meaning of section 2(a)(20) of the Act and will provide investment management services to the Funds subject to, without limitation, the requirements of sections 15(c) and 36(b) of the Act.[7] The Subadvisers, subject to the oversight of the Adviser and the Board, will determine the securities and other investments to be purchased, sold or entered into by a Subadvised Fund's portfolio or a portion thereof, and will place orders with brokers or dealers that they select.[8]

6. The Subadvisory Agreements will be approved by the Board, including a majority of the Independent Trustees, in accordance with sections 15(a) and 15(c) of the Act. In addition, the terms of each Subadvisory Agreement will comply fully with the requirements of section 15(a) of the Act. The Adviser may compensate the Subadvisers or the Subadvised Funds may compensate the Subadvisers directly.

7. Subadvised Funds will inform shareholders of the hiring of a new Subadviser pursuant to the following procedures (''Modified Notice and Access Procedures''): (a) Within 90 days after a new Subadviser is hired for any Subadvised Fund, that Fund will send its shareholders either a Multi-manager Notice or a Multi-manager Notice and Multi-manager Information Statement; [9] and (b) the Subadvised Fund will make the Multi-manager Information Statement available on the website identified in the Multi-manager Notice no later than when the Multi-manager Notice (or Multi-manager Notice and Multi-manager Information Statement) is first sent to shareholders, and will maintain it on that website for at least 90 days.[10]

## III. Applicable Law

8. Section 15(a) of the Act states, in part, that it is unlawful for any person to act as an investment adviser to a registered investment company ''except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, has been approved by the vote of a majority of the outstanding voting securities of such registered company.''

9. Form N–1A is the registration statement used by open-end investment companies. Item 19(a)(3) of Form N–1A requires a registered investment company to disclose in its statement of additional information the method of computing the ''advisory fee payable'' by the investment company with respect to each investment adviser, including the total dollar amounts that the investment company ''paid to the adviser (aggregated with amounts paid to affiliated advisers, if any), and any advisers who are not affiliated persons of the adviser, under the investment advisory contract for the last three fiscal years.''

10. Rule 20a–1 under the Act requires proxies solicited with respect to a registered investment company to comply with Schedule 14A under the 1934 Act. Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the ''rate of compensation of the investment adviser,'' the ''aggregate amount of the investment adviser's fee,'' a description of the ''terms of the contract to be acted upon,'' and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

11. Regulation S–X sets forth the requirements for financial statements required to be included as part of a registered investment company's registration statement and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b), and (c) of Regulation S–X require a registered investment company to include in its financial statements information about investment advisory fees.

12. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets this standard for the reasons discussed below.

## IV. Arguments in Support of the Requested Relief

13. Applicants assert that, from the perspective of the shareholder, the role of the Subadvisers is substantially equivalent to the limited role of the individual portfolio managers employed by an investment adviser to a traditional investment company. Applicants also assert that the shareholders expect the Adviser, subject to review and approval of the Board, to select a Subadviser who is in the best position to achieve the Subadvised Fund's investment objective. Applicants believe that permitting the Adviser to perform the duties for which the shareholders of the Subadvised Fund are paying the Adviser—the selection, oversight and evaluation of the Subadviser—without incurring unnecessary delays or expenses of convening special meetings of shareholders is appropriate and in the interest of the Fund's shareholders, and will allow such Fund to operate more efficiently. Applicants state that each Investment Advisory Agreement will continue to be fully subject to section 15(a) of the Act and approved by the relevant Board, including a majority of the Independent Trustees, in the manner required by section 15(a) and 15(c) of the Act.

14. Applicants submit that the requested relief meets the standards for relief under section 6(c) of the Act.

---

[6] Applicants represent that if the name of any Subadvised Fund contains the name of a subadviser, the name of the Adviser that serves as the primary adviser to the Fund, or a trademark or trade name that is owned by or publicly used to identify the Adviser, will precede the name of the subadviser.

[7] The Subadvisers will be registered with the Commission as an investment adviser under the Advisers Act or not subject to such registration.

[8] A ''Subadviser'' also includes an investment subadviser that provides or will provide the Adviser with a model portfolio reflecting a specific strategy, style or focus with respect to the investment of all or a portion of a Subadvised Fund's assets. The Adviser may use the model portfolio to determine the securities and other instruments to be purchased, sold or entered into by a Subadvised Fund's portfolio or a portion thereof, and place orders with brokers or dealers that it selects.

[9] A ''Multi-manager Notice'' will be modeled on a Notice of Internet Availability as defined in Rule 14a–16 under the 1934 Act, and specifically will, among other things: (a) Summarize the relevant information regarding the new Subadviser (except as modified to permit Aggregate Fee Disclosure); (b) inform shareholders that the Multi-manager Information Statement is available on a website; (c) provide the website address; (d) state the time period during which the Multi-manager Information Statement will remain available on that website; (e) provide instructions for accessing and printing the Multi-manager Information Statement; and (f) instruct the shareholder that a paper or email copy of the Multi-manager Information Statement may be obtained, without charge, by contacting the Subadvised Fund. A ''Multi-manager Information Statement'' will meet the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the 1934 Act for an information statement, except as modified by the requested order to permit Aggregate Fee Disclosure. Multi-manager Information Statements will be filed with the Commission via the EDGAR system.

[10] In addition, Applicants represent that whenever a Subadviser is hired or terminated, or a Subadvisory Agreement is materially amended, the Subadvised Fund's prospectus and statement of additional information will be supplemented promptly pursuant to rule 497(e) under the Securities Act of 1933.

Applicants state that the operation of the Subadvised Fund in the manner described in the Application must be approved by shareholders of that Fund before it may rely on the requested relief. Applicants also state that the proposed conditions to the requested relief are designed to address any potential conflicts of interest or economic incentives, and provide that shareholders are informed when new Subadvisers are hired.

15. Applicants contend that, in the circumstances described in the application, a proxy solicitation to approve the appointment of new Subadvisers provides no more meaningful information to shareholders than the proposed Multi-manager Information Statement. Applicants state that, accordingly, they believe the requested relief is necessary or appropriate in the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

16. With respect to the relief permitting Aggregate Fee Disclosure, Applicants assert that disclosure of the individual fees paid to the Subadvisers does not serve any meaningful purpose. Applicants contend that the primary reasons for requiring disclosure of individual fees paid to Subadvisers are to inform shareholders of expenses to be charged by a particular Subadvised Fund and to enable shareholders to compare the fees to those of other comparable investment companies. Applicants believe that the requested relief satisfies these objectives because the Subadvised Fund's overall advisory fee will be fully disclosed and, therefore, shareholders will know what the Subadvised Fund's fees and expenses are and will be able to compare the advisory fees a Subadvised Fund is charged to those of other investment companies. In addition, Applicants assert that the requested relief would benefit shareholders of the Subadvised Fund because it would improve the Adviser's ability to negotiate the fees paid to Subadvisers. In particular, Applicants state that if the Adviser is not required to disclose the Subadvisers' fees to the public, the Adviser may be able to negotiate rates that are below a Subadviser's ''posted'' amounts. Applicants assert that the relief will also encourage Subadvisers to negotiate lower subadvisory fees with the Adviser if the lower fees are not required to be made public.

## V. Relief for Affiliated Subadvisers

17. The Commission has granted the requested relief with respect to Wholly-Owned and Non-Affiliated Subadvisers through numerous exemptive orders. The Commission also has extended the requested relief to Affiliated Subadvisers.[11] Applicants state that although the Adviser's judgment in recommending a Subadviser can be affected by certain conflicts, they do not warrant denying the extension of the requested relief to Affiliated Subadvisers. Specifically, the Adviser faces those conflicts in allocating fund assets between itself and a Subadviser, and across Subadvisers, as it has an interest in considering the benefit it will receive, directly or indirectly, from the fee the Subadvised Fund pays for the management of those assets. Applicants also state that to the extent the Adviser has a conflict of interest with respect to the selection of an Affiliated Subadviser, the proposed conditions are protective of shareholder interests by ensuring the Board's independence and providing the Board with the appropriate resources and information to monitor and address conflicts.

18. With respect to the relief permitting Aggregate Fee Disclosure, Applicants assert that it is appropriate to disclose only aggregate fees paid to Affiliated Subadvisers for the same reasons that similar relief has been granted previously with respect to Wholly-Owned and Non-Affiliated Subadvisers.

## VI. Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Subadvised Fund may rely on the order requested in the Application, the operation of the Subadvised Fund in the manner described in the Application will be, or has been, approved by a majority of the Subadvised Fund's outstanding voting securities as defined in the Act, or, in the case of a Subadvised Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder before such Subadvised Fund's shares are offered to the public.

2. The prospectus for each Subadvised Fund will disclose the existence, substance and effect of any order granted pursuant to the Application. In addition, each Subadvised Fund will hold itself out to the public as employing the multi-manager structure described in the Application. The prospectus will prominently disclose that the Adviser has the ultimate responsibility, subject to oversight by the Board, to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. The Adviser will provide general management services to each Subadvised Fund, including overall supervisory responsibility for the general management and investment of the Subadvised Fund's assets, and subject to review and oversight of the Board, will (i) set the Subadvised Fund's overall investment strategies, (ii) evaluate, select, and recommend Subadvisers for all or a portion of the Subadvised Fund's assets, (iii) allocate and, when appropriate, reallocate the Subadvised Fund's assets among Subadvisers, (iv) monitor and evaluate the Subadvisers' performance, and (v) implement procedures reasonably designed to ensure that Subadvisers comply with the Subadvised Fund's investment objective, policies and restrictions.

4. Subadvised Funds will inform shareholders of the hiring of a new Subadviser within 90 days after the hiring of the new Subadviser pursuant to the Modified Notice and Access Procedures.

5. At all times, at least a majority of the Board will be Independent Trustees, and the selection and nomination of new or additional Independent Trustees will be placed within the discretion of the then-existing Independent Trustees.

6. Independent Legal Counsel, as defined in Rule 0–1(a)(6) under the Act, will be engaged to represent the Independent Trustees. The selection of such counsel will be within the discretion of the then-existing Independent Trustees.

7. Whenever a Subadviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the profitability of the Adviser.

8. The Board must evaluate any material conflicts that may be present in a subadvisory arrangement. Specifically, whenever a subadviser change is proposed for a Subadvised Fund (''Subadviser Change'') or the Board considers an existing Subadvisory Agreement as part of its annual review process (''Subadviser Review''):

(a) The Adviser will provide the Board, to the extent not already being provided pursuant to section 15(c) of the Act, with all relevant information concerning:

(i) Any material interest in the proposed new Subadviser, in the case of a Subadviser Change, or the Subadviser in the case of a Subadviser Review, held

[11] *See Carillon Series Trust and Carillon Tower Advisers, Inc.,* Investment Company Act Rel. Nos. 33464 (May 2, 2019) (notice) and 33494 (May 29, 2019) (order).

directly or indirectly by the Adviser or a parent or sister company of the Adviser, and any material impact the proposed Subadvisory Agreement may have on that interest;

(ii) any arrangement or understanding in which the Adviser or any parent or sister company of the Adviser is a participant that (A) may have had a material effect on the proposed Subadviser Change or Subadviser Review, or (B) may be materially affected by the proposed Subadviser Change or Subadviser Review;

(iii) any material interest in a Subadviser held directly or indirectly by an officer or Trustee of the Subadvised Fund, or an officer or board member of the Adviser (other than through a pooled investment vehicle not controlled by such person); and

(iv) any other information that may be relevant to the Board in evaluating any potential material conflicts of interest in the proposed Subadviser Change or Subadviser Review.

(b) the Board, including a majority of the Independent Trustees, will make a separate finding, reflected in the Board minutes, that the Subadviser Change or continuation after Subadviser Review is in the best interests of the Subadvised Fund and its shareholders and, based on the information provided to the Board, does not involve a conflict of interest from which the Adviser, a Subadviser, any officer or Trustee of the Subadvised Fund, or any officer or board member of the Adviser derives an inappropriate advantage.

9. Each Subadvised Fund will disclose in its registration statement the Aggregate Fee Disclosure.

10. In the event that the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the Application, the requested order will expire on the effective date of that rule.

11. Any new Subadvisory Agreement or any amendment to an existing Investment Advisory Agreement or Subadvisory Agreement that directly or indirectly results in an increase in the aggregate advisory fee rate payable by the Subadvised Fund will be submitted to the Subadvised Fund's shareholders for approval.

For the Commission, by the Division of Investment Management, under delegated authority.

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00089 Filed 1–7–21; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–90841; File No. SR–ICC–2020–014]**

## Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change Relating to the ICC Clearing Participant Default Management Procedures

January 4, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2020, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC Clearing Participant (''CP'') Default Management Procedures (''Default Management Procedures''). These revisions do not require any changes to the ICC Clearing Rules (the ''Rules'').[3]

### II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(a) Purpose

ICC proposes to revise the Default Management Procedures, which set forth ICC's default management process, including the actions taken by ICC to determine that a CP is in default as well as the actions taken by ICC in connection with such default to close-out the defaulter's portfolio. These revisions do not require any changes to ICC's existing default management rules or any other procedures as they are limited to clarification changes that formalize the process for convening the CDS Default Committee remotely and minor updates regarding notifications sent as part of the default management process. ICC believes such revisions will facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. ICC proposes to make such changes effective following Commission approval of the proposed rule change. The proposed revisions are described in detail as follows.

ICC proposes revisions to Subsection 4.4 (Secure Trading Facility) related to convening the ICC CDS Default Committee, which consists of trading personnel seconded from CPs to assist with default management. The proposed changes specify that ICC may convene its CDS Default Committee in a private room at its offices (''Secure Trading Facility'') or remotely by teleconference (''Remote Trader Consultation'') in the event the committee is unable to meet in person. The decision of whether to convene in person or remotely would be made by the ICC Chief Risk Officer (''CRO'') and would depend on the circumstances at the time of the declaration of the default.

ICC also proposes updates to Section 6 (Default Declaration). The proposed changes to Subsection 6.1.5 (CCO Pre-Declaration Initiated Actions) allow the ICC Chief Compliance Officer (''CCO'') to inform the Commission and the Commodity Futures Trading Commission (''CFTC'') by telephone or email of a potential default and further direct the CCO to inform other regulators of the potential default as may be required. Amended Subsection 6.4 (Default Declaration Notification) similarly directs the CCO to notify other regulators (in addition to the Commission and the CFTC) of a default if applicable and includes a minor edit to replace ''all'' with ''above'' in the phrase ''CCO confirming all notifications.'' The proposed updates to Subsection 6.5.3 (CRO Post-Declaration Preparation) relate to the CRO's actions to convene the CDS Default Committee following a declaration of default, including the CRO's determination of whether this committee meets in person or remotely, and distinguish certain actions that would be taken for an in-person CDS Default Committee meeting.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms used but not defined herein have the meanings specified in the Rules.

The proposed revisions to Subsection 6.5.4 (CCO Post-Declaration Actions) make minor clarifications in respect of the notice that the CCO provides to the compliance personnel of a CDS Default Committee member following a declaration of a default.

ICC further proposes changes to Section 7 (CDS Default Committee Consultation). The proposed changes reference ICC's ability to convene the CDS Default Committee remotely. Amended Subsection 7.1 (Convening a CDS Default Committee Meeting) formalizes the process for convening a CDS Default Committee remotely by teleconference, including how notice is provided to CDS Default Committee members and what is included in the notice. The changes also distinguish what actions would be taken in connection with convening the CDS Default Committee at the Secure Trading Facility, by Remote Trader Consultation, or by either means. Amended Subsection 7.3 (Initial CDS Default Committee Meeting) specifies that certain actions are conducted where technologically practicable during the initial CDS Default Committee meeting and includes minor grammatical updates, including adding a parenthetical and updating the sentence structure for clarity.

(b) Statutory Basis

ICC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act [4] and the regulations thereunder applicable to it, including the applicable standards under Rule 17Ad–22.[5] In particular, Section 17A(b)(3)(F) of the Act [6] requires that the rule change be consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, to Section 17(A)(b)(3)(F),[7] because the proposed rule change enhances ICC's ability to manage the risk of a default by formalizing the process for convening the CDS Default Committee remotely and including minor updates regarding notifications sent as part of the default management process. The clarification and clean-up changes ensure that the documentation of ICC's Default Management Procedures remains up-to-date, transparent, and focused on clearly articulating the policies and procedures used to support ICC's default management process such that ICC can take timely action in case of a default. ICC believes that such changes augment ICC's procedures relating to default management and enhance ICC's ability to withstand defaults and continue providing clearing services, thereby promoting the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions; the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible; and the protection of investors and the public interest. As such, the proposed rule change is designed to promote the prompt and accurate clearance and settlement of securities transactions, derivatives agreements, contracts, and transactions; to contribute to the safeguarding of securities and funds associated with security-based swap transactions in ICC's custody or control, or for which ICC is responsible; and, in general, to protect investors and the public interest within the meaning of Section 17A(b)(3)(F) of the Act.[8]

The amendments would also satisfy relevant requirements of Rule 17Ad–22.[9] Rule 17Ad–22(e)(2)(i) and (v) [10] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. The Default Management Procedures clearly assign and document responsibility and accountability for default management actions and decisions. The proposed changes specify that the CRO is responsible for determining whether to convene the CDS Default Committee in person or remotely by teleconference. Moreover, the proposed revisions continue to allow for feedback from, and notification to, relevant stakeholders, such as the CDS Default Committee, CPs, and regulators. These governance arrangements are clear and transparent, such that information relating to the assignment of responsibilities and the requisite involvement of relevant committees and ICC personnel is clearly documented. In ICC's view, the proposed rule change continues to ensure that ICC maintains policies and procedures that are reasonably designed to provide for clear and transparent governance arrangements and specify clear and direct lines of responsibility, consistent with Rule 17Ad–22(e)(2)(i) and (v).[11]

Rule 17Ad–22(e)(4)(ii) [12] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. The proposed changes set out procedures for convening the CDS Default Committee remotely, which enhances ICC's ability to manage a default if circumstances prevent the CDS Default Committee from meeting in person. The proposed changes further enhance ICC's procedures for managing a default by ensuring that relevant individuals are notified, including through additional details on how individuals are notified and what is included in the notice, and can take timely action during the default management process. As such, the proposed amendments would strengthen ICC's ability to maintain its financial resources and withstand the pressures of defaults, consistent with the requirements of Rule 17Ad–22(e)(4)(ii).[13]

Rule 17Ad–22(e)(13) [14] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to ensure it has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations by, at a minimum, requiring its participants and, when practicable, other stakeholders to participate in the testing and review of its default procedures, including any close-out procedures, at least annually and following material changes thereto. The proposed changes continue to ensure that ICC can take timely action to contain losses and liquidity demands

[4] 15 U.S.C. 78q–1.

[5] 17 CFR 240.17Ad–22.

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] *Id.*

[8] *Id.*

[9] 17 CFR 240.17Ad–22.

[10] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[11] *Id.*

[12] 17 CFR 240.17Ad–22(e)(4)(ii).

[13] *Id.*

[14] 17 CFR 240.17Ad–22(e)(13).

and continue meeting its obligations in the event of a default, including by formalizing and detailing procedures for convening the CDS Default Committee remotely, which promotes ICC's ability to efficiently and safely manage its close-out process where the CDS Default Committee cannot meet in person, thereby enhancing ICC's ability to withstand defaults and continue providing clearing services. Additionally, ICC believes that the notification related updates and clean-up changes further enhance ICC's default management process by ensuring that relevant stakeholders receive necessary information and that the Default Management Procedures remain up-to-date, clear, and transparent to ensure that ICC can take timely action to contain losses and liquidity demands and continue meeting its obligations in the event of a default. Therefore, ICC believes the proposed rule change is consistent with the requirements of Rule 17ad–22(e)(13).[15]

*(B) Clearing Agency's Statement on Burden on Competition*

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition. The proposed changes to the Default Management Procedures will apply uniformly across all market participants. Therefore, ICC does not believe the amendments would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2020–014 on the subject line.

*Paper Comments*

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–ICC–2020–014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2020–014 and should be submitted on or before January 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021–00096 Filed 1–7–21; 8:45 am]

**BILLING CODE 8011–01–P**

[15] *Id.*

[16] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 2:00 p.m. on Wednesday, January 13, 2021.

**PLACE:** The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

**STATUS:** This meeting will be closed to the public.

**MATTERS TO BE CONSIDERED:** Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: January 6, 2021.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2021–00253 Filed 1–6–21; 11:15 am]

**BILLING CODE 8011–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #16832 and #16833; California Disaster Number CA–00332]**

### Administrative Declaration of a Disaster for the State of California

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a notice of an Administrative declaration of a disaster for the State of California dated 12/30/2020.

*Incident:* Mountain View Fire.

*Incident Period:* 11/17/2020 through 11/23/2020.

**DATES:** Issued on 12/30/2020.

*Physical Loan Application Deadline Date:* 03/01/2021.

*Economic Injury (EIDL) Loan Application Deadline Date:* 09/30/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the 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:* Mono.

*Contiguous Counties:*

California: Alpine, Fresno, Inyo, Madera, Tuolumne.

Nevada: Douglas, Esmeralda, Lyon, Mineral.

*The Interest Rates are:*

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Homeowners With Credit Available Elsewhere | 2.250 |
| Homeowners Without Credit Available Elsewhere | 1.125 |
| Businesses With Credit Available Elsewhere | 6.000 |
| Businesses Without Credit Available Elsewhere | 3.000 |
| Non-Profit Organizations With Credit Available Elsewhere | 2.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.000 |
| *For Economic Injury:* | |
| Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere | 3.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.000 |

The number assigned to this disaster for physical damage is 16832 5 and for economic injury is 16833 0.

The States which received an EIDL Declaration # are California, Nevada.

(Catalog of Federal Domestic Assistance Number 59008)

**Jovita Carranza,**

*Administrator.*

[FR Doc. 2021–00168 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declarations of Economic Injury for the Coronavirus (COVID–19)]**

### Amendment to Administrative Declarations of Economic Injury Disasters for the Entire United States and U.S. Territories

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment to the Economic Injury Disaster Loan (EIDL) declarations issued for each State and Territory of the U.S.

*Incident:* Coronavirus (COVID–19).

*Incident Period:* 01/31/2020 and continuing.

**DATES:** Issued 12/30/2020.

*Economic Injury (EIDL) Loan Application Deadline Date*: 12/31/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** The notice of the Economic Injury declarations for each State and Territory of the U.S., dated between 03/16/2020 to 03/21/2020, is hereby amended to extend the deadline date for filing applications for economic injury as a result of this disaster to 12/31/2021. For additional information, please visit *SBA.gov/disaster.* For questions, please contact the SBA disaster assistance customer service center at 1–800–659–2955 (TTY: 1–800–877–8339) or email *disastercustomerservice@sba.gov.*

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**Jovita Carranza,**

*Administrator.*

[FR Doc. 2021–00171 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration # 16838 and # 16839; UTAH Disaster Number UT–00079]**

### Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Utah

**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 Utah (FEMA—4548—DR), dated 12/31/2020.

*Incident:* Earthquake and Aftershocks.

*Incident Period:* 03/18/2020 through 04/17/2020.

**DATES:** Issued on 12/31/2020.

*Physical Loan Application Deadline Date:* 03/01/2021.

*Economic Injury (EIDL) Loan Application Deadline Date*: 10/01/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 12/31/2020, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations. The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* Salt Lake.

The Interest Rates are:

| | Precent |
|---|---|
| *For Physical Damage:* | |
| For Profit Organizations With Credit Available Elsewhere ... | 2.750 |
| Non-Profit Organizations Without Credit Available Elsewhere ..... | 2.750 |
| *For Economic Injury:* | |
| Non-Profit Organizations Without Credit Available Elsewhere ..... | 2.750 |

The number assigned to this disaster for physical damage is 168382 and for economic injury is 168390.

(Catalog of Federal Domestic Assistance Number 59008)

**Cynthia Pitts,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 2021–00166 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #16836 and #16837; MISSISSIPPI Disaster Number MS–00134]**

### Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Mississippi

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Mississippi (FEMA–4576—DR), dated 12/31/2020.

*Incident:* Hurricane Zeta.

*Incident Period:* 10/28/2020 through 10/29/2020.

**DATES:** Issued on 12/31/2020.

*Physical Loan Application Deadline Date:* 03/01/2021.

*Economic Injury (EIDL) Loan Application Deadline Date:* 10/01/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 12/31/2020, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* George, Greene, Hancock, Harrison, Jackson, Perry, Stone, Wayne.

*The Interest Rates are:*

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Non-Profit Organizations With Credit Available Elsewhere ... | 2.750 |
| Non-Profit Organizations Without Credit Available Elsewhere ..... | 2.750 |
| *For Economic Injury:* | |
| Non-Profit Organizations Without Credit Available Elsewhere ..... | 2.750 |

The number assigned to this disaster for physical damage is 168368 and for economic injury is 168370.

(Catalog of Federal Domestic Assistance Number 59008)

**Cynthia Pitts,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 2021–00170 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #16532; CALIFORNIA Disaster Number CA–00321 Declaration of Economic Injury]**

### Administrative Declaration Amendment of an Economic Injury Disaster for the State of California

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of an Economic Injury Disaster Loan (EIDL) declaration for the State of California, dated 07/07/2020.

*Incident:* Civil Unrest.

*Incident Period:* 05/26/2020 through 12/28/2020.

**DATES:** Issued on 12/30/2020.

*Economic Injury (EIDL) Loan Application Deadline Date:* 04/07/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** The notice of an Economic Injury declaration for the State of California, dated 07/07/2020, is hereby amended to establish the incident period for this disaster as beginning 05/26/2020 and continuing through 12/28/2020.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**Jovita Carranza,**

*Administrator.*

[FR Doc. 2021–00172 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #16834 and #16835; MISSISSIPPI Disaster Number MS–00130]**

### Presidential Declaration of a Major Disaster for the State of Mississippi

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA—4576—DR), dated 12/31/2020.

*Incident:* Hurricane Zeta.

*Incident Period:* 10/28/2020 through 10/29/2020.

**DATES:** Issued on 12/31/2020.

*Physical Loan Application Deadline Date:* 03/01/2021.

*Economic Injury (EIDL) Loan Application Deadline Date:* 10/01/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 12/31/2020, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties (Physical Damage and Economic Injury Loans):* George, Greene, Hancock, Harrison, Jackson, Stone.

*Contiguous Counties (Economic Injury Loans Only):*

Mississippi: Forrest, Pearl River, Perry, Wayne.

Alabama: Mobile, Washington.

Louisiana: Saint Tammany.

The Interest Rates are:

| | Percent |
|---|---|
| For Physical Damage:. | |
| Homeowners With Credit Available Elsewhere | 2.375 |
| Homeowners Without Credit Available Elsewhere | 1.188 |
| Businesses With Credit Available Elsewhere | 6.000 |
| Businesses Without Credit Available Elsewhere | 3.000 |
| Non-Profit Organizations With Credit Available Elsewhere | 2.750 |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.750 |
| For Economic Injury:. | |
| Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere | 3.000 |
| Non-Profit Organizations Without Credit Available Elsewhere | 2.750 |

The number assigned to this disaster for physical damage is 168348 and for economic injury is 168350.

(Catalog of Federal Domestic Assistance Number 59008)

**Cynthia Pitts,**

*Acting Associate Administrator for Disaster Assistance.*

[FR Doc. 2021–00167 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #16485 and #16486; CALIFORNIA Disaster Number CA–00319]**

### Administrative Declaration Amendment of a Disaster for the State of California

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Administrative declaration of a disaster for the State of California dated 06/17/2020.

*Incident:* Civil Unrest.

*Incident Period:* 05/26/2020 to 12/28/2020.

**DATES:** Issued on 12/30/2020.

*Physical Loan Application Deadline Date:* 09/16/2020.

*Economic Injury (EIDL) Loan Application Deadline Date:* 03/17/2021.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** The notice of an Administrative declaration for the State of California, dated 06/17/2020, is hereby amended to establish the incident period for this disaster as beginning 05/26/2020 and continuing through 12/28/2020.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**Jovita Carranza,**

*Administrator.*

[FR Doc. 2021–00169 Filed 1–7–21; 8:45 am]

**BILLING CODE 8026–03–P**

## DEPARTMENT OF STATE

**[Public Notice 11297]**

### List of Participating Countries and Entities in the Kimberley Process Certification Scheme, Known as ''Participants'' for the Purposes of the Clean Diamond Trade Act of 2003 (Pub. L. 108–19) and Section 2 of Executive Order 13312 of July 29, 2003

**ACTION:** Notice.

**SUMMARY:** The Department of State is updating the list of Participants eligible for trade in rough diamonds under the Act, and their respective Importing and Exporting Authorities, revising the previously published list of July 5, 2019, to reflect the addition of the United Kingdom as an independent Participant, among other changes.

**DATES:** This notice is effective on January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Pamela Fierst-Walsh, Senior Advisor, Bureau of Economic and Business Affairs, Department of State, (202) 647–6116.

**SUPPLEMENTARY INFORMATION:**

Section 4 of the Clean Diamond Trade Act of 2003, Public Law 108–19 (the ''Act'') requires the President to prohibit the importation into, or the exportation from, the United States of any rough diamond, from whatever source, that has not been controlled through the Kimberley Process Certification Scheme (KPCS). Under Section 3(2) of the Act, ''controlled through the Kimberley Process Certification Scheme'' means an importation from the territory of a Participant or exportation to the territory of a Participant of rough diamonds that is either (i) carried out in accordance with the KPCS, as set forth in regulations promulgated by the President, or (ii) controlled under a system determined by the President to meet substantially the standards, practices, and procedures of the KPCS. The referenced regulations are contained at 31 CFR part 592 (''Rough Diamond Control Regulations'') (68 FR 45777, August 4, 2003).

Section 6(b) of the Act requires the President to publish in the **Federal Register** a list of all Participants, and all Importing and Exporting Authorities of Participants, and to update the list as necessary. Section 2 of Executive Order 13312 of July 29, 2003 delegates this function to the Secretary of State. Section 3(7) of the Act defines ''Participant'' as a state, customs territory, or regional economic integration organization identified by the Secretary of State. Section 3(3) of the Act defines ''Exporting Authority'' as one or more entities designated by a Participant from whose territory a shipment of rough diamonds is being exported as having the authority to validate a Kimberley Process Certificate. Section 3(4) of the Act defines ''Importing Authority'' as one or more entities designated by a Participant into whose territory a shipment of rough diamonds is imported as having the authority to enforce the laws and regulations of the Participant regarding imports, including the verification of the Kimberley Process Certificate accompanying the shipment.

#### List of Participants

Pursuant to Sections 3 and 6 of the Act, Section 2 of Executive Order 13312, Department of State Delegations of Authority No. 245–1 (February 13, 2009), and No. 376 (October 31, 2011), I hereby identify the following entities as Participants under section 6(b) of the Act. Included in this List are the Importing and Exporting Authorities for Participants, as required by Section 6(b) of the Act. This List is published solely for the purpose of implementing the mandates cited above and does not reflect or prejudice any other regulation or prohibition that may apply with respect to trading, doing business, or engaging in any other transaction with any of the listed countries or entities. This list revises the revising the previously published list of July 5, 2019 to reflect the addition of the United Kingdom as an independent Participant, among other changes.

Angola—Ministry of Mineral Resources and Petroleum, Ministry of Trade.

Armenia—Ministry of Economic Development and Investment.

Australia—Department of Industry, Innovation and Science (Exporting Authority), Department of Home Affairs (Importing Authority).

Bangladesh—Export Promotion Bureau.
Belarus—Ministry of Finance—Precious Metals and Gemstones Department.
Botswana—Ministry of Minerals, Green Technology and Energy Security—Diamond Hub.
Brazil—Ministry of Mines and Energy—Secretariat of Geology, Mining and Mineral Processing—National Mining Agency.
Cambodia—Ministry of Commerce.
Cameroon—Ministry of Mines—National Permanent Secretariat for the Kimberley Process.
Canada—Ministry of Natural Resources Canada.
Central African Republic—Ministry of Mines, Energy and Hydraulics.
China—General Administration of China Customs; in the Hong Kong Special Administrative Region: Trade and Industry Department (Exporting Authority), Customs and Exercise Department (Importing Authority).
Congo, Democratic Republic of the—Ministry of Mines—The Center of Expertise, Evaluation and Certification of Precious and Semiprecious Mineral Substances.
Congo, Republic of the—Ministry of Mines and Geology—Bureau of Expertise, Evaluation and Certification of Precious Mineral Substances.
Cote D'Ivoire (Ivory Coast)—General Directorate of Customs.
Eswatini—Office of the Commissioner of Mines.
European Union—European Commission—Foreign Policy Instruments; in Belgium: Federal Public Service of Economy; in the Czech Republic: General Directorate of Customs; in Germany: Main Customs Office (Exporting Authority), General Directorate for Management VI (Importing Authority); In Ireland: the Kimberley Process and Responsible Minerals Authority—Exploration and Mining Division—Department of Communications, Climate Action and Environment; in Portugal: Tributary and Customs Authority—Licensing Services Directorate; in Romania: National Authority for Consumer Protection—General Department for Precious Metals, Precious Stones and the Kimberley Process.
Gabon—Permanent Center for the Kimberley Process
Ghana—Ministry of Lands and Natural Resources—Precious Minerals Marketing Company Limited.
Guinea—Ministry of Mines and Geology.
Guyana—Guyana Geology and Mines Commission.
India—The Gem and Jewellery Export Promotion Council.
Indonesia—Ministry of Trade—Director General for Foreign Trade.
Israel—Ministry of Economy and Industry—Office of the Diamond Controller.
Japan—Ministry of Economy, Trade and Industry—Agency for Natural Resources and Energy Trade and Economic Cooperation Bureau.
Kazakhstan—Ministry for Investments and Development—Committee for Technical Regulation and Metrology.
Korea, Republic of (South Korea)—Ministry of Trade, Industry and Energy.
Laos—Ministry of Industry and Commerce—Department of Import and Export.
Lebanon—Ministry of Economy and Trade.
Lesotho—Ministry of Mining—Department of Mines—Diamond Control Office.
Liberia—Ministry of Lands, Mines and Energy.
Malaysia—Royal Malaysian Customs Department.
Mali—Ministry of Mines—Office of Expertise, Evaluation and Certification of Rough Diamonds.
Mauritius—Ministry of Industry, Commerce and Consumer Protection—Trade Division.
Mexico—Ministry of Economy—Directorate-General for International Trade in Goods.
Namibia—Ministry of Mines and Energy—Directorate of Diamond Affairs.
New Zealand—New Zealand Customs Service.
Norway—Norwegian Customs Service.
Panama—National Customs Authority.
Russia—Ministry of Finance.
Sierra Leone—National Minerals Agency, National Revenue Authority.
Singapore—Ministry of Trade and Industry, Singapore Customs.
South Africa—South African Diamond and Precious Metals Regulator.
Sri Lanka—National Gem and Jewellery Authority.
Switzerland—State Secretariat for Economic Affairs.
Taipei—Ministry of Economic Affairs—Bureau of Foreign Trade—Import/Export Administration Division.
Tanzania—Ministry of Energy and Minerals—Commissioner for Minerals.
Thailand—Ministry of Commerce—Department of Foreign Trade.
Togo—Ministry of Mines and Energy—Head Office of Mines and Geology.
Turkey—Borsa Istanbul Precious Metals and Diamond Market.
Ukraine—Ministry of Finance—State Gemmological Centre of Ukraine.
United Arab Emirates—Dubai Multi Commodities Center Authority—U.A.E. Kimberley Process Office in the Dubai Airport Free Zone.
United Kingdom—Foreign, Commonwealth & Development Office—Government Diamond Office.
United States of America—United States Census Bureau (Exporting Authority), United States Customs and Border Protection (Importing Authority).
Venezuela—Central Bank of Venezuela (Exporting Authority), National Customs and Tax Administration Integrated Service (Importing Authority).
Vietnam—Ministry of Industry and Trade—Import Export Management Divisions in Hanoi and Ho Chi Minh City.
Zimbabwe—Minerals Marketing Corporation of Zimbabwe (Exporting Authority), Zimbabwe Revenue Authority (Importing Authority).

**Peter D. Haas,**

*Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.*

[FR Doc. 2021–00062 Filed 1–7–21; 8:45 am]

**BILLING CODE 4710–AE–P**

## DEPARTMENT OF STATE

**[Public Notice 11296]**

## Updating the State Department's List of Entities and Subentities Associated With Cuba (Cuba Restricted List) Updated Publication of List of Entities and Subentities; Notice

**SUMMARY:** The Department of State is publishing an update to its List of Restricted Entities and Subentities Associated With Cuba (Cuba Restricted List) with which direct financial transactions are generally prohibited under the Cuban Assets Control Regulations (CACR). The Department of Commerce's Bureau of Industry and Security (BIS) generally will deny applications to export or reexport items for use by entities or subentities on the Cuba Restricted List.

**DATES:** Effective on January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** Emily Belson, Office of Economic Sanctions Policy and Implementation, 202–647–6526; Robert Haas, Office of the Coordinator for Cuban Affairs, tel.: 202–453–8456, Department of State, Washington, DC 20520.

**SUPPLEMENTARY INFORMATION:**

### Background

On June 16, 2017, the President signed National Security Presidential Memorandum-5 on Strengthening the Policy of the United States Toward Cuba (NSPM–5). As directed by NSPM–5, on November 9, 2017, the Department of the Treasury's Office of Foreign Assets Control (OFAC) published a final rule in the **Federal Register** amending the CACR, 31 CFR part 515, and the Department of Commerce's Bureau of Industry and Security (BIS) published a final rule in the **Federal Register** amending, among other sections, the section of the Export Administration Regulations (EAR) regarding Cuba, 15 CFR 746.2. The regulatory amendment to the CACR added § 515.209, which generally prohibits direct financial transactions with certain entities and subentities identified on the State Department's Cuba Restricted List. The regulatory amendment to 15 CFR 746.2 notes BIS will generally deny applications to export or re-export items for use by entities or subentities identified on the Cuba Restricted List. The State Department is now updating the Cuba Restricted list, as published below and available on the State Department's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*)

This update includes one additional subentity. This is the eighth update to

the Cuba Restricted List since it was published November 9, 2017 (82 FR 52089). Previous updates were published November 15, 2018 (see 83 FR 57523), March 9, 2019 (see 84 FR 8939), April 24, 2019 (see 84 FR 17228), July 26, 2019 (see 84 FR 36154), November 19, 2019 (see 84 FR 63953), June 12, 2020 (see 85 FR 35972), a correction June 19, 2020 (85 FR 37146), and September 29, 2020 (85 FR 61079). The State Department will continue to update the Cuba Restricted List periodically.

The publication of the updated Cuba Restricted List further implements the directive in paragraph 3(a)(i) of NSPM–5 to the Secretary of State to identify the entities or subentities, as appropriate, that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel, and publish a list of those identified entities and subentities with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.

**Electronic Availability**

This document and additional information concerning the Cuba Restricted List are available from the Department of State's website (*https://www.state.gov/cuba-sanctions/cuba-restricted-list/*).

**List of Restricted Entities and Subentities Associated With Cuba as of January 8, 2021**

Below is the U.S. Department of State's list of entities and subentities under the control of, or acting for or on behalf of, the Cuban military, intelligence, or security services or personnel with which direct financial transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba. For information regarding the prohibition on direct financial transactions with these entities, please see 31 CFR 515.209. All entities and subentities were listed effective November 9, 2017, unless otherwise indicated.

* * * *Entities or subentities owned or controlled by another entity or subentity on this list are not treated as restricted unless also specified by name on the list.* * * *

*Ministries*

MINFAR — Ministerio de las Fuerzas Armadas Revolucionarias

MININT — Ministerio del Interior

*Holding Companies*

CIMEX — Corporación CIMEX S.A.
Compañía Turística Habaguanex S.A.
GAESA — Grupo de Administración Empresarial S.A.
Gaviota — Grupo de Turismo Gaviota
UIM — Unión de Industria Militar

*Hotels in Havana and Old Havana*

Aparthotel Montehabana
Gran Hotel Bristol Kempinski *Effective November 15, 2019*
Gran Hotel Manzana Kempinski
H10 Habana Panorama
Hostal Valencia
Hotel Ambos Mundos
Hotel Armadores de Santander
Hotel Beltrán de Santa Cruz
Hotel Conde de Villanueva
Hotel del Tejadillo
Hotel el Bosque
Hotel el Comendador
Hotel el Mesón de la Flota
Hotel Florida
Hotel Habana 612
Hotel Kohly
Hotel Los Frailes
Hotel Marqués de Prado Ameno
Hotel Marqués de Cardenas de Montehermoso *Effective June 12, 2020*
Hotel Palacio Cueto *Effective July 26, 2019*
Hotel Palacio del Marqués de San Felipe y Santiago de Bejucal
Hotel Palacio O'Farrill
Hotel Park View
Hotel Raquel
Hotel Regis *Effective June 12, 2020*
Hotel San Miguel
Hotel Santa Isabel *Effective April 24, 2019*
Hotel Telégrafo
Hotel Terral
Iberostar Grand Packard Hotel *Effective November 15, 2018*
Memories Miramar Havana
Memories Miramar Montehabana
SO/Havana Paseo del Prado *Effective November 15, 2018*

*Hotels in Santiago de Cuba*

Villa Gaviota Santiago

*Hotels in Varadero*

Blau Marina Varadero Resort
also Fiesta Americana Punta Varadero *Effective November 15, 2018*
also Fiesta Club Adults Only *Effective March 12, 2019*
Grand Aston Varadero Resort *Effective November 15, 2019*
Grand Memories Varadero
Hotel El Caney Varadero *Effective April 24, 2019*
Hotel Las Nubes *Effective November 15, 2018*
Hotel Oasis *Effective November 15, 2018*
Iberostar Bella Vista *Effective November 15, 2018*
Iberostar Laguna Azul
Iberostar Playa Alameda
Meliá Marina Varadero
Meliá Marina Varadero Apartamentos *Effective April 24, 2019*
Meliá Peninsula Varadero
Memories Varadero
Naviti Varadero
Ocean Varadero El Patriarca
Ocean Vista Azul
Paradisus Princesa del Mar
Paradisus Varadero
Sol Sirenas Coral

*Hotels in Pinar del Rio*

Hotel Villa Cabo de San Antonio
Hotel Villa Maria La Gorda y Centro Internacional de Buceo

*Hotels in Baracoa*

Hostal 1511
Hostal La Habanera
Hostal La Rusa
Hostal Rio Miel
Hotel El Castillo
Hotel Porto Santo
Villa Maguana

*Hotels in Cayos de Villa Clara*

Angsana Cayo Santa María *Effective November 15, 2018*
Dhawa Cayo Santa María
Grand Aston Cayo Las Brujas Beach Resort and Spa *Effective November 19, 2019*
Golden Tulip Aguas Claras *Effective November 15, 2018*
Hotel Cayo Santa María
Hotel Playa Cayo Santa María
Iberostar Ensenachos
Las Salinas Plana & Spa *Effective November 15, 2018*
La Salina Noreste *Effective November 15, 2018*
La Salina Suroeste *Effective November 15, 2018*
Meliá Buenavista
Meliá Cayo Santa María
Meliá Las Dunas
Memories Azul
Memories Flamenco
Memories Paraíso
Ocean Casa del Mar
Paradisus Los Cayos *Effective November 15, 2018*
Royalton Cayo Santa María
Sercotel Experience Cayo Santa María *Effective November 15, 2018*
Sol Cayo Santa María
Starfish Cayo Santa María *Effective November 15, 2018*
Valentín Perla Blanca *Effective November 15, 2018*
Villa Las Brujas
Warwick Cayo Santa María
also Labranda Cayo Santa María Hotel *Effective November 15, 2018*

Hotels in Holguín

Blau Costa Verde Beach & Resort

also Fiesta Americana Holguín Costa Verde *Effective November 15, 2018*
Hotel Playa Costa Verde
Hotel Playa Pesquero

*Memories Holguín*

Paradisus Río de Oro Resort & Spa
Playa Costa Verde
Playa Pesquero Premium Service
Sol Rio de Luna y Mares
Villa Cayo Naranjo
Villa Cayo Saetia
Villa Pinares de Mayari

*Hotels in Jardines del Rey*

Cayo Guillermo Resort Kempinski *Effective July 26, 2019*
Grand Muthu Cayo Guillermo *Effective November 15, 2018*
Gran Muthu Imperial Hotel *Effective November 15, 2019*
Gran Muthu Rainbow Hotel *Effective November 15, 2019*
Hotel Playa Coco Plus
Iberostar Playa Pilar
Meliá Jardines del Rey
Memories Caribe
Pestana Cayo Coco
also Hotel Playa Paraiso *Effective June 12, 2020*

*Hotels in Topes de Collantes*

Hostal Los Helechos
Kurhotel Escambray *Effective November 15, 2018*
Los Helechos
Villa Caburni

*Tourist Agencies*

Crucero del Sol
Gaviota Tours

*Marinas*

Marina Gaviota Cabo de San Antonio (Pinar del Rio)
Marina Gaviota Cayo Coco (Jardines del Rey)
Marina Gaviota Las Brujas (Cayos de Villa Clara)
Marina Gaviota Puerto Vita (Holguín)
Marina Gaviota Varadero (Varadero)

*Stores in Old Havana*

Casa del Abanico
Colección Habana
Florería Jardín Wagner
Joyería Coral Negro—Additional locations throughout Cuba
La Casa del Regalo
San Ignacio 415
Soldadito de Plomo
Tienda El Navegante
Tienda Muñecos de Leyenda
Tienda Museo El Reloj Cuervo y Sobrinos

*Entities Directly Serving the Defense and Security Sectors*

ACERPROT—Agencia de Certificación y Consultoría de Seguridad y Protección
Alias Empresa de Certificación de Sistemas de Seguridad y Protección *Effective November 15, 2018*
AGROMIN—Grupo Empresarial Agropecuario del Ministerio del Interior
APCI—Agencia de Protección Contra Incendios
CAHOMA—Empresa Militar Industrial Comandante Ernesto Che Guevara
Casa Editorial Verde Olivo *Effective July 26, 2019*
CASEG—Empresa Militar Industrial Transporte Occidente
CID NAV—Centro de Investigación y Desarrollo Naval
CIDAI—Centro de Investigación y Desarrollo de Armamento de Infantería
CIDAO—Centro de Investigación y Desarrollo del Armamento de Artillería e Instrumentos Ópticos y Ópticos Electrónicos
CORCEL—Empresa Militar Industrial Emilio Barcenas Pier
CUBAGRO—Empresa Comercializadora y Exportadora de Productos Agropecuarios y Agroindustriales
DATYS—Empresa Para El Desarrollo De Aplicaciones, Tecnologías Y Sistemas
DCM TRANS—Centro de Investigación y Desarrollo del Transporte
DEGOR—Empresa Militar Industrial Desembarco Del Granma
DSE—Departamento de Seguridad del Estado
Editorial Capitán San Luis *Effective July 26, 2019*
EMIAT—Empresa Importadora Exportadora de Abastecimientos Técnicos
Empresa Militar Industrial Astilleros Astimar
Empresa Militar Industrial Astilleros Centro
Empresa Militar Industrial Yuri Gagarin
ETASE—Empresa de Transporte y Aseguramiento
Ferretería TRASVAL
GELCOM—Centro de Investigación y Desarrollo Grito de Baire
Impresos de Seguridad
MECATRONICS—Centro de Investigación y Desarrollo de Electrónica y Mecánica
NAZCA—Empresa Militar Industrial Granma
OIBS—Organización Integración para el Bienestar Social
PLAMEC—Empresa Militar Industrial Ignacio Agramonte
PNR—Policía Nacional Revolucionaria
PROVARI—Empresa de Producciones Varias
SEPSA—Servicios Especializados de Protección
SERTOD—Servicios de Telecomunicaciones a los Órganos de la Defensa *Effective November 15, 2018*
SIMPRO—Centro de Investigación y Desarrollo de Simuladores
TECAL—Empresa de Tecnologías Alternativas
TECNOPRO—Empresa Militar Industrial ''G.B. Francisco Cruz Bourzac''
TECNOTEX—Empresa Cubana Exportadora e Importadora de Servicios, Artículos y Productos Técnicos Especializados
TGF—Tropas de Guardafronteras
UAM—Unión Agropecuaria Militar
ULAEX—Unión Latinoamericana de Explosivos
XETID—Empresa de Tecnologías de la Información Para La Defensa
YABO—Empresa Militar Industrial Coronel Francisco Aguiar Rodríguez

*Additional Subentities of CIMEX*

ADESA/ASAT—Agencia Servicios Aduanales (Customs Services)
American International Services (Remittances) *Effective September 29, 2020*
alias AIS Remesas *Effective September 29, 2020*
Cachito (Beverage Manufacturer)
Contex (Fashion)
Datacimex
ECUSE—Empresa Cubana de Servicios
FINCIMEX *Effective June 19, 2020*
Inmobiliaria CIMEX (Real Estate)
Inversiones CIMEX
Jupiña (Beverage Manufacturer)
La Maisón (Fashion)
Najita (Beverage Manufacturer)
Publicitaria Imagen (Advertising)
Residencial Tarara S.A. (Real Estate/ Property Rental) *Effective November 15, 2018*
Ron Caney (Rum Production)
Ron Varadero (Rum Production)
Telecable (Satellite Television)
Tropicola
(Beverage Manufacturer)
Zona Especializada de Logística y Comercio (ZELCOM)

*Additional Subentities of GAESA*

Aerogaviota *Effective April 24, 2019*
Almacenes Universales (AUSA)
ANTEX—Corporación Antillana Exportadora
Banco Financiero Internacional S.A. (BFI). *Effective [date published in* **Federal Register***]*
Compañía Inmobiliaria Aurea S.A. *Effective November 15, 2018*
Dirección Integrada Proyecto Mariel (DIP)
Empresa Inmobiliaria Almest (Real Estate)
GRAFOS (Advertising)
RAFIN S.A. (Financial Services)
Sociedad Mercantin Inmobiliaria Caribe (Real Estate)
TECNOIMPORT

Terminal de Contenedores de la Habana (TCH)

Terminal de Contenedores de Mariel, S.A.

UCM—Unión de Construcciones Militares

Zona Especial de Desarrollo Mariel (ZEDM)

Zona Especial de Desarrollo y Actividades Logísticas (ZEDAL)

≤*Additional Subentities of Gaviota*

AT Comercial

Centro de Buceo Varadero *Effective June 12, 2020*

Centro Internacional de Buceo Gaviota Las Molas *Effective June 12, 2020*

Delfinario Cayo Naranjo *Effective June 12, 2020*

Diving Center—Marina Gaviota *Effective April 24, 2019*

Gaviota Hoteles Cuba *Effective March 12, 2019*

Hoteles Habaguanex *Effective March 12, 2019*

Hoteles Playa Gaviota *Effective March 12, 2019*

Manzana de Gomez

Marinas Gaviota Cuba *Effective March 12, 2019*

PhotoService

Plaza La Estrella *Effective November 15, 2018*

Plaza Las Dunas *Effective November 15, 2018*

Plaza Las Morlas *Effective November 15, 2018*

Plaza Las Salinas *Effective November 15, 2018*

Plaza Las Terrazas del Atardecer *Effective November 15, 2018*

Plaza Los Flamencos *Effective November 15, 2018*

Plaza Pesquero *Effective November 15, 2018*

Producciones TRIMAGEN S.A. (Tiendas Trimagen)

*Additional Subentities of Habaguanex*

Sociedad Mercantil Cubana Inmobiliaria Fenix S.A. (Real Estate)

* * Activities in parentheticals are intended to aid in identification, but are only representative. All activities of listed entities and subentities are subject to the applicable prohibitions.* *

**Manisha Singh,**

*Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.*

[FR Doc. 2021–00061 Filed 1–7–21; 8:45 am]

**BILLING CODE 4710–29–P**

## SURFACE TRANSPORTATION BOARD

**[Docket No. FD 36284]**

### Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—In Utah, Carbon, Duchesne, and Uintah Counties, Utah

On May 29, 2020, the Seven County Infrastructure Coalition (Coalition) filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authorization to construct and operate an approximately 85-mile rail line connecting two termini in the Uinta Basin near South Myton Bench, Utah, and Leland Bench, Utah, to the national rail network at Kyune, Utah. The Coalition asks that the Board issue a preliminary decision addressing the transportation aspects of the project while the environmental review is ongoing.

The Board received filings both supporting and opposing the petition. Several government officials have filed in support, as discussed below. The opponents include the Center for Biological Diversity (Center), the Argyle Wilderness Preservation Alliance (Argyle), and numerous individuals. These commenters argue, among other things, that the requested preliminary decision is not appropriate, that the transportation aspects of the petition do not satisfy the section 10502 standards, and that the Board should reject the petition and require an application under section 10901.

As discussed below, the Board concludes that an application is not necessary and that the requested approach of issuing a preliminary decision on the transportation merits is appropriate here. The Board preliminarily concludes, subject to completion of the ongoing environmental review, that the proposed transaction meets the statutory standards for exemption under section 10502. This decision only addresses the transportation merits, however, and does not grant the exemption or allow construction to begin. After the Board has considered the potential environmental impacts associated with this proposal, and weighed those potential impacts with the transportation merits, it will issue a final decision either granting the exemption, with conditions, if appropriate, or denying it.

### Background

The Coalition explains that it is an independent political subdivision of the State of Utah, whose member counties include Carbon, Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah Counties. (Pet. 5.) It was formed to, among other things, identify and develop infrastructure projects that will promote resource utilization and development. (*Id.*) The Coalition is proposing to construct a rail line that would extend generally southwest from terminus points in the Uinta Basin to a connection with an existing rail line owned by Union Pacific Railroad Company (UP) near Kyune, Utah (the Whitmore Park Alternative). The rail line would generally parallel U.S. Route 191 through Indian Canyon and would be located within Utah, Carbon, Duchesne, and Uintah Counties in Utah. (*Id.* at 8–9, 43.)

The Coalition asserts that goods produced or consumed in the Uinta Basin today can be transported only by truck and that the proposed project would give shippers an additional freight transportation option, eliminating longstanding transportation constraints. (Pet. 13–15.) The Coalition claims that adding a rail transportation option would provide local industries the opportunity to access new markets and increase their competitiveness in the national marketplace, and the removal of transportation constraints would benefit oil producers, mining companies, ranchers, farmers, and other local industries. (*Id.* at 15.)

The Coalition argues that regulation of the construction and operation of the proposed line under section 10901 is not needed to carry out the rail transportation policy (RTP) at 49 U.S.C. 10101, that the project would promote several provisions of the RTP, and that an application under section 10901 is not required to protect shippers from an abuse of market power. (Pet. 21–22.) As noted above, the Coalition requests that, in considering the petition, the Board follow a two-step approach, addressing the transportation aspects of the project in advance of the environmental issues. (*Id.* at 26–28.) [1]

On July 7, 2020, the Center filed a reply [2] arguing that the Coalition has failed to justify its request for a preliminary decision on the transportation merits and that the Board should reject the petition and require the Coalition to seek its authority through an application under section 10901. (Ctr. Reply 1.) On the same day, Argyle also filed a reply, likewise arguing that the Board should reject the

[1] Based on a request from Argyle, the Board extended the due date for comments on the petition for an additional 20 days to July 7, 2020.

[2] On July 13, 2020, the Center submitted a supplemental filing consisting of the references cited in its reply.

petition for exemption and require greater scrutiny of the proposed project through an application. (Argyle Reply 9, July 7, 2020.) Argyle argues that, if it is not rejected, the petition for exemption should be denied because the project undermines various RTP goals. (*Id.*) Argyle also claims that the Coalition has failed to justify its requested two-step review process. (*Id.* at 14.) Additionally, by separate filings submitted on July 7, 2020, Argyle submitted numerous letters from individuals opposing the project.[3]

On July 21, 2020, the Coalition filed a response to the various filings and filed a motion asking that the Board accept its reply.[4] Argyle filed in opposition to that motion on August 10, 2020. On September 14, 2020, Argyle filed a letter asking that the Board take notice of *Texas Central Railroad & Infrastructure, Inc—Petition for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.,* FD 36025 (STB served July 16, 2020), a decision Argyle claims supports its position that an application is warranted here.

The Board has also received several letters in support of the Coalition's proposal. On November 20, 2019, Governor Gary R. Herbert submitted a letter stating that the proposed rail line represents an important opportunity to enhance the rural economies in eastern Utah and improve the state's energy infrastructure and environmental stewardship. On December 1, 2020, a joint letter supporting the Coalition's project was filed by U.S. Senators Mitt Romney and Mike Lee and U.S. Representatives Rob Bishop, Chris Stewart, and John Curtis. On December 7, 2020, Utah State Senate President J. Stuart Adams and Utah State House of Representatives Speaker Brad Wilson separately filed letters in support of the project. Also on December 7, 2020, Governor Herbert, Lieutenant Governor Spencer J. Cox, Utah State Senate President Adams, and Utah State House of Representatives Speaker Wilson submitted a joint letter supporting the project.

**Preliminary Matters**

On August 26, 2020, the Director of the Office of Proceedings instituted a proceeding under 49 U.S.C. 10502(b). That decision stated that the Coalition's July 21 motion for leave to file and other late-filed submissions would be addressed in a subsequent decision.

The Board will grant the Coalition's motion for leave to file and accept its July 21, 2020 filing. Although 49 CFR part 1121 does not provide for rebuttals and the Board struck such filings in the cases Argyle cites, the Board's action in those cases was primarily focused on the fact that the rebuttals there were filed shortly before a regulatory deadline, a factor that is not present here. *See Burlington N. & Santa Fe Ry.—Aban. of Chi. Area Trackage in Cook Cnty., Ill.,* AB 6 (Sub-No. 382X), slip op. at 1–2 (STB served Sept. 21, 1999) (filing rejected where regulatory deadline precluded protestants' response); *Cent. R.R. of Ind.—Aban. Exemption—in Dearborn, Decatur, Franklin, Ripley, & Shelby Cntys., Ind.,* AB 459 (Sub-No. 2X), slip op. at 3 (STB served May 4, 1998) (filing rejected four days before regulatory deadline). In light of the arguments raised here regarding the appropriateness of the exemption process and the request for a preliminary decision on the transportation merits, the Coalition's filing provides a more complete record for the Board to consider these arguments. Also in the interest of a more complete record, the Board will accept all of the comments and letters that have been filed with the Board.

**Discussion and Conclusions**

The construction of new railroad lines that are to be part of the interstate rail network requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. 10901 or, as requested here, through an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Section 10901(c) directs the Board to grant rail construction proposals ''unless the Board finds that such activities are inconsistent with the public convenience and necessity.'' *See Alaska R.R.—Constr. & Operation Exemption—A Rail Line Extension to Port MacKenzie, Alaska,* FD 35095, slip op. at 5 (STB served Nov. 21, 2011), *aff'd sub nom. Alaska Survival* v. *STB,* 705 F.3d 1073 (9th Cir. 2013) (addressing the Board's construction exemption process). Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise. *See Lone Star R.R.—Track Constr. & Operation Exemption—in Howard Cnty., Tex.,* FD 35874, slip op. at 3 (STB served Mar. 3, 2016.).

Under 49 U.S.C. 10502(a), however, the Board, ''to the maximum extent'' consistent with 49 U.S.C. 10101–10908, ''shall exempt'' a transaction (including a construction proposal) from the prior approval requirements of section 10901 when it finds that: (1) Regulation is not necessary to carry out the RTP of 49 U.S.C. 10101; and (2) either (a) the transaction is of limited scope or (b) application of the statutory provision is not needed to protect shippers from the abuse of market power. *Ken Tenn Reg'l Rail Partners—Constr. & Operation Exemption—in Fulton Cnty., Ky. & Obion Cnty., Tenn.,* FD 36328, slip op. at 3 (STB served Dec. 1, 2020.) Congress thus has directed the Board to exempt a rail construction proposal from the requirements of the full application process—even if significant in scope—so long as the application of section 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. *See Alaska Survival,* 705 F.3d at 1082–83; *Vill. of Palestine* v. *ICC,* 936 F.2d 1335, 1337, 1340 (D.C. Cir. 1991).

*Application vs. Petition for Exemption*

The Center argues that the Board should reject the petition and require the Coalition to seek its authority through an application under section 10901. Among other reasons, the Center claims greater scrutiny is required because the project would not be financially viable and could pose significant financial risk to public entities and taxpayers, the most likely source of funding through the issuance of municipal bonds.[5] (Ctr. Reply 2, 7, 12, 20–21.)

The Center maintains that there are insufficient proven oil quantities in the Uinta Basin to justify the project's construction, and that there is a limited portfolio of potential industries and shipping commodities that the railway could service. (*Id.* at 2.) Furthermore, it argues that the ''collapse'' in the global oil market and the American shale industry as well as weak market forecasts make it unlikely that a real need for new crude oil transportation capacity exists in the Basin. (*Id.*) Therefore, the Center contends, the public might be ''on the hook'' for a multibillion-dollar project unable to pay for itself. (*Id.*)

The Center also notes that the 2018 pre-feasibility study, prepared for the Coalition by R.L. Banks & Associates, Inc. (R.L. Banks), provides an analysis of the proposed line, but the Center asserts

[3] Letters were also filed separately by individuals Julie Mach on July 6, 2020, Powell T. Wood on July 8, 2020, and Alan T. Robinson on July 16, 2020.

[4] The Coalition filed a letter on July 22, 2020, updating its response.

[5] The Center also argues that greater scrutiny is necessary here because there were irregularities in the selection of a developer and the award of a $27.9 million grant from the Utah Permanent Community Impact Board. (Ctr. Reply 12–16.) The Center further claims that the Coalition has failed to provide the public information or solicit its input as part of the Coalition's decisionmaking regarding the rail project. (*Id.* at 16–19.) These concerns, however, appear to be based on Utah state law and should be raised in a different forum.

that the Coalition has refused to release an unredacted version of that study. (*Id.* at 22–23, 25.) In redacted versions of the study, which the Center submits in its July 13, 2020 supplement, the Coalition redacted the market forecast, transportation rate, and other data underlying the study's conclusions on the economic feasibility of the project. (*Id. at 25.*) The Center argues that such data should be made publicly available so that the Board and the public can determine whether assertions of the proposed line's viability are based on reasonable assumptions. (*Id.*)

Finally, the Center states that the construction cost of a rail line similar to the Coalition's preferred route here was projected in 2015 to cost $4.5 billion, but the Coalition's projections for the current preferred route are now one-third of that 2015 estimate, raising questions as to the reliability of the Coalition's cost projections. (*Id.* at 19.) The Center further states that the required financing for the project has not yet been secured and asserts that it appears increasingly unlikely that financing can be achieved for a potentially multibillion-dollar project. (*Id.*)

Similarly, Argyle opposes the project proceeding by exemption. It claims that such an approach is not appropriate where, as here, the proposal is vigorously contested and highly controversial. (Argyle Reply 3–4, July 7, 2020.) Argyle also claims that there is neither evidence of financial ability to complete the proposed construction nor evidence of public need for the project. (*Id.* at 4–9.) For these reasons, it argues that the Board should reject the petition and require a full application. In its September 14, 2020 filing, Argyle notes that the Board required an application for the construction proposed in *Texas Central Railroad & Infrastructure, Inc.,* FD 36025, slip op. at 13–15. The individual commenters raise concerns similar to Argyle's and claim, among other things, that the there is no need for the rail line and that constructing it would needlessly disrupt landowners use of their land and adversely affect the rural area in which the proposed line would be constructed.

The Coalition responds that the opposition has raised no serious question showing that the project should not be decided under the exemption criteria at section 10502. (Coalition Reply 3–4, July 21, 2020.) The Coalition adds that controversy does not preclude use of the exemption process, (*id.* at 6), and that questions raised by opponents regarding the project's financial viability are based on speculation rather than fact, (*id.* at 8). The Coalition further asserts that *Texas Central Railroad & Infrastructure, Inc.,* is inapposite. (Rebuttal 10.)

The arguments presented by the opponents do not warrant rejecting the petition and requiring an application. There is nothing in the language of section 10502 to suggest that an exemption proceeding is inappropriate if the viability of the proposed rail line is questioned. *See Alaska Survival,* 705 F.3d at 1082 (affirming the Board's exemption proceeding where financial viability of the line was questioned). Furthermore, the Board's grant of authority to construct a line (whether under section 10901 or by exemption under section 10502) is permissive, not mandatory—that is, the Board does not require that an approved line be built. *See U.S. Dep't of Energy—Rail Constr. & Operation—Caliente Rail Line in Lincoln, Nye & Esmeralda Cntys., Nev.,* FD 35106, slip op. at 3 (STB served June 27, 2008); *Dakota, Minn. & E. R.R. Corp. Constr. Into the Powder River Basin,* FD 33407, slip op. at 19 (STB served Feb. 15, 2006). As a result, the Board has repeatedly recognized that the ultimate decision to go forward with an approved project is in the hands of the applicant and the financial marketplace, not the agency. *See Mid States Coal. for Progress* v. *STB,* 345 F.3d 520, 552 (8th Cir. 2003) (noting the insight and expertise of financial institutions and agreeing with the Board that the ultimate test of financial fitness will come when the railroad seeks financing); *U.S. Dep't of Energy,* FD 35106, slip op. at 3. Simply put, the Board's grant of authority *permits* a new rail line to be built if the necessary financing is obtained. Without moving forward with the process needed to obtain Board authority, however, no new rail lines could be built, regardless of how viable the projects might be.

In addition, the Coalition recognizes that conditions beyond its control can affect the amount of rail traffic on the proposed line, (Pet. 15), and, prior to seeking authority from the Board for this project, the Coalition asked R.L. Banks to prepare a detailed 2018 feasibility study addressing the viability of the line. Moreover, the Utah Petroleum Association, Enefit Oil Company, Utah Royalty Owners Association, National Oil Shale Association, and Western Energy Alliance have expressed support for the project. (Coalition Reply 16, July 21, 2020.)[6] Such support, and the information submitted in this record, indicates the proposed line could be viable. And, despite claims by the opponents that there is no public need for the line, the support that this project has received suggests otherwise.

It is well settled that, because the Board's authority is permissive, the Board may grant authority to construct a line even if all outstanding issues related to the proposed construction, such as financing, have not yet been resolved or if factors beyond the Board's control might ultimately prevent consummation of authority for a proposed construction. *See Mid States Coal. for Progress,* 345 F.3d at 552; *Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cntys., Cal.,* FD 35724 (Sub-No. 1), slip op. at 11 (STB served Aug. 12, 2014) (with Board Member Begeman dissenting). The Board does not find that the additional financial information sought by Argyle is necessary in this proceeding.[7]

The opponents' filings also do not lead to a conclusion that an application is necessary here. To be clear, the agency has found the exemption process suitable in considering other projects that have drawn opposition.[8] To the extent opponents here raise environmental issues, the environmental review conducted by the Board does not depend on whether the proposed construction is decided under section 10901 or section 10502—the environmental review process is the same under either scenario. *See Cal. High-Speed Rail Auth.,* FD 35724 (Sub-No. 1), slip op at 11 (STB served Aug. 12, 2014).

The Board's decisions in *Ozark Mountain Railroad—Construction Exemption,* FD 32204 (ICC served Sept. 25, 1995), and *Texas Central Railroad & Infrastructure, Inc,* FD 36025, slip op. at 13–15, do not show that an application is necessary here. In *Ozark Mountain Railroad,* the agency required an application under section 10901 for the proposed construction of a highly controversial passenger excursion train

[6] The Center asserts that the Basin holds only approximately five years' worth of oil at the most by pointing to a U.S. Energy Information Administration estimate from 2019. (Ctr. Reply 23–24.) This figure, however, only covers ''proved reserves,'' (Ctr. Supp. 662), and, as the Center itself admits, estimates of the amount of oil in the Basin ''vary widely,'' (Ctr. Reply 23). Indeed, the 2018 pre-feasibility study from R.L. Banks lists a much higher range. (Ctr. Supp. 392.)

[7] For the same reasons, the Board does not need the material currently redacted in the R.L. Banks 2018 feasibility study obtained by the Center, despite the Center's claim to the contrary. (Ctr. Reply 25.)

[8] *See, e.g., Cal. High-Speed Rail Auth.,* FD 35724 (Sub-No. 1) (STB served Aug. 14, 2014); *Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal.,* FD 35724 (STB served June 13, 2013); *Alaska R.R.,* FD 35095; and *San Jacinto Rail Constr. Exemption—Build Out to the Bayport Loop Near Houston, Harris Cnty., Tex.,* FD 34079 (STB served Aug. 28, 2002).

as part of a ''huge development plan.'' *Ozark Mountain R.R.,* FD 32204, slip op at 2. The agency decided that it would be inappropriate to move forward without the financial information required in an application because of significant concerns that the applicant there would not be able to bring the project to fruition. *Id.* In *Texas Central Railroad & Infrastructure, Inc.,* FD 36025, slip op. at 13–15, the Board, in requiring an application, explained that significant questions had been raised surrounding the financial feasibility of that proposed passenger rail project, namely the potential increase in cost from over $10 billion to over $20 billion (with one estimate over $30 billion) and the funding sources to cover those increased costs. Indeed, in that case, the record included a letter from a Texas Central official indicating substantially higher project costs than those previously presented to the Board, *see Texas Central,* FD 36025, slip op. at 13 & n.24, and this discrepancy was not adequately addressed. Moreover, the record indicated conflicting statements from individuals associated with Texas Central as to the extent of nonmarket funding sources.[9] *See id.* at 14 n.27. Here, not only is the projected cost of the project far less than that of the projected cost of the Texas project, but, based on the record, it has not dramatically increased as in the Texas case.[10] Although there is some uncertainty as to financing beyond the $27.9 million that the Coalition has already received from a Utah agency, the record does not, unlike the Texas case, include inconsistent statements from the petitioner as to the project's costs or its target future funding or financing sources, including from nonmarket sources.

In short, it is appropriate to consider the Coalition's construction proposal under section 10502, and an application proceeding under section 10901 is not required here.

*Issuance of Preliminary Decision on the Transportation Merits*

As noted above, the Coalition requests that the Board issue a preliminary decision addressing the transportation aspects of the project in advance of completing its review of the environmental issues. The Coalition explains that streamlining the regulatory process by issuing a preliminary decision on the transportation-related issues would help hasten its recovery from the economic downturn stemming from the pandemic. (Pet. 26–27.) Both Argyle and the Center oppose the Coalition's request. The Center argues that based on prior Board precedent a preliminary decision addressing the transportation merits requires a ''showing of some unique or compelling circumstances'' and that the Coalition has made no such showing here. (Ctr. Reply 5–6.) The Center claims that the Coalition has failed to explain how addressing the transportation merits before completing the environmental review process and determining whether to allow construction to begin would increase efficiencies in the process, mitigate the economic impacts of the pandemic, or benefit the proposed rail line. (*Id.*) The Coalition responds that examining the project in the two-step approach would hasten its ability to secure financing for the line. (Rebuttal 14.)

The Board has considered requests for preliminary decisions addressing the transportation merits of a project over the years.[11] Although the Board indicated in 2007 that it would generally only issue a preliminary decision on the transportation merits of a construction proposal based on a showing of unique or compelling circumstances,[12] the Board has only once since that time denied a request for a preliminary decision on the transportation merits, *see Cal. High-Speed Rail Auth.,* FD 35724 (Sub-No. 1), slip op. at 2 (STB served Dec. 4, 2013).[13] The Board recently used the two-step process in a construction case. In that case, the applicant had received support from state and local entities, the transportation merits of the project were apparent, and there was no opposition to the request for preliminary decision or the exemption itself at that time. *Ken Tenn Reg'l Rail Partners,* FD 36328, slip op. at 3–4.[14] Here, there is also strong support from state and local entities (in addition to the seven-county Coalition), and the transportation merits are convincing (as described below). While the Board acknowledges opposition to the project, the economic circumstances, exacerbated by the current pandemic, are compelling, and, under the circumstances, issuing a preliminary decision on the transportation merits will help ensure the development and continuation of a sound rail transportation system, foster sound economic conditions in transportation, and reduce barriers to entry. *See* 49 U.S.C. 10101(4), (5) (7). Therefore, the Board finds it appropriate to issue a preliminary decision on the transportation merits while the Board continues the environmental review of the proposed construction.

*Rail Transportation Analysis*

As noted above, the Board must exempt a proposed rail line construction when it finds that application of the provisions of section 10901 is not necessary to carry out the RTP and there is no danger of market power abuse. Based on the record, the Board preliminarily concludes that the proposed construction qualifies for an exemption under section 10502 from the prior approval requirements of section 10901.

First, regulation under section 10901 is not necessary to carry out the RTP in this case. The record here shows that the proposed rail line would provide an alternative, more cost-effective method of transportation for shippers that are currently limited to shipping by truck. (Pet. 13–15.) The proposed line would provide shippers in the Basin the opportunity to enter markets they currently cannot access due to cost constraints and the ability to import materials into the Basin at a more economical cost. (Pet. 13–15; Coalition Reply 15–16, July 21, 2020.)

[9] That is not to say that any increase in project costs or uncertainty about funding sources necessitate an application, given that the ultimate test of financial fitness is in the hands of the applicant and marketplace. However, when those two factors are both substantial and inadequately or inconsistently addressed, combined with other relevant factors, including the extent to which the marketplace will assess financial fitness, additional scrutiny may be warranted.

[10] In fact, the Center questions whether the costs for the project are too low because they are lower than a similar project the Utah Department of Transportation studied in 2015. (Ctr. Reply 19.) As the Coalition explains, however, that project was different because, among other things, it involved the reconstruction of an existing highway, which is not part of the project at issue here. (Coalition Reply 13, July 21, 2020.)

[11] *See Six Cnty. Ass'n of Gov'ts—Constr. & Operation Exemption—A Rail Line Between Levan & Salina, Utah,* FD 34075 (STB served Sept. 3, 2015); *Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska,* FD 34658 (STB served Oct. 4, 2007).

[12] *See Alaska R.R. Constr.,* FD 34658, slip op. at 2. Prior to 2007, the Board did not use this standard when considering whether to issue a preliminary decision on the transportation merits in rail construction cases. *See, e.g., Burlington N. & Santa Fe Ry.—Constr. & Operation Exemption—Merced Cnty., Cal.,* FD 34305 (STB served Mar. 28, 2003); *San Jacinto Rail Constr. Exemption,* FD 34079, slip op. at 7.

[13] In *Texas Railway Exchange LLC—Construction & Operation Exemption—Galveston County, Tex.,* FD 36186 et al., slip op. at 2, 5 (STB served Jan. 17, 2020), the Board denied as moot a request for a preliminary decision on the transportation merits because the Board was, in the same decision, granting the petition for exemption to construct and operate the new rail line. A request for preliminary decision on the transportation merits is currently pending in *Brookhaven Rail LLC—Construction & Operation Exemption—in Suffolk County, N.Y.,* Docket No. FD 36398.

[14] A petition for reconsideration has since been filed in that docket.

Accordingly, the proposed line would enhance competition by providing shippers in the area with a freight rail option that does not currently exist and foster sound economic conditions in transportation, consistent with section 10101(4) & (5). Additionally, consistent with sections 10101(2) and 10101(7), an exemption will minimize the need for federal regulatory control over the rail transportation system and reduce regulatory barriers to entry by minimizing the time and administrative expense associated with the construction and commencement of operations. (Pet. 21–22.)

Argyle claims that the RTP goals at section 10101(8), concerning public safety, and section 10101(11), concerning safe working conditions, would be undermined by the project. (Argyle Reply 9, July 7, 2020.) Argyle asserts that there will be a substantial increase in local truck traffic if oil production were to increase to the extent claimed by the Coalition. (*Id.* at 10.) Argyle also claims, among other things, that rail activities could trigger forest fires and notes that Argyle Canyon was heavily damaged by a fire in 2012. (*Id.*) The Board takes important concerns such as these seriously, and they will be examined as part of OEA's environmental review and further examined by the Board in a subsequent decision considering the environmental impacts of the project. *Cf. Brookhaven Rail—Constr. & Operation Exemption—in Suffolk Cnty., N.Y.,* FD 36398, et al., slip op. at 6 (STB served Oct. 23, 2020) (rejecting petition seeking exemption from 49 U.S.C. 10909 and noting concerns stemming from section 10101(8), among others).

Second, application of section 10901 is not necessary to protect shippers from an abuse of market power.[15] The proposed line would enhance transportation service to shippers by providing an opportunity to use rail service where none currently exists. Currently, the only transportation option available to freight shippers in the Uinta Basin is trucking along two-lane highways. (Pet. 13.) The proposed line, when completed, would provide freight shippers in the Basin with rail service and access to the interstate rail network and would result in increased intermodal competition with commercial freight by truck. Therefore, the proposed line would increase competitive options to shippers and eliminate shippers' reliance on one option for freight transportation.

*Environmental Review.*

As discussed above, the Board has preliminarily concluded that the proposed construction meets the statutory standards for exemption on the transportation merits, subject to completion of the ongoing environmental review. The Board's Office of Environmental Analysis (OEA) issued a Final Scope of Study for the Environmental Impact Statement (EIS) on December 13, 2019, and a Draft EIS on October 30, 2020, for public review and comment. OEA also held six virtual public meetings to receive oral comments, the last of which took place on December 3, 2020. Following the conclusion of the comment period (January 28, 2021), OEA will issue a Final EIS addressing the public comments and environmental impacts and make its final recommendations to the Board.

Following the conclusion of the environmental review process, the Board will issue a further decision assessing the potential environmental impacts of the proposal, weighing the potential environmental impacts and the transportation merits, and determining whether to make the exemption effective at that time, and if so, whether to include appropriate mitigation conditions. *See Mo. Mining, Inc.* v. *ICC,* 33 F.3d 980 (8th Cir. 1994).

The decision issued today is a preliminary determination that does not prejudge the Board's final decision, nor diminish the agency's environmental review process concerning the proposed Line's construction. *See Ill. Com. Comm'n* v. *ICC,* 848 F.2d 1246, 1259 (DC Cir. 1988). Construction may not begin unless and until authorized by the Board in a final decision, which may impose environmental mitigation as appropriate, and until any such final decision has become effective.

*It is ordered:*

1. The Coalition's July 21, 2020 response and the late-filed replies and letters are accepted into the record.

2. Under 49 U.S.C. 10502, the Board preliminarily exempts the construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to further consideration of the potential environmental impacts of the proposal.

3. On completion of the environmental review, the Board will issue a further, final decision addressing any potential environmental impacts, weighing any environmental impacts with the transportation merits, and determining whether the exemption should become effective (subject to any appropriate mitigation conditions). Construction may not begin unless and until the Board issues a final decision authorizing the exemption and any such decision has become effective.

4. Notice of this decision will be published in the **Federal Register**.

5. Petitions for reconsideration must be filed by January 25, 2021.

6. This decision is effective 30 days from the date of service.

Decided: January 4, 2021.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Oberman dissented with a separate expression.

Board Member Oberman, dissenting:

The Board majority has reached a preliminary conclusion that the transportation merits of the proposal of the Seven County Infrastructure Coalition (the Coalition) to construct and operate the approximately 85-mile line at issue (the project) in the Uinta Basin meet the statutory exemption standard under 49 U.S.C. 10502. The majority has reached this conclusion in a so-called two-step process, in which it has preliminarily addressed the transportation merits prior to considering the environmental impacts and any necessary mitigation requirements.

I dissent from both aspects of this decision (*Decision*). I do not conclude that the Board should find, today, that an application *is* necessary here—only that the Board should not make a finding now that an application *is not* necessary and should not and cannot reach a conclusion on the transportation merits, even preliminarily, prior to completing the environmental review and resolving issues concerning the project's financial viability.

*Introduction.* Based on the instant record and publicly available information affecting the potential success of this project, as discussed below, serious questions have been raised about the transportation merits of the project, especially concerning the financial viability of the line. In addition, the Board's Office of Environmental Analysis (OEA) has issued a Draft Environmental Impact Statement (Draft EIS) which concludes that the project ''would result in significant environmental impacts.'' (Draft EIS S–1.) Rather than finding today both that a petition for exemption is the appropriate procedure and preliminarily concluding that the statutory exemption standard has been met, the Board should seek additional information concerning the financial viability of and long-term need for this

[15] Because regulation of the proposed construction and operation is not needed to protect shippers from the abuse of market power, the Board need not determine whether the transaction is limited in scope. 49 U.S.C. 10502(a)(2).

project in order to provide clarity on the uncertainties surrounding these two issues, and should allow the environmental review process to be completed before making these decisions.

Given these uncertainties and the controversial nature of the project, the transportation merits cannot properly be determined without measuring them against whatever environmental degradation the project will cause. In this case, the Board should not deviate from precedent generally disfavoring such a two-step process.[1] It is therefore premature for the Board to reach a preliminary conclusion on the transportation merits of this case, and it is equally premature for the Board to decide now that an application is not necessary.

*Application* vs. *Petition for Exemption.* Under 49 U.S.C. 10502, the Board must exempt a proposed rail line construction from the application procedures at 49 U.S.C. 10901 when the Board finds that: (1) Those procedures are not necessary to carry out the rail transportation policy (RTP) of section 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. *E.g., Ken Tenn Reg'l Rail Partners—Constr. & Operation Exemption—in Fulton Cnty, Ky. & Obion Cnty., Tenn.,* FD 36328, slip op. at 3 (STB served Dec. 1, 2020); *Tex. Cent. R.R. & Infrastructure, Inc—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.* (*Tex. Cent. R.R. June 2020*), FD 36025, slip op. at 5 (STB served June 20, 2020).

In considering a construction application under 49 U.S.C. 10901, the Board ''shall'' grant such an application ''unless the Board finds that such activities are inconsistent with the public convenience and necessity.'' 49 U.S.C. 10901(c); *e.g., Ken Tenn Reg'l Rail Partners,* FD 36328, slip op. at 3. When measuring the public convenience and necessity, the Board looks at ''whether: (1) the applicant is financially able to undertake the project and provide rail service; (2) there is a public demand or need for the proposed service; and (3) the proposal is in the public interest and will not unduly harm existing services.'' *Tongue River R.R.—Constr. & Operation—W. Alignment,* FD 30186 (Sub-No. 3) et al., slip op. at 13 (STB served Oct. 9, 2007). While the majority correctly states that Board precedent holds that there is a statutory presumption that construction projects should be approved, *Decision* 4, such a presumption does not obviate the Board's statutory obligation to determine whether regulation is necessary to carry out the RTP of section 10101, and if so, whether the project is consistent with the public convenience and necessity.

As detailed below, there are more than enough unanswered questions about the financial viability of, and public need for, this project to raise the serious potential that, after the development of a complete record, the Board may find that regulation here is necessary to carry out the RTP of section 10101, and that the presumption in favor of approving construction may well be overcome.

In the past, the Board has rejected an exemption and required an application in construction cases presenting significant controversy, particularly where concerns have been raised about the project's financial feasibility and its impact on the local area. *See Tex. Cent. R.R. & Infrastructure, Inc—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex.* (*Tex. Cent. R.R. July 2020*), FD 36025, slip op. at 14 (STB served July 16, 2020) (''[A]n application here would provide the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the project that would assist the Board in considering the transportation merits of the project.''); *Ozark Mountain R.R.—Construction Exemption,* FD 32204, slip op. at 4–5 (ICC served Dec. 15, 1994) (revoking conditional exemption and requiring application due to ''[s]ignificant public opposition to the project'' including concerns that the applicant ''will be unable to construct and operate the proposed lines'').

Here, the majority declines to follow these precedents, *see Decision* 7, finding that a petition for exemption is appropriate, stating: ''[t]here is nothing in the language of section 10502 to suggest that an exemption proceeding is inappropriate if the viability of the proposed rail line is questioned'' because ''the Board's grant of authority to construct a line . . . is permissive, not mandatory.'' *Decision* 5–6. Given the state of the instant record, I disagree with the majority's decision finding, at this time, that a petition for exemption is appropriate. Rather than ignoring the public opposition and significant questions about the project's financial feasibility, the state of the instant record requires the Board to seek additional information and clarify these important issues before concluding that the full application procedures are not necessary to carry out the RTP of section 10101.2

*A two-step process involving preliminary approval.* In particular, I find it inappropriate and ill-advised for the Board to undertake a two-step process here, reaching a preliminary conclusion on the transportation merits of the Coalition's petition for exemption before the completion of the environmental review process. From the information currently in the record, the transportation merits of this project—discussed in detail below—are not clear. In addition, significant environmental issues have been raised. Though I have full faith in OEA to conduct a rigorous and thorough environmental analysis regardless of whether the Board reaches a preliminary conclusion on the transportation merits of the project, the Board should withhold judgment on the transportation merits until it also has the benefit of OEA's environmental analysis.[3]

The instant case is easily distinguished from *Ken Tenn Regional Rail Partners,* FD 36328, cited by the majority. *Decision* 4, 8. In that case (in which I joined with the majority), the Board issued a preliminary decision on

[1] *See, e.g., Alaska Railroad—Construction & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska,* FD 34658, slip op. at 2 (STB served Oct. 4, 2007).

[3] Furthermore, to the extent the standard for issuance of a preliminary decision on the transportation merits requires a showing of unique or compelling circumstances, *see Six County Ass'n of Governments—Construction & Operation Exemption—A Rail Line Between Levan & Salina, Utah,* FD 34075, slip op. at 2 n.4 (STB served Sept. 3, 2015); *Alaska Railroad—Construction & Operation Exemption—Rail Line Between Eielson Air Force Base & Fort Greely, Alaska,* FD 34658, slip op. at 2 (STB served Oct. 4, 2007), the Coalition has failed to make that showing. The Coalition cites only ''the ongoing COVID–19 pandemic and its economic impacts'' in support of its argument that there are unique or compelling circumstances here. (Pet. 26.) While the significant impacts the pandemic has had across the country and the world are self-evident, these impacts are also among the principal reasons that further inquiry into the financial viability of the project is necessary, as discussed, infra.

[4] On December 21, 2020, a group of landowners filed a petition for reconsideration in that docket alleging, among other things, that the petitioner ''misrepresented to the Board that the Petition is unopposed.'' Pet. for Recons. 2, Ken Tenn Reg'l Rail Partners, FD 36328. The petition for reconsideration is currently pending before the Board.

[5] The Board only received a copy of this study because, in its opposition to the petition, the Center for Biological Diversity (Center) submitted a version of the study. But that version was redacted by the Coalition before it was made available to the Center. (*See* Ctr. Supp. 387–469.)

[6] The Center and the Argyle Wilderness Preservation Alliance (Argyle) argue there is no evidence to support a claim of need for the line outside the oil industry. (Ctr. Reply 31 (noting that

the transportation merits of a petition for exemption in a construction case. But the facts in *Ken Tenn* were significantly different from the instant case. There, on the record before the Board at the time,[4] no financial or environmental concerns had been raised (though, as here, the environmental process is ongoing), and in fact it appeared there was no opposition at all to either the request for a preliminary exemption or the petition itself. *Ken Tenn Reg'l Rail Partners,* FD 36328, slip op. at 4. By contrast, here, though there is support from state and local entities (including that the Coalition itself is an independent political subdivision of the State of Utah, *see Decision* 2), there is also significant opposition, and that opposition has raised both financial and environmental concerns. I will discuss the transportation merits and the environmental concerns separately.

*Transportation merits.* While the Coalition argues an exemption should be granted because ''key economic activities in the Uinta Basin, including farming, ranching, oil and gas production, and mineral extraction, depend heavily on the transportation of goods and commodities in and out of the region,'' (Pet. 12–13), there can be no doubt that the singular rationale for constructing the proposed railroad is to provide rail transportation to stimulate an increase in oil production in the Basin, (*id.* at 13–17). It is beyond contradiction that without the hoped-for increase in oil production, there is virtually no possibility the railroad would be financially viable. But reliance on future oil production to sustain the project, based on currently available information and the record before the Board, is problematic at best, as discussed below.

In 2018, the Coalition commissioned a consultant, R.L. Banks & Associates, Inc. (R.L. Banks) to conduct a pre-feasibility study for the project. However, in support of its petition, the Coalition failed to mention this study and never submitted it to the Board. I find this omission significant. Had the Banks study been persuasive in support of the project, one would have expected the Coalition to enthusiastically rely on it.

The Coalition ultimately mentioned the existence of the R.L. Banks study in its reply only *after* it was submitted and referenced by the objectors in their replies to the Coalition's petition.[5] (*See* Coalition Reply 16 n.46 & 17 n.51, July 21, 2020.) The inescapable conclusion from a review of the R.L. Banks study is that the project's success relies entirely on an increase in oil production in the Uinta Basin, with that oil being shipped by rail; shipment of any other commodities on the railroad would be insignificant in comparison to oil. (*See* Pet. 15; *id.,* V.S. McKee ¶ 17 (Executive Director of the Coalition stating the line ''will primarily be used to ship crude oil and fracking sand.'').) Non-oil shipments could never justify the cost of constructing the project.[6]

But the R.L. Banks study hardly is persuasive on the likelihood that a projected increase in oil production will be large enough to sustain the railroad. First, the only version of the study obtainable by the Center is woefully incomplete. While R.L. Banks states that it undertook to make detailed projections of the demand for Uinta Basin oil and the number of carloads such demand would generate for the proposed railroad, the Coalition has redacted every statistic and every table in the R.L. Banks study released to the Center. Therefore, it is impossible for the Board (or anyone) to evaluate the substance and reliability of the conclusions purportedly reached by R.L. Banks concerning the projected volume of shipments on the line. If those statistics were persuasive of the transportation merits of the project, again, one would have expected the Coalition to supply them to the Board (which, if confidentiality was a concern, could have been submitted under seal subject to a protective order). The Coalition's failure to do so supports an inference that the statistics compiled by R.L. Banks are either not persuasive or are no longer reliable.[7]

Aside from this shortcoming, even the R.L. Banks study acknowledges that the demand for the type of oil extracted from the Uinta Basin is unknown. (Ctr Supp. 417 (''Unknown Demand—The demand for Uinta Basin's waxy crude, which is not well known outside of Utah, in large part due to lack of transportation infrastructure to ship product out of the Uinta Basin, may not be as readily accepted as initial indications would suggest.'').) More importantly, since the preparation of the R.L. Banks study in 2018, the global demand for oil has changed dramatically, both because of the pandemic and its long term ramifications, and because of the changing progress in the world's reliance on non-fossil fuel energy.

As a result, there are significant questions about the future global demand for oil, which would affect the financial viability of a rail line built primarily to move Uinta Basin oil, the demand for which was unknown even prior to the pandemic. Further, while the Coalition assumes the pandemic-related changes may be short-term (Pet. 10 n.28, 14 n.52), there are significant indications that this assumption may be unwarranted.

These questions of future global demand were recently summarized by former Vice President Al Gore:

> As a former oil minister in Saudi Arabia put it 20 years ago, ''the Stone Age came to an end, not because we had a lack of stones, and the oil age will come to an end not because we have a lack of oil.'' Many global investors have reached the same conclusion and are beginning to shift capital away from climate-destroying businesses to sustainable solutions. . . . [S]ome of the world's largest investment firms are now joining this movement, too, having belatedly recognized that fossil fuels have been extremely poor investments for a long while. Thirty asset managers overseeing $9 trillion announced on [December 11, 2020] an agreement to align their portfolios with net-zero emissions by 2050.

Al Gore, Opinion, *Al Gore: Where I Find Hope,* New York Times (Dec. 13, 2020), *https://www.nytimes.com/2020/12/12/opinion/sunday/biden-climate-change-al-gore.html.*

Indeed, many of the world's major oil producers have written down the value of their oil reserves—including shale oil reserves—by multi-billions of dollars since the middle of 2020. These write-downs have been based on longer term projections, only partly resulting from pandemic fallout:

[4] On December 21, 2020, a group of landowners filed a petition for reconsideration in that docket alleging, among other things, that the petitioner ''misrepresented to the Board that the Petition is unopposed.'' Pet. for Recons. 2, Ken Tenn Reg'l Rail Partners, FD 36328. The petition for reconsideration is currently pending before the Board.

[5] The Board only received a copy of this study because, in its opposition to the petition, the Center for Biological Diversity (Center) submitted a version of the study. But that version was redacted by the Coalition before it was made available to the Center. (*See* Ctr. Supp. 387–469.)

[6] The Center and the Argyle Wilderness Preservation Alliance (Argyle) argue there is no evidence to support a claim of need for the line outside the oil industry. (Ctr. Reply 31 (noting that prior revenue forecasts for the project have not included products outside the oil industry); Argyle Reply 9, 12 & Appx. 1 at 2, July 7, 2020 (arguing in particular that there are no agricultural producers who would utilize the line).) The Draft EIS also points out that the volume of non-oil traffic is likely to be low, stating that ''[t]he Coalition does not anticipate that the volume of other commodities would be large enough to warrant dedicated trains.'' (Draft EIS 2–2.)

[7] Surprisingly, the majority dismisses its own inability to examine the redacted material in the R.L Banks study, concluding, without explanation, that no additional financial information is needed. *Decision* 6 n.8. Since there is virtually no financial information in the record showing the viability of the project, apparently, the majority concludes that financial viability is unimportant.

BP PLC, Hess Corp. and Occidental Petroleum Corp., have recently taken multibillion-dollar [asset] impairments as a coronavirus-induced economic slowdown adds pressure to an already struggling shale sector. Chevron Corp. took a $10 billion write-down in December, [2019] and Royal Dutch Shell PLC said Tuesday that it would write down the value of its assets by up to $22 billion because of lower energy prices. . . .

*The U.S. shale industry has written down more than $450 billion in assets since 2010,* according to a June [2020] report by Deloitte, reassessing holdings amid a global supply glut and growing investor concerns about the long-term future of fossil fuels. *The accounting firm projects additional shale impairments of as much as $300 billion in coming months* as the coronavirus holds down commodity prices.

Christopher M. Matthews, *Exxon Mobil Resists Write-Downs as Oil, Gas Prices Plummet, Wall Street Journal* (June 30, 2020), *https://www.wsj.com/articles/exxon-mobil-resists-write-downs-as-oil-gas-prices-plummet-11593521685* (emphasis added); *see also* Christopher M. Matthews, *Exxon Slashes Spending, Writes Down Assets, Wall Street Journal* (Nov. 30, 2020), *https://www.wsj.com/articles/exxon-slashes-spending-writes-down-assets-11606774099* (''Exxon cut its expectations for future oil prices for each of the next seven years by 11% to 17% . . . . The sizable reduction suggests Exxon expects the economic fallout from the pandemic to linger for much of the next decade.'').[8]

To be clear, owners of oil assets generally distinguish between the amount of their ''proven reserves'' and all other reserves. The term ''proven reserves'' refers to the quantity of oil which can be extracted profitably at the prevailing price for that oil. Thus, if the price of oil drops below the cost of extraction, then the amount of ''proven reserves'' must be reduced accordingly. Here, questions have been raised about the quantity of oil reserves in the Basin, the demand for the specific type of oil found there, and whether there are sufficient proven reserves to provide long term business for the proposed railroad. Estimates in the record of the amount of oil in the Basin vary, in part depending on whether unconventional resources such as oil produced from oil shale are included in the estimate.[9] (Ctr. Reply 23–24 (estimating 401 million barrels of ''proven'' conventional reserves across the state of Utah at the end of 2018, or only approximately five years' worth); Ctr. Supp 392 (R.L. Banks study estimating ''between 50–321 billion barrels'' without further description of type).) While the high-end estimates here would support the prospect of a booming oil business in the Basin if the demand exists, the low-end estimates would not—and there is little information in the record that would enable the Board to determine even a range of what might be realistic.

Given the depression in the oil market since the R.L. Banks study in 2018, there is no basis in the present record for the Board to determine the amount of ''proven reserves'' in the Uinta Basin. But surely, if in 2020, the world's major oil producers have been forced to undertake major write-downs of the value of their oil reserves and lower their expectations for the future of oil prices, as discussed above, it is difficult to imagine that the Uinta Basin producers have not been required to do the same, especially in view of the R.L. Banks study's concession that the demand for Uinta Basin's waxy crude is ''unknown'' and ''may not be as readily accepted as initial indications would suggest,'' (Ctr. Supp. 417).

If, as the foregoing sources suggest, the global demand for oil is indeed depressed and does not bounce back to pre-pandemic levels as quickly as the Coalition assumes [10]—or never rebounds entirely—the viability of the Uinta Basin railroad is clearly thrown into question. Understandably, even the R.L. Banks study caveats its traffic volume forecasts, stating that ''[t]he viability of the [project] is grounded on the assumption that oil markets will be stable or favorable . . . . However, a significant and long-term downturn in the price of [West Texas Intermediate crude oil], particularly in the early years of the prospective railroad, could result in significant shortfalls from the performance indicated herein.'' (Ctr. Supp. 416.) It takes no great insight to observe that the oil markets have been anything but stable or favorable, thus leaving R.L Banks' ''assumption'' at best questionable.[11]

The majority did not explore these significant changes in the global oil market and dismisses concerns raised by the Center and Argyle about the financial viability of the project, finding that, because the Board's authority is permissive, ''the ultimate decision to go forward with an approved project is in the hands of the applicant and the financial marketplace,'' and thus the Board need not consider such concerns.[12] *Decision* 6.

Even if relying on the financial marketplace to determine whether this railroad should be built constituted a sufficient discharge of the Board's duties in determining whether a project should be granted an exemption from the full application process, here the record establishes that the financial marketplace cannot be relied on. The R.L. Banks feasibility study makes clear that *the private sector will not build this railroad;* only a government can afford to build it:

[R.L. Banks] assumed that construction of the railroad would be the responsibility of [the Coalition], another public entity, or a consortium of public entities. While private/public partnerships (''3Ps'') are not unprecedented in the freight rail industry, *there has never been such a partnership approaching the size and scope of the [project].* Furthermore, given the generally conservative nature of the rail freight industry, [R.L. Banks] believes any railroad which may eventually service the line has relatively little incentive to invest in the construction of the line, especially given *the high associated capital costs projected and lack of current production levels sufficient to justify construction.*

(Ctr. Supp 433 (emphasis added).) Further, R.L. Banks made clear that the railroad financing could only be obtained through the issuance of government bonds:

[8] Further, as Argyle points out, changes in the foreign and domestic oil markets ''recently resulted in a negative value of crude oil for the first time in history.'' (Argyle Reply 8, July 7, 2020.)

[9] The R.L. Banks study looked at, among other commodities, crude oil and shale oil production in the Basin to estimate potential traffic volumes. While the study includes some unredacted information about the estimated production of crude oil, (Ctr. Supp. 419–421 (estimating annual crude oil production in the Basin to be between 225,000 barrels per day and 350,000 barrels per day)), the actual data relating to potential shale oil traffic volumes is all redacted, (Ctr. Supp 423).

[10] A further challenge to the Coalition's assumptions about oil demand is the concern that office commuters, significant users of petroleum products either through mass transit or automobile travel, may never return to commuting at pre-pandemic levels. *See, e.g.,* Paul Wiseman and Alexandra Olson, *Shift in Economic Landscape,* Chicago Tribune, Dec. 26, 2020, at 7 (''A McKinsey survey of 800 corporate executives worldwide found that 38% expect their employees now working remotely to continue to do so at least two days a week after the pandemic, up from 22% in surveys before the pandemic.'').

[11] The R.L. Banks study states that, in 2018, experts expected domestic oil production to grow at record pace, and that it was expected that ''worldwide demand for oil also will continue to grow over the next five years and the United States will supply most of the production to answer that growing demand.'' (Ctr. Supp. 392.) The study, of course, could not have anticipated the current pandemic and the related drastic change in the global oil markets, as reflected in 2020 by the write-downs undertaken by the world's major oil producers.

[12] *But see, Tex. Cent. R.R. July 2020,* FD 36025, slip op. at 13–15. In that case, the Board chose not to rely on the financial marketplace to decide the viability of the project, instead rejecting a petition and requiring an application due to the financial feasibility concerns raised by commenters. Though the projected cost estimates in that case were higher than in this case, the cost of the project here is greater than a billion dollars, (Pet. 11), and, as discussed herein, there is significant uncertainty about the financial viability of a project of that magnitude.

> Given the large capital investment required to construct the [project] . . . , [R.L. Banks] assumed that construction of the railroad would be financed through the issuing of bonds. Specifically, [R.L. Banks] assumed that the entire cost to construct the [project] would be financed with capital generated from issuing 30-year bonds.

(*Id.* at 444.)

While the record (as submitted, not by the Coalition, but by the objectors) refers to the possibility that the railroad construction will be financed by ''municipal conduit bonds,'' [13] there is no indication of how such financing would be structured. Given the uncertainty of demand for Uinta Basin oil, as discussed above, there is every possibility that such bonds could only be sold if they were backed not only by revenues from the railroad, but also by local tax dollars. As former Vice President Gore observed, the world's largest investment firms are withholding investments in fossil fuels and, if that is true, it appears highly unlikely that private investors can be found to invest in construction of a railroad dependent on harvesting oil of the type found in the Basin, in light of all of the information unknown from this record. Thus, the private financial marketplace is not likely to be a determinant of the financial feasibility of the railroad and should not be relied on by the Board to evaluate whether to grant a petition or approve an application for this project. On the contrary, the availability of public funding or public guarantees is likely to be the determinant.

Adding to the uncertainty at this time is the fact that the Coalition has decided to rely on a private investment partner to develop the financing. The Coalition is partnering with DHIP, (Pet. 6, 37–38), which it describes as ''an established independent infrastructure investment company that is successfully developing and financing projects across the United States. . . . '' (Coalition Reply 12, July 21, 2020). Nevertheless, now known as DHIP Group, the company appears to be a small, young firm. Its website reflects that it consists of two managing partners, and the firm lists no prior experience in financing the construction of railroads. Home—DHIP Group, *http://dhipgroup.com/* (last visited Jan. 4, 2021). The firm's website also lists only one other infrastructure project in which it has been involved. Infrastructure—DHIP Group, *http://dhipgroup.com/infrastructure/* (last visited Jan. 4, 2021). While DHIP Group may, in fact, be well qualified to carry out this project, given all of the above serious concerns with the future of the oil market, the Board should insist on further information from DHIP Group on the practicality of obtaining the necessary financial resources to complete the project.

In sum, the current record before the Board is woefully inadequate to permit the Board to evaluate and judge whether an exemption is warranted under the RTP or whether an application should be required so that the Board can determine whether the public convenience and necessity are met for the construction of the Uinta Basin railroad.

*Environmental review.* As noted above, OEA concludes in the Draft EIS that the project ''would result in significant environmental impacts.'' (Draft EIS S–1; *id.* 1–1.) OEA also preliminarily concludes there could be major ''significant and adverse impacts'' as a result of the project on: Water resources; special status species (including several threatened and endangered plant species and a bird species managed by the Bureau of Land Management and the State of Utah); wayside noise (train noise adjacent to a rail line other than that from a locomotive horn); land use and recreation on public, private, and tribal lands; socioeconomics, including beneficial impacts like the creation of jobs, and adverse impacts like the displacement of structures on private land and the severance of properties; and issues of tribal concern affecting the Ute Indian Tribe of the Uintah and Ouray Reservation, including impacts related to vehicle safety and delay, rail operations safety, biological resources, air emissions,[14] and cultural resources. (Draft EIS S–7 to S–9.) Mitigation measures could reduce but not eliminate these impacts, and the route recommended by OEA, the Whitmore Park Alternative, ''would result in the fewest significant impacts on the environment,'' (Draft EIS 2–47), compared to other alternative routes. In addition to these major impacts, OEA also enumerates several minor impacts in the Draft EIS, which OEA states can be mitigated if the recommended mitigation measures are adopted by the Board, as well as downline and cumulative impacts. (Draft EIS S–9 to S–12.) OEA states the Coalition has proposed 56 voluntary mitigation measures to address the environmental impacts of the project, and OEA preliminarily recommends an additional 73 mitigation measures for the project. (Draft EIS S–23; *see also* Draft EIS ch. 4, *Mitigation*.)

Both Argyle and the Center argue against the Board's reaching a preliminary conclusion on the Coalition's petition before the environmental review process is complete. The Center states that ''development of the railway raises many significant environmental and socioeconomic issues, which must be weighed[,] along with the project's financial risks, against its highly speculative benefits.'' (Ctr. Reply 33; *see also* Argyle Reply 14, July 7, 2020.)

The Draft EIS clearly illustrates there are serious environmental impacts that must be mitigated if the project is to proceed. What remains to be determined is whether the mitigation measures identified through the environmental review process will be sufficient to address these impacts, or whether the overall environmental impact of the project will outweigh the project's transportation merits which, as discussed above, are at this time, at best, uncertain. The likely significant cost of any imposed mitigation measures may also affect the project's financial viability. The transportation merits and the environmental impacts of this project are inherently interrelated and should be considered in balance with each other, rather than even preliminarily dealing with the transportation merits now. *See Alaska R.R.—Constr. & Operation Exemption—A Rail Line Extension to Port MacKenzie, Alaska,* FD 35095, slip op. at 22 (STB served Nov. 21, 2011) (Commissioner Mulvey, dissenting) (''[T]he more severe the environmental impacts, particularly those that cannot be fully mitigated, the greater burden on the proponent of the rail line to show that the transportation merits of its proposal outweigh those impacts.'').[15]

*Conclusion.* Contrary to the majority's conclusions, the Board is mistaken when it reaches a conclusion, preliminarily and via the petition for

[13] (Ctr. Reply 12; Ctr. Supp. 229 (Drexel Hamilton Infrastructure Partners LP (DHIP) Request for Information Response for the Commercialization, Financing, Construction, Operation, and Maintenance of the Uinta Basin Railway by the Seven Counties Infrastructure Coalition of Utah, dated Apr. 11, 2019); Ctr. Supp. 351 (Memorandum of Understanding Regarding the Development of the Uinta Basin Railway between the Coalition and DHIP, dated May 10, 2019).)

[14] Argyle notes that the Coalition claims crude oil production will increase by 400%, which, Argyle argues, ''would cause a corresponding increase in local truck traffic between the oilwell sites and the rail loading points.'' (Argyle Reply 10.) An increase in truck traffic in the Basin would have its own environmental and congestion-related impacts on the limited road infrastructure in the Basin.

[15] Though the majority states that it will weigh the environmental impacts and the transportation merits of the project following the conclusion of the environmental review process, *Decision* 10, a preliminary decision on the transportation merits in this case gives the merits of the project an endorsement that may well not be warranted.

exemption process, on the transportation merits of a project presenting serious questions like those raised here without more thoroughly evaluating those issues. The record in this proceeding on the overall financial viability of the project is significantly underdeveloped. Neither I nor the Board majority should be required to rely on reports in the media, which I have highlighted above, or on feasibility studies with all relevant data redacted, to make such an important decision on whether to approve construction of a rail line costing over a billion dollars through an environmentally sensitive area.

Rather than determining at this time that the Coalition's petition is ripe for decision, even preliminarily and piecemeal, the Board should require the Coalition to submit a complete and unredacted version of the R.L. Banks study, should insist that the Coalition elaborate on the projected demand for Uinta Basin oil in light of the global oil demand issues that have arisen since that study was completed, as discussed above, and should obtain more detail from the Coalition and DHIP Group on the reality of obtaining the necessary financing for the project, with or without obligating public funds, along with considering further input on these issues from the objectors.

I therefore find it premature for the Board to issue the decision the majority issues today. Though the *Decision* states that it ''does not prejudge the Board's final decision, nor diminish the agency's environmental review process concerning the proposed line's construction,'' *Decision* 10, nevertheless, the far more prudent course of action for the Board here would be to defer any decision on whether an exemption is warranted and on the overall transportation merits until the environmental review process is complete and until the Coalition submits more persuasive evidence on the financial viability of the entire project.

I respectfully dissent.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2021–00175 Filed 1–7–21; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–2021–0001]**

### Establishment of an Emergency Relief Docket for Calendar Year 2021

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of establishment of public docket.

**SUMMARY:** This Notice announces the establishment of FRA's emergency relief docket (ERD) for calendar year 2021. The designated ERD for calendar year 2021 is docket number FRA–2021–0001.

**ADDRESSES:** See **SUPPLEMENTARY INFORMATION** section for further information regarding submitting petitions and/or comments to docket number FRA–2021–0001.

**SUPPLEMENTARY INFORMATION:** On May 19, 2009, FRA published a direct final rule establishing ERDs and the procedures for handling petitions for emergency waivers of safety rules, regulations, or standards during an emergency situation or event. 74 FR 23329. That direct final rule became effective on July 20, 2009 and made minor modifications to 49 CFR 211.45 in FRA's Rules of Practice in 49 CFR part 211. Section 211.45(b) provides that each calendar year FRA will establish an ERD in the publicly accessible DOT docket system (available at *www.regulations.gov*). Section 211.45(b) further provides that FRA will publish a notice in the **Federal Register** identifying by docket number the ERD for that year. FRA established the ERD and emergency waiver procedures to provide an expedited process for FRA to address the needs of the public and the railroad industry during emergency situations or events. This Notice announces the designated ERD for calendar year 2021 is docket number FRA–2021–0001.

As detailed in § 211.45, if the FRA Administrator determines an emergency event as defined in 49 CFR 211.45(a) has occurred, or that an imminent threat of such an emergency occurring exists, and public safety would benefit from providing the railroad industry with operational relief, the emergency waiver procedures of 49 CFR 211.45 will go into effect.[1] In such an event, the FRA Administrator will issue a statement in the ERD indicating the emergency waiver procedures are in effect and FRA will make every effort to post the statement on its website at *railroads.dot.gov.* Any party desiring relief from FRA regulatory requirements as a result of the emergency should submit a petition for emergency waiver under 49 CFR 211.45(e) and (f). Specific instructions for filing petitions for emergency waivers under 49 CFR 211.45 are found at 49 CFR 211.45(f). Specific instructions for filing comments in response to petitions for emergency waivers are at 49 CFR 211.45(h).

Privacy

Anyone can 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.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.* See also *www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

**John Karl Alexy,**

*Associate Administrator for Railroad Safety Chief Safety Officer.*

[FR Doc. 2021–00142 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

[1] Given the ongoing nature of the coronavirus disease 2019 (COVID–19) public health emergency, FRA considers the FRA Administrator's March 13, 2020, emergency declaration in docket number FRA–2020–0002 to be in effect until it is specifically rescinded by the Administrator. See *https://www.regulations.gov/document?D=FRA-2020-0002-0002*. However, any new requests for relief related to COVID–19 should be submitted to the 2021 ERD (FRA–2021–0001).

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–1999–6439, Notice No. 27]**

### Adjustment of Nationwide Significant Risk Threshold

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of adjustment of Nationwide Significant Risk Threshold.

**SUMMARY:** FRA is updating the Nationwide Significant Risk Threshold (NSRT) for purposes of FRA's regulation on the Use of Locomotive Horns at Public Highway-Rail Grade Crossings. This action is needed to ensure the

public has the proper permissible risk threshold to evaluate risk resulting from prohibiting routine locomotive horn sounding at highway-rail grade crossings located in quiet zones. This is the ninth update to the NSRT and it is increasing from 13,811 to 15,488.

**DATES:** The applicable date of this notice is January 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** James Payne, Staff Director, Highway-Rail Crossing and Trespasser Programs Division (telephone: 202–493–6005, email: *james.payne@dot.gov*); or Kathryn Gresham, Attorney Adviser, Office of the Chief Counsel (telephone: 202–493–6063, email: *kathryn.gresham@dot.gov*).

**SUPPLEMENTARY INFORMATION:**

**Background**

The NSRT is an average of the risk indexes for gated public crossings nationwide where train horns are routinely sounded. FRA developed this risk index to serve as one threshold of permissible risk for quiet zones established across the nation under 49 CFR part 222, Use of Locomotive Horns at Public Highway-Rail Grade Crossings. Thus, a community trying to establish and/or maintain its quiet zone, under 49 CFR part 222, can compare the Quiet Zone Risk Index calculated for its specific crossing corridor to the NSRT to determine whether sufficient measures have been taken to compensate for the excess risk that results from prohibiting routine sounding of the locomotive horn. In the alternative, a community can establish its quiet zone in comparison to the Risk Index With Horns, which is defined in 49 CFR 222.9 as a measure of risk to the motoring public when locomotive horns are routinely sounded at every public highway-rail grade crossing within a quiet zone.

FRA has periodically updated the NSRT since 2006. FRA last updated the NSRT in 2019 to be 13,811. 84 FR 22562, May 17, 2019.

**New NSRT**

Using collision data over a 5-year period from 2015 to 2019, FRA has recalculated the NSRT based on formulas identified in 49 CFR part 222, appendix D. In making this recalculation, FRA noted the total number of gated crossings nationwide where train horns are routinely sounded was 48,607.

$$\text{Fatality Rate} = \frac{\text{Fatalities}}{\text{Fatal Incidents}} = \frac{295}{245} = 1.2041$$

$$\text{Injury Rate} = \frac{\text{Injuries in Injury-Only Incidents}}{\text{Injury-Only Incidents}} = \frac{1023}{663} = 1.5430$$

Applying the fatality rate and injury rate to the probable number of fatalities and injuries predicted to occur at each of the 48,607 identified crossings, and the predicted cost of the associated injuries and fatalities, FRA calculates the NSRT to be 15,488. Accordingly, this updated NSRT value will serve as one threshold of permissible risk for quiet zones established across the nation pursuant to 49 CFR part 222.

**John Karl Alexy,**

*Associate Administrator for Railroad Safety, Chief Safety Officer.*

[FR Doc. 2021–00155 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket No. FRA–2020–0027–N–39]**

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** Under the Paperwork Reduction Act of 1995 (PRA), this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On October 5, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

**DATES:** Interested persons are invited to submit comments on or before February 8, 2021.

**ADDRESSES:** Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kim Toone, Information Collection Clearance Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: (202) 493–06132) or *kim.toone@dot.gov.*

**SUPPLEMENTARY INFORMATION:** The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On October 5, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 62798. FRA received no comments in response to this 60-day notice.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.10(b); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the

methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

*Title:* Design and Evaluation of a Robust Manual Locomotive Operating Mode.

*OMB Control Number:* 2130–0623.

*Abstract:* The purpose of this study is to design and evaluate a prototype locomotive operating mode that allows an engineer to ''manually'' control a train by providing a desired speed target while the control system determines the throttle notch changes required. This research addresses DOT's safety strategic goal. Information collected from this research will be used by researchers and equipment designers to evaluate the merit of a prototype display and control configuration maximizing the use of both automation and human capabilities. The information will also assist the Federal government in recommending display design standards to the rail industry for future displays and the results may help design future displays and controls for locomotives. The ICR, which was previously approved by OMB, will be extended as the study was not completed by the anticipated completion date.

*Type of Request:* Extension without change of a current information collection.

*Affected Public:* Railroad Engineers, College Student Volunteers.

*Respondent Universe:* 20 Engineers/ 10 Volunteers.

*Frequency of Submission:* Once.

*Total Estimated Annual Responses:* 90.

*Total Estimated Annual Burden:* 272.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct or sponsor a collection of information unless it displays a currently valid OMB control number.

**Authority:** 44 U.S.C. 3501–3520.

**Brett A. Jortland,**

*Deputy Chief Counsel.*

[FR Doc. 2021–00099 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**[Docket Number FRA–2000–7137]**

### Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on December 21, 2020, San Diego Trolley Incorporated (SDTI) petitioned the Federal Railroad Administration (FRA) to renew a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at various parts of 49 CFR. FRA assigned the petition Docket Number FRA–2000–7137.

Specifically, SDTI seeks a five-year extension of its existing waiver of compliance with modifications. The waiver applies to certain portions of SDTI's rail fixed guideway urban transit operations which employ temporal separation to safely share track with the general railroad system's San Diego & Imperial Valley Railroad (SDIV). Contiguous to the shared trackage are portions with limited connections to the general railroad system, which include a small shared corridor with BNSF Railway and Coaster commuter train service, which also shares a storage yard with SDTI. FRA granted SDTI its initial waiver on January 19, 2001, and the most recent update to the waiver was FRA's May 1, 2020, approval of SDTI's new absolute block arrangement on its Blue Line.

In this petition, SDTI seeks an extension of its relief from the following parts and sections in 49 CFR: part 217, Railroad Operating Rules (except for 217.9(d)); 218.27(a), *Workers on track other than main track* (as granted in part and denied in part in FRA's January 19, 2001, letter); part 219, Control of Alcohol and Drug Use; part 220, Railroad Communications (as granted in part in FRA's January 19, 2001, letter); part 221, Rear End Marking Device—Passenger, Commuter and Freight Trains; 223.9(c), *Requirements for new or rebuilt equipment* and 223.15(c), *Requirements for existing passenger cars;* part 225, Railroad Accidents/ Incidents: Reports Classification, and Investigations (for employee injuries only); part 228, subpart F, Substantive Hours of Service Requirements for Train Employees Engaged in Commuter or Intercity Rail Passenger Transportation, and relevant recordkeeping sections of subpart B, Records and Reporting; the following sections of part 229, Railroad Locomotive Safety Standards: 229.46–229.59, 229.61, 229.65, 229.71, 229.77, 229.125, and 229.135; 231.14, *Passenger-train cars without end platforms;* the following sections of part 238, Passenger Equipment Safety Standards: 238.112, 238.113, 238.114, 238.115(b)(4), 238.203, 238.205, 238.207, 238.209, 238.211, 238.213, 238.215, 238.217, 238.219, 238.231, 238.233, 238.237, and part 238, subpart D in its entirety, sections 238.301 through 238.319; part 239, Passenger Train Emergency Preparedness; part 240, Locomotive Engineer Certification; and part 242, Qualification and Certification of Conductors.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

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 parties desire an opportunity for oral comment and a public hearing, 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:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation (DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by February 22, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can 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.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can

be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

**John Karl Alexy,**

*Associate Administrator for Railroad Safety Chief Safety Officer.*

[FR Doc. 2021–00141 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

### U.S. Maritime Transportation System National Advisory Committee; Notice of Solicitation for Applications for Potential Members

**AGENCY:** Maritime Administration, Department of Transportation.

**ACTION:** Notice of solicitation for membership.

**SUMMARY:** Pursuant to authority delegated by the Secretary of Transportation (Secretary) to the Maritime Administrator (Administrator), the Maritime Administration (MARAD) requests nominations for membership on the U.S. Maritime Transportation System National Advisory Committee (MTSNAC).

**DATES:** Applications must be received on or before 5:00 p.m. ET on February 8, 2021. After that date, MARAD will continue to accept applications under this notice for a period of up to two years from the deadline to fill any vacancies that may arise. MARAD encourages nominations submitted any time before the deadline for consideration of upcoming vacancies.

**ADDRESSES:** Interested applicants may submit a completed application by sending an email to *MTSNAC@dot.gov,* subject line: MTSNAC Application (Named Individual). Please note that due to the Coronavirus Disease 2019 (COVID–19), MARAD will only accept electronic submissions. If that option does not work for you, please call the Designated Federal Officer for other options.

**FOR FURTHER INFORMATION CONTACT:** Amanda Rutherford, Designated Federal Officer, at *MTSNAC@dot.gov* or at (202) 595–4657. Please visit the MTSNAC website at *https://www.maritime.dot.gov/outreach/maritime-transportation-system-mts/marine-transportation-system-national-advisory-committee.*

**SUPPLEMENTARY INFORMATION:**

**Committee Objective**

The objective of the Maritime Transportation System National Advisory Committee (MTSNAC or Committee) is to identify and seek solutions to impediments hindering effective use of short sea transportation. The Committee will provide information, advice, and recommendations to the U.S. Secretary of Transportation (Secretary), through the Maritime Administrator (Administrator), on matters stated in the document *Goals and Objectives for a Stronger Maritime Nation: A Report to Congress* that are related to identifying and seeking solutions to impediments hindering effective use of short sea transportation. The Committee will not exercise program management responsibilities and will make no decisions directly affecting the programs on which it provides advice; decisions directly affecting implementation of maritime policy will remain with the Administrator.

The Administrator will use the advice, information, and recommendations generated by MTSNAC for an array of policy deliberations and for interagency discussions on meeting the *Goals and Objectives for a Stronger Maritime Nation: A Report to Congress.* The Secretary and Administrator may accept or reject a recommendation made by the MTSNAC and are not bound to pursue any recommendation from the MTSNAC. In the exercise of his or her discretion, the Secretary, Administrator, or his or her designee, may withdraw a task being considered by the MTSNAC at any time.

**Description of Duties**

During the term of the charter, MTSNAC shall undertake information gathering activities, develop technical advice, and present recommendations to the Administrator on short sea shipping matters including the following: (1) How to address impediments hindering effective use of short sea transportation, including the expansion of America's Marine Highways, as directed in 46 U.S.C. 55603; (2) How to strengthen U.S. Maritime capabilities essential to national security and economic prosperity; (3) Ways to ensure the availability of a U.S. maritime workforce that will support the sealift resource needs of the National Security Strategy; (4) Ways to support enhancement of U.S. port infrastructure and performance; and, (5) Ways to enable maritime industry innovation in information, automation, safety, environmental impact and other areas.

**I. Who should be considered for nomination as MTSNAC members?**

MARAD seeks nominations for immediate consideration to fill positions on the Committee for the upcoming charter term, and will continue to accept nominations under this notice on an on-going basis for two years for consideration to fill vacancies that may arise during the charter term. Member appointment terms run until September 17, 2022 and may be renewed, subject to charter renewal. Members will be selected in accordance with applicable Agency guidelines based upon their ability to advise the Administrator on marine transportation issues. Members will be selected to obtain membership balance of the marine transportation interests, including (1) active mariners; (2) vessel operators; (3) port authorities and terminal operators; (4) shippers or beneficial cargo owners; (5) the ship construction, repair and/or recycling industries; (6) relevant policy areas such as innovative financing, economic competitiveness, performance monitoring, safety, insurance, labor, and environment; (7) freight customers and providers; and (8) government bodies. All MTSNAC members serve at the pleasure of the Secretary of Transportation.

Registered lobbyists are not eligible to serve on Federal Advisory Committees in an individual capacity. See ''*Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards and Commissions*'' (79 FR 47482, August 13, 2014). Registered lobbyists are ''lobbyists,'' as defined in Title 2 U.S.C. 1602, who are required by Title 2 U.S.C. 1603 to register with the Secretary of the Senate and the Clerk of the House of Representatives. The prohibition does not apply if registered lobbyists are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, and similar groups) or state or local governments. Registered lobbyists are required to comply with provisions contained in the Lobbying Disclosure Act of 1995 (Pub. L. 110–81).

**II. Do MTSNAC members receive compensation and/or per diem?**

Committee members will receive no salary for participating in MTSNAC activities. While attending meetings or when otherwise engaged in Committee business, members may be reimbursed for travel and per diem expenses as permitted under applicable Federal

travel regulations. Reimbursement is subject to funding availability.

**III. What is the process for submitting applications/nominations?**

Individuals can self-apply or be nominated by any individual or organization. To be considered for the MTSNAC, applicants/nominators should submit the following information:

(1) Contact Information for the nominee, consisting of:

a. Name

b. Title

c. Organization or Affiliation

d. Address

e. City, State, Zip

f. Telephone number

g. Email address

(2) Statement of interest limited to 250 words on why the nominee wants to serve on the MTSNAC and the unique perspectives and experiences the nominee brings to the Committee;

(3) Resume limited to 3 pages describing professional and academic expertise, experience, and knowledge, including any relevant experience serving on advisory committees, past and present;

(4) An affirmative statement that the nominee is not a federally registered lobbyist seeking to serve on the Committee in their individual capacity and the identity of the interests they intend to represent, if appointed as member of the Committee; and

(5) Optional letters of support.

Please do not send company, trade association, organization brochures, or any other promotional information. Materials submitted should total five pages or less and must be in a 12 font, formatted in Microsoft Word or PDF. Should more information be needed, MARAD staff will contact the nominee, obtain information from the nominee's past affiliations, or obtain information from publicly available sources. Those interested in applying to become a member of the Committee, may send a completed application package by email listed in the **ADDRESSES** section. Please note that, due to circumstances relating to the COVID–19 public health emergency, we will only accept electronic submissions. If electronic submission is problematic for you, please call the Designated Federal Officer for other options. Applications must be received by the deadline listed in the **DATES** section; however, candidates are encouraged to send application any time before the deadline.

**IV. How will MARAD select MTSNAC members?**

A selection team comprising representatives from MARAD will review the application packages. The selection team will make recommendations regarding membership to the Administrator based on the following criteria: (1) Professional or academic expertise, experience, and knowledge; (2) stakeholder representation; (3) availability and willingness to serve; (4) relevant experience in working in committees and advisory panels; and (5) the MTSNAC Charter and Membership Balance Plan. Nominations are open to all individuals without regard to race, color, religion, sex, national origin, age, mental or physical disability, marital status, or sexual orientation.

(Authority: 49 CFR part 1.93(a); 5 U.S.C. 552b; 41 CFR parts 102–3; 5 U.S.C. app. Sections 1–16)

* * * * *

By Order of the Maritime Administrator.
Dated: January 5, 2021.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2021–00121 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2020–0018]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Reducing the Illegal Passing of School Buses

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Notice and request for comments on a new information collection.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below is being submitted to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected burden. This new information collection seeks to assess the knowledge of drivers nationwide about the laws governing passing a school bus. A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on July 17, 2020. By the close of the comment period, NHTSA received six comments.

**DATES:** Comments must be received on or before February 8, 2021.

**ADDRESSES:** Written comments and recommendations for the proposed information collection, including suggestions for reducing the burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

**FOR FURTHER INFORMATION CONTACT:** For additional information or access to background documents, contact Kristin Rosenthal, Highway Safety Specialist, 1200 New Jersey Avenue SE, W44–245, Washington, DC 20590. Ms. Rosenthal's phone number is 202–366–8995, and her email address is *kristin.rosenthal@dot.gov.* Please identify the relevant collection of information by referring to its OMB Control Number.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request has been submitted to OMB. A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on July 17, 2020 (85 FR 43645). NHTSA received six comments by the close of the comment period. The National Transportation Safety Board (NTSB), the National School Transportation Association (NSTA), and David DeVeau provided comments supportive of the proposed information collection. Gardian Angel, LLC (which submitted the same comment twice) also provided comments regarding the proposed collection but expressed concerns about not including the recent NTSB recommendations adopted on March 31, 2020. Gardian Angel, LLC raised the concern that the data collection should address the NTSB recommendation, which includes evaluating various technologies as well as the inclusion of Gardian Angel, LLC products. To the comment regarding the inclusion of Gardian Angel, LLC products, NHTSA does not endorse specific products. This study is focused

on assessing a high-visibility enforcement approach that includes the use of automated cameras on the school bus. NHTSA will take under consideration the suggestion to evaluate other technologies at another time. One anonymous post asked NHTSA to include pedestrian and bicyclist safety; however, this data collection is specific to school buses. We appreciate the comments from NTSB, NSTA, Gardian Angel, LLC, and the individual who provided comment and thank them for thoughtfully considering the described program.

*Title:* Reducing the Illegal Passing of School Buses.

*OMB Control Number:* New.

*Form Number:* 1559.

*Type of Request:* Request for approval of a new information collection.

*Type of Review Requested:* Regular.

*Length of Approval Requested:* Three years from date of approval.

*Affected Public:* Drivers in the AmeriSpeak panel run by National Opinion Research Center (NORC) at the University of Chicago and driver volunteers in two selected communities.

*Summary of the Collection of Information:* The National Highway Traffic Safety Administration (NHTSA) was established by the Highway Safety Act of 1970 to reduce deaths, injuries, and economic losses due to road traffic crashes on the Nation's highways. Even though every State has a law requiring drivers to stop for a stopped school bus displaying flashing red lights, illegal passing of stopped school buses is a frequent occurrence across the country. Title 23, Section 403 of the United States Code gives the Secretary authorization to use funds appropriated to conduct research and development activities, including demonstration projects and the collection and analysis of highway and motor vehicle safety data and related information needed to carry out that section. NHTSA seeks to assess the knowledge and attitudes of drivers nationwide about the laws governing passing a school bus (under the specific State laws where the driver lives) as a function of varying roadway configurations, flashing yellow and red light deployment on the school bus, and activation of the stop swing arm on the bus.

To make this assessment, NHTSA will conduct a study that consists of two new voluntary surveys of drivers in the general public. The first survey will collect data from current drivers of motor vehicles in the AmeriSpeak panel who volunteer to participate. AmeriSpeak is funded and operated by National Opinion Research Center (NORC) at the University of Chicago and is a probability-based panel designed to be representative of the U.S. household population to take part in online and telephone surveys. Screening and data collection for this national survey will take place in the respondents' homes or wherever respondents choose to operate their own computer, laptop, or mobile device. The second will evaluate the effectiveness of a high visibility enforcement (HVE) program, including the use of automated cameras on the school bus in two communities, aimed at reducing violations of the school bus passing laws. A survey in each community before and after the HVE application will be part of the evaluation. Screening and data collection for the community survey will take place on a computer or tablet provided by the study at a public venue frequented by drivers across the socioeconomic and demographic spectra, such as a mall or motor vehicle department office. All collection of data will be anonymous.

*Description of the Need for the Information and Proposed Use of the Information:* NHTSA's mission is to save lives, prevent injuries, and reduce economic costs due to road traffic crashes, through education, research, safety standards and enforcement activity. The agency develops, promotes, and implements educational, enforcement, engineering, and emergency response programs with the goal of ending preventable tragedies and reducing economic costs associated with vehicle use and highway travel. One highway safety problem NHTSA has been following closely involves school children struck by passing motorists while entering or exiting a stopped school bus with its red lights flashing and its stop arm extended. Even though there have been some highly-publicized child fatalities of this type and the annual national stop-arm violation count by the National Association of State Directors of Pupil Transportation Services (NASDPTS) continues to show a surprisingly high incidence of these illegal passes, to date, no national survey has assessed the levels of driver knowledge and understanding of the laws regarding passing of school buses. The findings from this proposed collection of information will assist NHTSA in designing, targeting, and implementing programs intended to mitigate illegal passing of school buses on the roadways and to provide data to States, localities, and law enforcement agencies that will aid in their efforts to reduce crashes and injuries due to illegal school bus passing.

*Estimated Number of Respondents:* The study anticipates collecting 3,000 responses to the national survey from members of the AmeriSpeak panel. It is estimated that up to 3,400 AmeriSpeak panelists will have to be screened to obtain 3,100 qualified volunteers who take the national survey (100 of these volunteers are estimated not to complete the entire survey). For the community surveys, NHTSA estimates that 400 volunteers will have to be screened for each wave (400 for the before-program implementation and 400 for the after-program implementation) for each of the two communities. Therefore, a total of 1,600 volunteers will have to be screened for the estimated yield of 300 completed surveys for each wave for the two communities, or 1,200 total responses in the two waves of community surveys at the two selected sites.

*Frequency of Collection:* Respondents will only respond to the national survey request a single time during the study period. The community survey will be conducted twice at the same locations in each of the two selected communities over a period of approximately 10 months. Therefore, an extremely small possibility exists that an individual might be invited to participate more than once for the community survey. If an individual is asked to participate a second time, they will be prompted to decline.

*Estimated Time per Participant:* Both the national and community surveys will be administered via an internet-hosted survey on a tablet or other small computer. The national and community surveys will have the same core items related to knowledge of and attitudes towards school bus passing laws. The community survey will have additional items about awareness of countermeasure program activities and basic respondent demographic information. Demographic information for the panelists in the national survey is part of their AmeriSpeak profile. The intent is for each participant to complete a survey only once. However, no identifying information will be collected for the community survey, so a slight possibility exists that an individual will participate more than once. The estimated average time to complete the survey per participant in either the national or community sample is 15 minutes. The screening involving (1) reading a recruitment communication, such as an email or listening to a researcher describe the study, and (2) determining an individual's eligibility (*e.g.,* 18+ years old, current driver, lives in the community being studied) can take up

to three minutes for the community surveys and two minutes for the national survey.

*Total Estimated Annual Burden Hours:* 1,268 hours for the total study.

NHTSA estimates that for the 3,400 AmeriSpeak panelists that will have to be screened, the estimated total burden is 113 hours (3,400 × 2 min./60). For the 3,100 qualified volunteers who take the national survey, the estimated total burden hours are 775 hours (3,100 × 15 min./60), yielding at least 3,000 fully completed surveys. Likewise, the total estimated burden for the maximum of 1,600 potential participants to be screened for the community survey (400 per wave × 2 communities x 2 waves) is 80 hours (1,600 × 3 min./60). The estimated total burden hours for the 1,200 fully completed surveys (300 per wave × 2 communities × 2 waves) is 300 hours (1,200 × 15 min./60). Table 1 provides a summary of the burden hours per survey.

| Participant group | Form name | Number of responses per participant | Estimate burden per response (min.) | Number of participants | Total burden hours |
|---|---|---|---|---|---|
| National Survey | Screening | 1 | 2 | 3,400 | 113 |
| National Survey | Online Survey | 1 | 15 | 3,100 | 775 |
| Community Survey | Screening | 1 | 3 | 1,600 | 80 |
| Community Survey | Online Survey | 1 | 15 | 1,200 | 300 |
| Total | | | | | 1,268 |

*Estimated Total Annual Burden Cost:* The only cost to participants will be time spent responding to the screening and the subsequent survey if they volunteer. Participants who volunteer and begin the survey will receive compensation for this time.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for 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 of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways for the department 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses without reducing the quality of the collected information.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Issued in Washington, DC.

**Nanda Narayanan Srinivasan,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2021–00136 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. DOT–NHTSA–2020–0103]**

### National Emergency Medical Services Advisory Council Notice of Public Meeting

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a meeting of the National Emergency Medical Services Advisory Council (NEMSAC).

**DATES:** The meeting will be held February 10–11, 2021, from 9:00 a.m. to 5:00 p.m. EST.

Requests to attend the meeting must be received by February 5, 2021.

Requests for accommodations to a disability must be received by February 5, 2021.

If you wish to speak during the meeting, you must submit a written copy of your remarks to DOT by February 5, 2021.

Requests to submit written materials to be reviewed during the meeting must be received no later than February 5, 2021.

**ADDRESSES:** The meeting will be held virtually. Copies of the meeting minutes will be available on the NEMSAC internet website at *EMS.gov*. The detailed agenda will be posted on the NEMSAC internet website at *EMS.gov* at least one week in advance of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Clary Mole, EMS Specialist, DOT, at *Clary.Mole@DOT.gov* or 202–366–2795. Any committee related requests should be sent to the person listed in this section.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The NEMSAC was established pursuant to Section 31108 of the Moving Ahead for Progress in the 21st Century (MAP–21) Act of 2012, under the Federal Advisory Committee Act. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives to provide advice and consult with:

a. The Federal Interagency Committee on Emergency Medical Services (FICEMS) on matters relating to EMS issues; and

b. The Secretary of Transportation on matters relating to EMS issues affecting DOT.

The NEMSAC provides an important national forum for the non-Federal deliberation of national EMS issues and serves as a platform for advice on DOT's national EMS activities. NEMSAC also provides advice and recommendations to the FICEMS. NEMSAC is authorized under Section 31108 of the MAP–21 Act of 2012, codified at 42 U.S.C. 300d–4.

#### II. Agenda

At the meeting, the agenda will cover the following topics:

- Updates from Federal Emergency Services Liaisons
- Emergency Services Personnel Safety and Wellness
- Information on FICEMS Initiatives
- Update on NHTSA Initiatives
- Committee Reports

#### III. Public Participation

The meeting will be open to the public. Members of the public who wish

to attend must RSVP to the person listed in the **FOR FURTHER INFORMATION CONTACT** section with your name and affiliation. The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than the deadline listed in the **DATES** section.

There will be a thirty (30) minute period allotted for comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the NHTSA office of EMS may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to NEMSAC members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the committee at any time.

**Authority:** 42 U.S.C. 300d–4(b); 49 CFR part 1.95(i)(4).

Issued in Washington, DC.

**Nanda Narayanan Srinivasan,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2021–00161 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. DOT–NHTSA–2020–0105]**

### National Emergency Medical Services Advisory Council; Notice of Public Meeting

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a meeting of the National Emergency Medical Services Advisory Council (NEMSAC).

**DATES:** The meeting will be held November 17–18, 2021, from 9:00 a.m. to 5:00 p.m. EST Requests to attend the meeting must be received by November 13, 2021.

Requests for accommodations to a disability must be received by November 13, 2021.

If you wish to speak during the meeting, you must submit a written copy of your remarks to DOT by November 13, 2021.

Requests to submit written materials to be reviewed during the meeting must be received no later than November 13, 2021.

**ADDRESSES:** The meeting will be held virtually (depending on the status of the Coronavirus Disease 2019 (COVID–19) public health emergency) or at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Copies of the meeting minutes will be available on the NEMSAC internet website at *EMS.gov.* The detailed agenda will be posted on the NEMSAC internet website at *EMS.gov* at least one week in advance of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Clary Mole, EMS Specialist, DOT, at *Clary.Mole@DOT.gov* or 202–366–2795. Any committee related requests should be sent to the person listed in this section.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The NEMSAC was established pursuant to Section 31108 of the Moving Ahead for Progress in the 21st Century (MAP–21) Act of 2012, under the Federal Advisory Committee Act. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives to provide advice and consult with:

a. The Federal Interagency Committee on Emergency Medical Services (FICEMS) on matters relating to EMS issues; and

b. The Secretary of Transportation on matters relating to EMS issues affecting DOT.

The NEMSAC provides an important national forum for the non-Federal deliberation of national EMS issues and serves as a platform for advice on DOT's national EMS activities. NEMSAC also provides advice and recommendations to the FICEMS. NEMSAC is authorized under Section 31108 of the MAP–21 Act of 2012, codified at 42 U.S.C. 300d–4.

#### II. Agenda

At the meeting, the agenda will cover the following topics:

- Updates from Federal Emergency Services Liaisons
- Emergency Services Personnel Safety and Wellness
- Information on FICEMS Initiatives
- Update on NHTSA Initiatives
- Committee Reports

#### III. Public Participation

The meeting will be open to the public on a first-come, first-served basis, as space is limited. Members of the public who wish to attend in person must RSVP to the person listed in the **FOR FURTHER INFORMATION CONTACT** section with your name and affiliation. DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than the deadline listed in the **DATES** section.

There will be a thirty (30) minute period allotted for comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the NHTSA office of EMS may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to NEMSAC members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the committee at any time.

**Authority:** 42 U.S.C. 300d–4(b); 49 CFR part 1.95(i)(4))

Issued in Washington, DC.

**Nanda Narayanan Srinivasan,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2021–00163 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. DOT–NHTSA–2020–104]**

### National Emergency Medical Services Advisory Council; Notice of Public Meeting

**AGENCY:** National Highway Traffic Safety Administration, U.S. Department of Transportation (DOT).

**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a meeting of the National Emergency Medical Services Advisory Council (NEMSAC).

**DATES:** The meeting will be held August 11–12, 2021, from 9:00 a.m. to 5:00 p.m. EDT Requests to attend the meeting must be received by August 6, 2021.

Requests for accommodations to a disability must be received by August 6, 2021.

If you wish to speak during the meeting, you must submit a written copy of your remarks to DOT by August 6, 2021.

Requests to submit written materials to be reviewed during the meeting must be received no later than August 6, 2021.

**ADDRESSES:** The meeting will be held virtually (depending on the status of the Coronavirus Disease 2019 (COVID–19) public health emergency) or at the U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Copies of the meeting minutes will be available on the NEMSAC internet website at EMS.gov. The detailed agenda will be posted on the NEMSAC internet website at EMS.gov at least one week in advance of the meeting.

**FOR FURTHER INFORMATION CONTACT:** Clary Mole, EMS Specialist, U.S. Department of Transportation, at *Clary.Mole@DOT.gov* or 202.366.2795. Any committee related requests should be sent to the person listed in this section.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The NEMSAC was established pursuant to Section 31108 of the Moving Ahead for Progress in the 21st Century (MAP–21) Act of 2012, under the Federal Advisory Committee Act. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives to provide advice and consult with:

a. The Federal Interagency Committee on Emergency Medical Services (FICEMS) on matters relating to EMS issues; and

b. The Secretary of Transportation on matters relating to EMS issues affecting DOT.

The NEMSAC provides an important national forum for the non-Federal deliberation of national EMS issues and serves as a platform for advice on DOT's national EMS activities. NEMSAC also provides advice and recommendations to the FICEMS. NEMSAC is authorized under Section 31108 of the MAP–21 Act of 2012, codified at 42 U.S.C. 300d–4.

#### II. Agenda

At the meeting, the agenda will cover the following topics:

- Updates from Federal Emergency Services Liaisons
- Updates on the FICEMS Initiatives
- Updates on NHTSA Initiatives
- Committee Reports

#### III. Public Participation

The meeting will be open to the public. Members of the public who wish to attend in person must RSVP to the person listed in the **FOR FURTHER INFORMATION CONTACT** section with your name and affiliation. The U.S. Department of Transportation is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than the deadline listed in the **DATES** section.

There will be a thirty (30) minute period allotted for comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name, address, and organizational affiliation of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the NHTSA office of EMS may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks for inclusion in the meeting records and for circulation to NEMSAC members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a written statement to the committee at any time.

**Authority:** 42 U.S.C. 300d–4(b); 49 CFR part 1.95(i)(4).

Issued in Washington, DC.

**Nanda Narayanan Srinivasan,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2021–00162 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

**FOR FURTHER INFORMATION CONTACT:** *OFAC:* Andrea Gacki, Director, tel.: 202–622–2420; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490, or; Assistant Director for Licensing, tel.: 202–622–2480.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treas.gov/ofac*).

#### Notice of OFAC Actions

On January 5, 2021, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

**BILLING CODE 4810–AL–P**

**Entities**

1. KAIFENG PINGMEI NEW CARBON MATERIALS TECHNOLOGY CO., LTD. (a.k.a. KAIFENG CARBON CO., LTD. CHINA PINGMEI SHENMA GROUP; a.k.a. KAIFENG PINGMEI XINXINGTAN MATERIAL TECHNOLOGY CO., LTD.; a.k.a. "KFCC"), Dongiaobian Village, Shunhe Hui District, Kaifeng, Henan 475002, China; Donjiaobian Village, No. 310 National Highway, Kaifeng, Henan 475002, China; Biancun, East Suburbs, Shunhe District, Kaifeng, Henan Province 475002, China; Website www.kfcc.com.cn; Additional Sanctions Information - Subject to Secondary Sanctions; Executive Order 13846 information: LOANS FROM UNITED STATES FINANCIAL INSTITUTIONS. Sec. 5(a)(i); alt. Executive Order 13846 information: FOREIGN EXCHANGE. Sec. 5(a)(ii); alt. Executive Order 13846 information: BANKING TRANSACTIONS. Sec. 5(a)(iii); alt. Executive Order 13846 information: BLOCKING PROPERTY AND INTERESTS IN PROPERTY. Sec. 5(a)(iv); alt. Executive Order 13846 information: BAN ON INVESTMENT IN EQUITY OR DEBT OF SANCTIONED PERSON. Sec. 5(a)(v); Tax ID No. 410211742522406 (China); Unified Social Credit Code (USCC) 914102007425224065 (China) [IFCA] [IRAN-EO13871] (Linked To: PASARGAD STEEL COMPLEX).

   Designated pursuant to section 1(a)(iv) of Executive Order 13871 of May 8, 2019, "Imposing Sanctions With Respect to the Iron, Steel, Aluminum, and Copper Sectors of Iran," 84 FR 20761 (E.O. 13871) for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of PASARGAD STEEL COMPLEX, a person whose property and interests in property are blocked pursuant to section 1 of E.O. 13871.

2. KHAZAR STEEL CO. (a.k.a. KHAZAR STEEL ROLLING), Rasht, Rasht Industrial City, at the end of Madras Boulevard, Rasht, Iran; Valiasr Str., after Dastgardi, at the beginning of Nasri Alley, No. 2551, Tehran 196864311, Iran; Rasht, Iran; No. 4, 3rd. Alley, Niloofar St., Khorram Shahr St., Tehran 1968643111, Iran; Website www.khazarsteel.co; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 10102629319 (Iran); Registration Number 221659 (Iran) [IRAN-EO13871].

   Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

3. PASARGAD STEEL COMPLEX (a.k.a. PASARGAD STEEL ZOB INDUSTRIAL COMPLEX; a.k.a. ZOBE AHAN PASARGAD INDUSTRY COMPLEX COMPANY; a.k.a. "PASCO"), No. 3, Nasim Alley, Movahed Danesh St., Aghdasieh, Tehran, Iran; West Atefi Street 33, Africa Avenue, Tehran, Iran; Website www.pascosteel.com; Additional Sanctions Information - Subject to Secondary Sanctions; Registration Number 218641 (Iran) [IRAN-EO13871].

   Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

4. VIAN STEEL COMPLEX (a.k.a. VIAN STEEL MELTING AND CASTING COMPANY; a.k.a. "VISCO"), No. 16, Esfandiar Blvd., Vali-e Asr Ave., Tehran 1968656391, Iran; 42nd Km. of Hamedan- Tehran Road, South Eastern of Mofatteh Power Plant, Hamedan, Iran; Website www.viansteel.com; Additional Sanctions Information - Subject to Secondary Sanctions [IRAN-EO13871].

Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

5. BONAB STEEL INDUSTRY COMPLEX (a.k.a. MOJTAME FOULAD SHAHIN BONAB; a.k.a. SHAHIN BONAB STEEL COMPLEX), No 17, Sarbalai Valiasr, Tavanir Bridge, Tabriz City, Iran; Bonab Industrial Zone, Bonab, East Azerbaijan, Iran; PO Box 51576-13533, Tabriz City, Iran; Website www.mfbco.ir; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 2005; National ID No. 742 (Iran) issued 2005 [IRAN-EO13871].

   Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

6. ESFARAYEN INDUSTRIAL COMPLEX (a.k.a. "EICO"), No. 7 Alvand Alley Street, Ghaem Magham Farahani Avenue, Tehran 1589673711, Iran; Number 20, Alvand St., Ghaem Magham-e-Farahani Ave, Tehran, Iran; 12th km of Bojnurd-Esfarayen Road, North Khorasan, Iran; PO Box 15745-513, Tehran, Iran; Website www.esfst.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 1990; National ID No. 89046 (Iran) issued 1990 [IRAN-EO13871].

   Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

7. GILAN STEEL COMPLEX (a.k.a. FERRO GILAN COMPLEX), Saravan Road, Rasht 4337185759, Iran; Ferro Gilan Complex Co. No. 38, West Arash Boulevard, Africa Ave, Tehran 1917743311, Iran; Website http://generative.ir/ferro_gilan; alt. Website https://www.ferrogilan.com/; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 30 Oct 2000; Commercial Registry Number 167640 (Iran) [IRAN-EO13871].
   Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

8. GMI PROJECTS HAMBURG GMBH, Jungfernstieg 14, Hamburg 20354, Germany; Website https://www.gmiprojects.de; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 18 Oct 2010; V.A.T. Number DE276234810 (Germany); Registration Number HRB115564 (Germany) [IRAN-EO13871] (Linked To: MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY).

   Designated pursuant to section 1(a)(v) of E.O. 13871 for being owned or controlled by, directly or indirectly, MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY, a person whose property and interests in property are blocked pursuant to section 1 of E.O. 13871.

9. GMI PROJECTS LTD, 20-22 Wenlock Road, London N1 7GU, United Kingdom; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 09 Feb 2009; Company Number 06813827 (United Kingdom) [IRAN-EO13871] (Linked To: MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY).

Designated pursuant to section 1(a)(v) of E.O. 13871 for being owned or controlled by, directly or indirectly, MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY, a person whose property and interests in property are blocked pursuant to section 1 of E.O. 13871.

10. MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY (a.k.a. "MIDHCO"), No. 8, Ma'aref Street, Farhang Boulevards, Sa'adatabad, Tehran 1465953349, Iran; No. 8, Rashidi St, Farhang Blvd, Sa'adatabad, Tehran, Iran; Website www.midhco.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 07 Nov 2007; Registration Number 310643 (Iran) [IRAN-EO13871] (Linked To: SIRJAN IRANIAN STEEL; Linked To: ZARAND IRANIAN STEEL COMPANY).

    Designated pursuant to section 1(a)(i) of E.O. 13871 for being a person that owns, controls, or operates SIRJAN IRANIAN STEEL and ZARAND IRANIAN STEEL COMPANY, entities that are part of the steel sector of Iran.

11. SIRJAN IRANIAN STEEL (a.k.a. SIRJAN IRANIAN STEEL CO (Arabic: فولاد شركت ايرانيان سيرجان); a.k.a. "SISCO"), No 39, Sepehr St., Farahzadi Blvd., Shahrak-e-Gharb, Tehran, Iran; Bucharest Avenue, Ninth Street, Tehran 1513733518, Iran; Website www.sisco.midhco.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 07 Nov 2009; National ID No. 362111 (Iran) [IRAN-EO13871].

    Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

12. SOUTH ROUHINA STEEL COMPLEX, South Rouhina Steel Complex, 7th Kilometer of Dezful to Shooshtar, Dezful, Khuzestan, Iran; No. 3 Naader Dead End, East 37th St., Alvand St., Arjantin Sq., Tehran, Iran; Website www.rouhinasteel.com; Additional Sanctions Information - Subject to Secondary Sanctions [IRAN-EO13871].

    Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

13. WEST ALBORZ STEEL COMPLEX (Arabic: غرب البرز فولاد مجتمع) (a.k.a. WEST ALBORZ STEEL CO.), No.10, Vatani Alley, Kavousifar St., Behesti Ave, Tehran 15778-15713, Iran; Website www.wasteelco.com; Additional Sanctions Information - Subject to Secondary Sanctions [IRAN-EO13871].

    Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

14. WORLD MINING INDUSTRY COMPANY LTD, Unit 1504, Full Tower, No. 9, East Third Ring Ro, Chaoyang District, Beijing, China; Level 2, Motahari St., No. 193, Tehran, Iran; Website http://wmi.midhco.com/; Additional Sanctions Information - Subject to Secondary Sanctions [IRAN-EO13871] (Linked To: MIDDLE EAST MINES AND MINERAL INDUSTRIES DEVELOPMENT HOLDING COMPANY).

    Designated pursuant to section 1(a)(v) of E.O. 13871 for being owned or controlled by, directly or indirectly, MIDDLE EAST MINES AND MINERAL INDUSTRIES

DEVELOPMENT HOLDING COMPANY., a person whose property and interests in property are blocked pursuant to section 1 of E.O. 13871.

15. YAZD INDUSTRIAL CONSTRUCTIONAL STEEL ROLLING MILL (a.k.a. FOULAD YAZD), 17th KM, towards Taft Town, Yazd-Kerman New Ring Road, Yazd, Iran; Foulad Building, no. 235 Azadi Avenue, Tehran 1457966191, Iran; Website www.yazdrollingmill.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 1996; Registration Number 51556 (Iran) [IRAN-EO13871].

    Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

16. ZARAND IRANIAN STEEL COMPANY (a.k.a. ZARAND IRANIAN STEEL CO; a.k.a. "ZISCO"), No. 35, flats No. 3 and 4, 2nd Floor, Street No. 27, Tehran, West Kordestan, Iran; No. 113, Between Soleiman Khater & Sohrawardi Street, Motahari Avenue, Tehran 1576918911, Iran; PO Box 1437747334, Tehran, Iran; Website http://zisco.midhco.com/; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 2011; National ID No. 333265 (Iran) [IRAN-EO13871].

    Designated pursuant to section 1(a)(i) of E.O. 13871 for operating in the steel sector of Iran.

Dated: January 5, 2021.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2021–00173 Filed 1–7–21; 8:45 am]

**BILLING CODE 4810–AL–C**

## DEPARTMENT OF THE TREASURY

### Emergency Rental Assistance

**AGENCY:** Department of the Treasury.

**ACTION:** Notification.

**SUMMARY:** This notification announces that information about the Emergency Rental Assistance Program for States, U.S. Territories, certain local governments, and tribal communities is available on the U.S. Department of the Treasury (Treasury) website, *https://www.treasury.gov/policy-issues/cares/emergency-rental-assistance-program.* The website includes the grantee payment information form, instructions for submitting payment information, a list of eligible local governments, and a copy of the award terms to which grantees must agree in order to receive payments from Treasury.

**FOR FURTHER INFORMATION CONTACT:** Hannah Resig, Senior Policy Analyst, Domestic Finance, 202–622–1407, or Stephen T. Milligan, Deputy Assistant General Counsel (Banking & Finance), 202–622–4051.

**SUPPLEMENTARY INFORMATION:** On December 27, 2020, the President signed into law the Consolidated Appropriations Act, 2021 (the ''Act''), Public Law 116–260. Division N, Section 501(a) of the Act provides $25 billion for Treasury to make payments directly to States (including the District of Columbia), U.S. Territories (Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa), local governments with more than 200,000 residents, the Department of Hawaiian Home Lands, and Indian tribes (defined to include Alaska native corporations) or the tribally designated housing entity of an Indian tribe, as applicable. Division N, Section 501(c) of the Act requires that grantees use at least 90 percent of the funds to provide financial assistance such as the payment of rent, rental arrears, utilities and home energy costs, and utility and home energy cost arrears on behalf of eligible households and permits grantees to use no more than ten percent of the funds to provide housing stability services to eligible households and cover administrative costs. More information is available at *https://www.treasury.gov/policy-issues/cares/emergency-rental-assistance-program.*

Dated: January 4, 2021.

**Daniel Kowalski,**

*Counselor to the Secretary, U.S. Department of the Treasury.*

[FR Doc. 2021–00164 Filed 1–7–21; 8:45 am]

**BILLING CODE P**

# FEDERAL REGISTER

Vol. 86 Friday,

No. 5 January 8, 2021


Part II

## Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 217

Taking Marine Mammals Incidental to the Hampton Roads Bridge Tunnel Expansion Project in Norfolk, Virginia; Proposed Rule

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 217**

**[Docket No. 201228–0360]**

**RIN 0648–BK21**

## Taking Marine Mammals Incidental to the Hampton Roads Bridge Tunnel Expansion Project in Norfolk, Virginia

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

**ACTION:** Proposed rule; request for comments and information.

**SUMMARY:** NMFS has received a request from the Hampton Roads Connector Partners (HRCP) for authorization to take small numbers of marine mammals incidental to pile driving and removal activities at the Hampton Roads Bridge Tunnel Expansion Project (HRBT) in Norfolk, Virginia over the course of five years (2021–2026). Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take, and requests comments on the proposed regulations. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization, and agency responses will be summarized in the final notice of our decision.

**DATES:** Comments and information must be received no later than February 8, 2021.

**ADDRESSES:** You may submit comments, identified by NOAA–NMFS–2020–0164, by the following method:

• *Comment submissions:* Submit all public comments via the Federal eRulemaking Portal, Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0164,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

### Availability

A copy of HRCP's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-hampton-roads-bridge-tunnel-expansion-project-hampton-0.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

### Purpose and Need for Regulatory Action

This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to construction activities including pile installation and pile replacement, as part of the (HRBT). The HRBT is a major road transport infrastructure project conducted by HRCP along the existing I–64 highway in Virginia, consisting of roadway improvements, trestle bridges, and bored tunnels crossing the James River between Norfolk and Hampton. The project will address severe traffic congestion at the existing HRBT crossing by increasing traffic capacity and upgrading lanes. We received an application from HRCP requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level A and Level B harassment only incidental to impact pile driving, vibratory pile driving, vibratory pile removal, jetting, and down-the-hole (DTH) pile installation. Please see Background below for definitions of harassment.

### Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Proposed Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

### Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule regarding HRCP's construction activities. These measures include:

• Shutdown of construction activities under certain circumstances to avoid injury of marine mammals.

• Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities.

• Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to initiating impact pile driving at full power.

• Use of bubble curtains during impact driving of steel piles except when water depth is less than 20 feet.

### Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

**National Environmental Policy Act**

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

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

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the incidental take authorization request.

**Summary of Request**

On November 19, 2019, NMFS received an application from HRCP requesting authorization for take of marine mammals incidental to construction activities related to a major road transport infrastructure project along the existing I–64 highway in Virginia, consisting of roadway improvements, trestle bridges, and bored tunnels crossing Hampton Roads between Norfolk and Hampton, Virginia. HRCP submitted a revised LOA application on June 27, 2020 which included changes to construction methods. We determined the application was adequate and complete on September 29, 2020. On October 7, 2020 (85 FR 63256), we published a notice of receipt (NOR) of HRCP's application in the **Federal Register**, requesting comments and information related to the request for thirty days. No comments were received on the NOR.

HRCP requests authorization to take a small number of five species of marine mammals by Level A and Level B harassment only. Neither HRCP nor NMFS expects serious injury or mortality to result from this activity. The proposed regulations would be valid for five years (2021–2026). Note that HRCP had previously applied for an IHA to cover initial in-water pile driving work. NMFS issued the IHA on July 10, 2020 (85 FR 48153; August 10, 2020).

**Description of Proposed Activity**

HRCP is proposing to conduct construction activities associated with the HRBT project. This is a major road transport infrastructure project along the existing I–64 highway in Virginia, consisting of roadway improvements, trestle bridges, and bored tunnels crossing Hampton Roads between Norfolk and Hampton. The Project will address severe traffic congestion at the existing HRBT crossing by increasing capacity. The Project will include widening I–64 to create an eight-lane facility with a consistent six-lanes between the I–64/I–664 and I–64/I–564 Interchange, which could expand to eight-lanes during peak travel periods with the use of drivable shoulder lanes within the Project limits. The Project will include the construction of two new two-lane tunnels, expansion of the existing portal islands, and full replacement of the existing North and South bridge-trestles.

The proposed HRBT project would include pile installation and pile removal. Pile installation methods will include impact and vibratory driving, jetting, and DTH pile installation. Pile removal techniques for temporary piles will include vibratory pile removal or cutting three feet below the mudline. Impact pile installation is projected to take place at 3 to 4 locations simultaneously and there is the potential for as many as 7 pile installation locations operating concurrently with different hammer types. Pile installation and removal can occur at variable rates, from a few minutes one day to several hours the next. HRCP anticipates that between 1 to 10 piles could be installed per day, depending on project scheduling.

The proposed action may incidentally expose marine mammals occurring in the vicinity to elevated levels of underwater sound, thereby resulting in incidental take, by Level A and Level B harassment.

*Dates and Duration*

The proposed regulations would be valid for a period of five years (2021–2026). The specified activities may occur at any time during the five-year period of validity of the proposed regulations. HRCP expects pile driving and removal to occur six days per week. The overall number of anticipated days of pile installation and removal is 312 each year for years 1–4 and 181 days for year 5, based on a 6-day work week. Over five years this would result in an estimated total of 1,429 days of in-water construction work, which may last from a few minutes up to several hours per day.

HRCP plans to conduct work during daylight hours although pile installation and removal may extend into evening or nighttime hours as needed to accommodate pile installation requirements (*e.g.,* once pile driving begins, a pile will be driven to design tip elevation). In order to maintain pile integrity and follow safety precautions, pile installation or removal will continue after dark only for piles already in the process of being installed or removed. Installation or removal will not commence on new piles after dark.

*Specific Geographic Region*

The proposed project area is located in the waterway of Hampton Roads adjacent to the existing bridge and island structures of the HRBT. Hampton Roads is located at the confluence of the James River, the Elizabeth River, the Nansemond River, Willoughby Bay, and the Chesapeake Bay. Navigational channels are maintained by the U.S. Army Corps of Engineers (USACE) within Hampton Roads to provide transit to the many ports in the region. Maintained navigation channels near the project area consist of:

- Norfolk Harbor Entrance Reach (1,000 to 1,400 feet wide and is maintained at a depth of 50 feet Mean Lower Low Water [MLLW]);
- Hampton Creek Entrance Channel (200 feet wide and is maintained at a depth of 12 feet MLLW);
- Phoebus Channel (150 feet wide and is maintained at a depth of 12 feet MLLW); and
- Willoughby Channel (200 feet wide and is maintained at a depth of 10 feet MLLW).

Sediments are mostly fine and medium sands with various amounts of coarse sand and gravel, and low organic carbon content. There is no naturally occurring rocky or cobble bottom present at or adjacent to the project area. The North Shore in Hampton contains estuarine intertidal sandy shore,

estuarine intertidal reef, as well as submerged aquatic vegetation (SAV) in shallow estuarine open water. The North Trestle is located in estuarine open water with depths less than 15 feet below MLLW. The North Island is surrounded by estuarine intertidal sandy shore and rocky shore. Estuarine open water depths are primarily less than 15 feet below MLLW, but drop to approximately 25 feet below MLLW near the southwest corner of the island expansion closer to the Hampton Creek Entrance Channel. The South Island is also surrounded by estuarine intertidal sandy shore and rocky shore, followed by estuarine open water. The proposed island expansion is mainly in deep water (15 to 30 feet below MLLW), with a pocket of deeper water approximately 35 feet below MLLW to the west. The South Trestle is primarily located in estuarine open water with depths less than 15 feet below MLLW, with the exception of deep water (15 to 30 feet below MLLW) near the South Island approach. The north shore of Willoughby Bay contains estuarine intertidal sandy shore with two small pockets of estuarine intertidal emergent wetlands to the east. The Willoughby Bay Trestles are located in estuarine open waters with depths of less than 15 feet below MLLW, with the entire west bound trestle in water less than 6.6 feet below MLLW. Willoughby Bay contains an estuarine intertidal sandy shore and consists of estuarine open water with depths to 15 feet below MLLW.

A map of the HRBT Project Area is provided in Figure 1 below and Figures 1–1 and 2–1 in HRCP's application.

BILLING CODE 3510–22–P

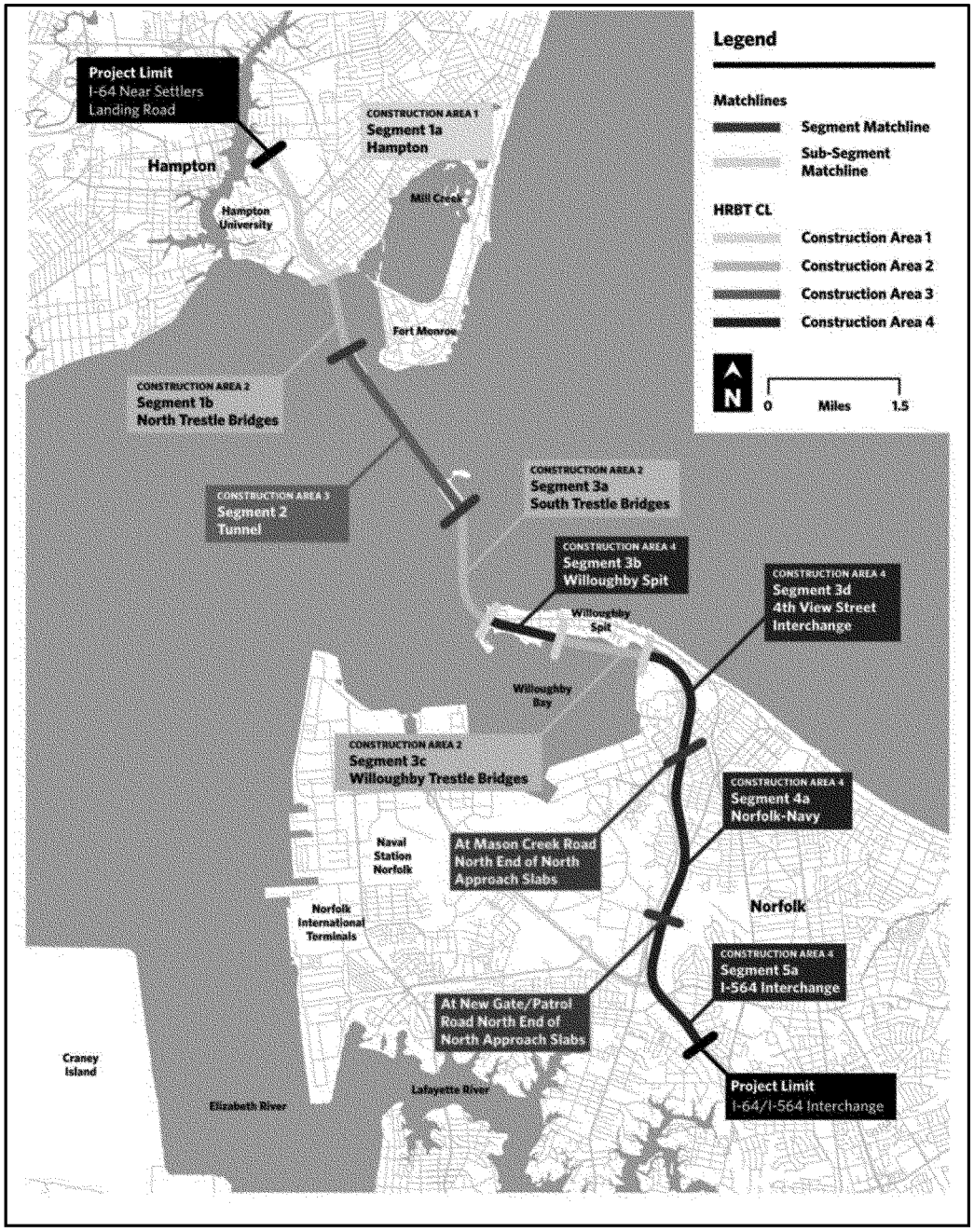



**Figure 1 – Project Location**

*Detailed Description of Specific Activity*

**BILLING CODE 3510–22–C**

The proposed project will widen I–64 for approximately 9.9 miles along I–64 from Settlers Landing Road in Hampton, Virginia, to the I–64/I–564 interchange in Norfolk, Virginia. The project will create an eight-lane facility with six consistent use lanes and will include full replacement of the North and South Trestle-Bridges, two new parallel tunnels constructed using a tunnel boring machine (TBM), expansion of the existing portal islands, and widening of the Willoughby Bay Trestle-Bridges, Bay Avenue Bridges, and Oastes Creek Bridges. Also, upland portions of I–64 will be widened to accommodate the additional lanes, the Mallory Street Bridge will be replaced, and the I–64 overpass bridges will be improved.

TABLE 1—HRBT EXPANSION PROJECT DESIGN SEGMENTS

| Project design segment number and name | Construction area |
|---|---|
| Segment 1a (Hampton) | Area 1. |
| Segment 1b (North Trestle-Bridges) [1] | Area 2. |
| Segment 2a (Tunnel) [1] | Area 3. |

TABLE 1—HRBT EXPANSION PROJECT DESIGN SEGMENTS—Continued

| Project design segment number and name | Construction area |
|---|---|
| Segment 3a (South Trestle-Bridge) [1] | Area 2. |
| Segment 3b (Willoughby Spit) [1] | Area 4. |
| Segment 3c (Willoughby Bay Trestle-Bridges) [1] | Area 2. |
| Segment 3d (4th View Street Interchange) | Area 4. |
| Segment 4a (Norfolk-Navy) | Area 4. |
| Segment 5a (I–564 Interchange) | Area 4. |

[1] Indicates segment includes in-water construction activities.

The proposed project design is divided into five segments as shown in Table 1. However, only the sub-segments identified in Table 1 and described below would include in-water marine construction activities that have the potential to affect marine mammals:

*Segment 1b—North Trestle-Bridges*

This segment includes new and replacement north tunnel approach trestles, This segment is located in Construction Area 2 as shown in Figure 1 above and Figure 1–1 in HRCP's application.

Temporary Work Trestles for Bridge Construction at the North Trestle—Several temporary work trestles will support construction of the permanent eastbound and westbound North Trestle-Bridges. The temporary North Shore Work Trestle will support construction of the permanent eastbound North Trestle-Bridge in the shallow water (<4 to 6 feet Mean Low Water (MLW)) closer to the North Shore, avoiding the need to dredge or deepen this area. The temporary North Shore Work Trestle (194 36-inch steel pipe piles) will be installed under the 2020 IHA (85 FR 48153; August 10, 2020) and will be removed using a vibratory hammer at the end of the project under this LOA (See Table 6). Unless stated otherwise, all of the work described below will be conducted as part of the proposed LOA.

Additional temporary work trestles will support construction of the permanent westbound North Trestle-Bridge in the shallow water near the North Island. These work trestles will be the same or similar to the North Shore Work Trestle, steel structures founded on 36-inch diameter steel pipe piles with 30 to 40 feet spans sized to accommodate a 300-ton crane. Approximately 182 36-inch steel piles will be installed to support these trestles using a combination of vibratory and impact hammers except along the shoreline where drilling with a DTH hammer may be needed to install piles through the armor stone.

Once that portion of the permanent eastbound and westbound North Trestle-Bridge is complete, the temporary pile foundations will be removed using a vibratory hammer and the work trestle reused for similar purposes at a different location on the project (*e.g.,* Willoughby Bay Work Trestles).

Jump Trestles for Bridge Construction at the North Trestle—Jump Trestles are temporary heavy duty platforms used to support cranes and other equipment, will be used the North Trestle for constructing trestle bridges. Jump trestles are built with a maximum of three spans which are progressively removed and reinstalled one span at a time, moving forward with the construction of the adjacent structure. Each span is supported by six (6) temporary 36-inch steel pipe piles. The steel pipe piles will be installed, removed, and reinstalled as the spans move forward using a combination of vibratory and impact hammers for installation except along the shoreline where drilling with a DTH hammer may be needed to install piles through the armor stone and vibratory hammers will be used for removal. Approximately 270 individual pile installations and 270 removals will be needed to support the Jump Trestle movement for construction of the permanent westbound North Trestle-Bridge.

Templates and Permanent Piles at the North Trestle—Temporary template piles will be used to guide installation of the permanent concrete piles used to support the new North Trestle-Bridge (Table 7). The templates will be supported by four temporary steel piles up to 36-inch in diameter, generally one at each corner of the template. A two-tier template will be used to account for the possible batter of the permanent piles. Each template will allow installation of multiple permanent concrete piles. A vibratory hammer will be used to install and remove the temporary 36-inch steel piles supporting the template.

Five hundred and sixty-two (562) permanent 54-inch concrete cylinder piles will be installed using an impact hammer and will remain in place at the end of construction. Pre-drilling will be done in the open without the use of a casing.

The drill, drill steel, and auger would be in leads and either attached to the pile leads or used independently and indexed to the template to resist rotation. The auger is anticipated to be 54-inch in diameter and 10 feet or less in height.

In areas containing rock obstructions, a casing will be advanced prior to installation of the permanent North Trestle piles. The DTH hammer will advance a 60-inch (outer diameter) steel pipe pile casing before installation of the 54-inch concrete cylinder pile. Approximately 15 60-inch steel pipe casings may be required. The 60-inch steel pipe casings will be left in place and cut to an appropriate length to accommodate final island construction.

Demolition Trestle at the North Trestle—The North Trestle Demolition Trestle will consist of a series of jump trestles, similar to or the same as that used to construct the permanent westbound North Trestle-Bridge. The jump trestles will be located in the shallow water near the North Shore and will be installed, removed, and reinstalled as demolition of the existing structures moves from the shoreline towards deeper water. Each jump trestle used for demolition will be 45 feet wide and approximately 1,200 feet long. Each jump trestle span will be supported by temporary 36-inch steel pipe piles. Approximately 344 individual pile installations and 344 removals will be needed to support the jump trestle movements using a combination of vibratory and impact hammers for installation except along the shoreline where a DTH hammer may be needed to install piles through the armor stone and vibratory hammers will be used for removal.

Moorings at the North Shore Work Trestle—Mooring dolphins that were installed under the existing IHA (85 FR 48153; August 10, 2020) at the southern end and along the outside edge of the North Shore Work Trestle will be removed as part of the LOA. Each dolphin consists of three 24-inch steel piles (Table 6). An additional thirteen

(13) 42-inch steel pipe piles were installed along the outer edge of the work trestle to provide additional single mooring points for barges and vessels delivering material and accessing the trestle. The 24-inch steel pipe piles and 42-inch steel pipe piles will be removed using a vibratory hammer.

Sheet Piles at the North Shore Abutment—Approximately 187 temporary panels of steel sheet piles (AZ–700–19) will be installed using a vibratory hammer at the North Shore shoreline to support excavation and construction of the North Shore Abutment. Most of this work is planned to be done at lower tides so that in-water work is minimized. However, some installation work below the tidal elevations (in-water) can be expected. Sheet piles will be removed using a vibratory hammer.

*Segment 2a—Tunnel*

This segment includes new bored tunnels, the tunnel approach structures, buildings, the North Island improvements for tunnel facilities, and South Island improvements. This segment is located in Construction Area 3 as shown in Figure 1.

Moorings at the North Island Expansion—Eighty (80) temporary moorings were installed along the perimeter of the North Island Expansion (North and South) under the existing IHA (HRCP 2020). All moorings will be removed using a vibratory hammer or cut to approximately 3 feet below the mudline.

Hampton Creek Approach Channel Marker at the North Island—An existing pile-mounted (Aid to Navigation) channel marker at the entrance to the Hampton Creek Approach Channel will be removed and relocated to allow expansion of the North Island. It will be removed using a vibratory hammer and a new permanent pile (36-inch steel pile) will be installed using a vibratory hammer.

Steel sheet piles will be installed as part of the North Island Expansion and at the shoreline of the North Island (Attachment 1, Figure 9) to support excavation and construction of the North Island Abutments and Expansion. Approximately 54 panels of sheet pile will be installed using a vibratory hammer around the perimeter of the North Island Expansion to support dredge and replacement of native soft soils. An additional 122 sheet pile panels will be installed around the perimeter of the North Island Expansion to support construction of the abutment and tunnel approach structure.

Approximately 128 panels of sheet pile will be installed at the North Island shoreline to support excavation and construction of the North Island Abutment. Most of this work is expected to be done at lower tides so that in-water work is minimized. However, some sheet pile installation work below the tidal elevations (in-water) can be expected. All sheet piles will be removed using a vibratory hammer.

TBM Platform at the South Island—HRCP is constructing the temporary TBM Platform or ''quay'' at the South Island to allow for the delivery, unloading, and assembly of the TBM components from barges to the Island. The installation of the TBM platform will occur under the existing IHA (HRCP 2020).

The TBM Platform is a steel structure erected on 216 36-inch diameter steel piles, with an overall area of approximately 0.70 acre (approximately 377 feet x 81 feet). The TBM Platform piles will be removed using a vibratory hammer or cut to approximately 3 feet below the mudline at the conclusion of the project.

Conveyor Trestle at the South Island—Tunnel boring spoils and other related materials will be moved between the South Island and barges via a conveyor belt and other equipment inside the tunnel boring. The Conveyor Trestle will also be used for maintenance and mooring of barges and vessels carrying TBM materials and other project-related materials. The Conveyor Trestle will be erected on 84 36-inch diameter steel piles. Installation of the Conveyor Trestle will occur under the existing IHA (85 FR 48153; August 10, 2020). At the conclusion of the project, the Conveyor Trestle piles will be removed using a vibratory hammer or cut to approximately 3 feet below the mudline.

Settlement Reduction Piles and Deep Foundation Piles at the South Island—Existing geotechnical conditions at the planned South Island Expansion will require additional considerations to reduce island settlement and support roadway construction. Therefore, approximately 394 24-inch steel pipe settlement reduction piles and 507 30-inch concrete-filled steel pipe deep foundation piles will be installed at the South Island Expansion to address these geotechnical conditions. The settlement reduction piles and the deep foundation piles will be installed using vibratory and impact hammers. Furthermore, the use of drilling with a DTH hammer may be needed to install the deep foundation piles through the armor stone. Temporary templates (Table 7) will be supported by four temporary steel pipe piles up to 36-inch in diameter that will be spudded in place and used to align the piles during installation. Steel sheet piles will be installed to partially enclose the deep foundation piles as installation progresses north to south along the island expansion area. For steel pipe piles in water depths greater than 20 feet, a bubble curtain will be used for pile installation to reduce hydroacoustic impacts caused by the impact hammer. A portion of the settlement reduction piles and deep foundation piles will be installed using a bubble curtain. See Mitigation for additional detail.

Moorings at the South Island—Temporary moorings will be installed along the perimeter of the South Island Expansion to support the construction of the island expansion. Twenty-five (25) 42-inch steel pipe piles will be installed to provide mooring points for barges and vessels. The mooring point piles will be installed using a vibratory hammer and eventually removed using a vibratory hammer.

Sheet Piles at the South Island Expansion and Abutment—Steel sheet piles will be installed as part of the South Island Expansion and at the shoreline of the South Island to support excavation and construction of the South Island Abutment. Approximately 152 panels of AZ–700–26 sheet pile will be installed around the perimeter of the South Island Expansion deep foundation piles using a vibratory hammer as pile installation progresses to support backfilling.

In addition, approximately 226 panels of AZ–700–26 temporary steel sheet pile will be installed around the perimeter of the South Island Expansion to support dredge and replacement of native soft soils. Temporary steel sheet piles will be installed using a vibratory hammer and will be removed using a vibratory hammer after completion of dredging/replacement works.

Approximately 70 panels of AZ–700–19 sheet pile will be installed at the South Island shoreline to support excavation and construction of the abutment and tunnel approach structure at the South Island. Similar to the North Shore Abutment work, most of this work is expected to be done at lower tides so that in-water work is minimized. However, some sheet pile installation work below the tidal elevations (in-water) can be expected. All sheet piles will be removed using a vibratory hammer.

*Segment 3a—South Trestle-Bridge*

This segment includes the new South Trestle-Bridge and any bridge elements that interface with the South Island to the south end of the south abutments at Willoughby Spit. This segment is

located in Construction Area 2 as shown in Figure 1.

Moorings at the South Trestle—Temporary moorings will be installed in the area of the South Trestle to support the construction of temporary work trestles and permanent trestle bridges. The installation of the moorings at the South Trestle will be performed under the existing IHA (HRCP 2020). The temporary moorings will be removed at the conclusion of the project using a vibratory hammer.

Temporary Work Trestles for Bridge Construction at the South Trestle—Several temporary work trestles will support construction of the temporary bridges used for maintaining traffic at the South Trestle during construction (*i.e.,* temporary MOT bridges) and will serve as temporary docks for delivery of deck elements and other materials. The South Trestle Work Trestles will consist of two separate structures at the South Island shoreline (South Island South 1 and 2) and a third structure at the South Shore or Norfolk shoreline.

The temporary South Trestle Work Trestle at South Island South 1 is a steel structure approximately 504 feet long and 44 feet wide, founded on 72 36-inch diameter steel piles with 30 to 40 feet spans sized to accommodate a 300-ton crane. Once the permanent roadway is complete, the temporary MOT Bridge will be removed as well as the South Island South 1 Work Trestle, including the temporary pile foundations and mooring piles. They will be removed via vibratory hammer and the work trestle will be reused for similar purposes at a different project location.

The temporary South Trestle Work Trestle at South Island South 2 is a steel structure approximately 634 feet long and 54 feet wide, founded on 90 36-inch diameter steel piles with 30 to 40 feet spans sized to accommodate a 300-ton crane. The pile foundations will be removed using a vibratory hammer once the permanent roadway is complete.

The temporary South Trestle Work Trestle at the South Shore or Norfolk shoreline will be similar to that used elsewhere on the project. The work trestle will be approximately 500 feet long and 66 feet wide with four 30 feet wide finger piers. The finger piers will consist of 94 36-inch diameter steel piles installed using a vibratory hammer.

Temporary steel pile foundations for each of the work trestles will be installed using vibratory and impact hammers. A bubble curtain will be used during installation of steel pipe piles in water depths greater than 20 feet. Some areas near the shores and islands will require the use of drilling with a DTH hammer to install the temporary piles. The South Trestle Work Trestle pile foundations will be removed using a vibratory hammer.

Templates and Permanent Piles at the South Trestle—Temporary template piles (Table 7) will be used to guide installation of the permanent concrete piles used to support the new South Trestle-Bridge. The templates will use four temporary steel piles up to 36-inch in diameter as supports, generally one at each corner of the template. A two-tier template will be used to account for the possible batter of the piles. Each template will allow installation of multiple permanent concrete piles. A vibratory hammer will be used to install and remove the temporary 36-inch steel piles supporting the template.

Eight hundred and ten (810) permanent 54-inch concrete cylinder piles will be installed using an impact hammer and will remain in place at the end of construction. Pre-drilling will be done in the open without the use of a casing. The drill, drill steel, and drill auger would be in leads and either attached to the pile leads or used independently and indexed to the template to resist rotation. The drill auger is anticipated to be 54-inch in diameter and 10-feet less in height. It is expected that the drill, drill steel, and drill auger would have almost no impact on noise levels.

In areas where there may be rock obstructions, such as at the toe of the existing South Island slope, a casing will be advanced prior to installation of the permanent South Trestle piles. The DTH hammer will advance a 60-inch (outer diameter) steel pipe pile casing before installation of the 54-inch concrete cylinder pile. Approximately 65 60-inch steel pipe casings may be required. The 60-inch steel pipe casings will be left in place and cut to an appropriate length to accommodate final island construction.

Jump Trestle for Bridge Construction at the South Trestle—Temporary jump trestles will be used for constructing trestle bridges (both new permanent and temporary MOT bridges) at the South Trestle. A combination of jump trestles and working from the existing trestles will be used to build the new trestle bridges.

The 36-inch steel pipe piles will be installed, removed, and reinstalled as the spans move forward using a combination of vibratory and impact hammers for installation except along the shoreline where drilling with a DTH hammer may be needed to install piles through the armor stone. Vibratory hammers will be used for removal. A bubble curtain will be used for installation of steel pipe piles in water depths greater than 20 feet. Approximately 420 individual pile installations and 420 removals will be needed to support the jump trestle movement for construction of the permanent westbound South Trestle-Bridge.

Temporary MOT Trestles at the South Trestle—Two temporary MOT Trestle bridges at the South Trestle will be used to phase construction and carry traffic prior to completion of the new structures. The eastbound traffic will be shifted on the new MOT Trestle to allow for a partial demolition of the existing eastbound bridge-trestle. Once the partial demolition is completed, the new eastbound connection to the eight-lane trestle will be built with the support of a jump trestle and eastbound traffic will be shifted on it. A temporary MOT Trestle will be built from South Island next to the existing westbound trestle. The westbound traffic will be shifted on the new MOT Trestle to allow for a partial demolition of the existing westbound bridge-trestle. A portion of the existing eastbound bridge-trestle will also be demolished to allow the new connection between the eight-lane structure and the new westbound bridge-trestle. The temporary MOT Trestle at the South Trestle will be a steel structure erected on 218 36-inch steel pipe piles that will be installed using a combination of vibratory and impact hammers except along the shoreline where drilling with a DTH hammer may be needed to install piles through the armor stone. A bubble curtain will be used for installation of steel pipe piles in water depths greater than 20 feet. Pile foundations will be removed using a vibratory hammer.

Thirty 42-inch steel pipe pile casings will be installed using a vibratory hammer in areas where the MOT trestle is in the footprint of the South Island Expansion. The 42-inch steel pipe pile casings will be left in place and cut to an appropriate length to accommodate final island construction.

Demolition Trestle at the South Trestle—The South Trestle Demolition Trestle will be similar to the work trestles previously described (*e.g.* Demolition Trestle at the North Trestle). Located at the South Shore, the South Trestle Demolition Trestle will be used to access the shallow water at the South Shore and support equipment used to remove the existing trestle structure. Approximately 72 36-inch steel pipe piles will be installed with a combination of vibratory and impact hammers. Some areas near the shores and islands will require the use of a DTH hammer to install the temporary

piles. At the conclusion of the project, the South Trestle Demolition Trestle will be removed using a vibratory hammer.

*Segment 3C—Willoughby Bay Trestle-Bridges*

This segment includes the new South Trestle-Bridge and any bridge elements that interface with the South Island to the south end of the south abutments at Willoughby Spit. This segment is located in Construction Area 2 as shown in Figure 1.

Moorings at Willoughby Bay—Temporary moorings will be installed in Willoughby Bay to support the construction of temporary work trestles and permanent trestle bridges, and to provide a safe haven (harbor of safe refuge) for vessels in the event of severe weather. Moorings will consist of six dolphins—each consisting of three 24-inch steel piles—and 50 42-inch steel pipe piles. The mooring dolphin piles and the single mooring point piles will be installed under the existing IHA (85 FR 48153; August 10, 2020).

An additional 40 42-inch steel pipe piles will be installed in Willoughby Bay to complete the safe haven (50 42-inch piles will be installed under the existing IHA; HRCP 2020). The moorings will be configured as two 2,000-feet long lines with a 42-inch mooring pile every 80-feet. The piles will be installed using a vibratory hammer and removed at the conclusion of the project using a vibratory hammer.

Temporary Work Trestles for Bridge Construction at Willoughby Bay—The existing Willoughby Bay Bridge structure will be modified by widening the two existing structures to the outside in both directions to accommodate new travel lanes, shoulders, and new sound walls. This will require installation of two to three additional piles at each pier location on the outside of both eastbound and westbound structures. Two temporary work trestles, each approximately 500 feet long and 45 feet wide, will be installed along the outside edge of the existing eastbound structure to provide access in the shallow water area near both shorelines. Approximately 212 36-inch steel pipe piles will be installed using a combination of vibratory and impact hammers to support the temporary work trestles. The temporary steel piles will be removed using a vibratory hammer.

Jump Trestle for Bridge Construction at Willoughby Bay—A combination of jump trestles and working from the existing trestles will be used to construct the widening of the existing Willoughby Bay westbound roadway. Similar to other locations (*e.g.,* Jump Trestle at the North Trestle see Section), the jump trestle will be supported by temporary 36-inch steel pipe pile foundations that will be installed, removed, and reinstalled as the spans move forward using a combination of vibratory and impact hammers for installation and vibratory hammers for removal. Approximately 544 individual pile installations and 544 removals will be needed to support the jump trestle movement across Willoughby Bay.

Templates and Permanent Piles at Willoughby Bay—Temporary template piles (Table 7) will be used to guide installation of the permanent concrete piles used to support widening of the eastbound and westbound Willoughby Bay roadway. The templates will be supported by four temporary steel piles up to 36-inch in diameter with one at each corner of the template.

A vibratory hammer will be used to install and remove the temporary 36-inch steel piles supporting the template. Some areas near the shorelines may require the use of a DTH hammer to install the templates (Table 7).

Five hundred and four (504) 24-inch concrete square permanent piles will be installed using an impact hammer and will remain in place at the end of construction. Where geotechnical conditions require, the permanent piles may also be installed via jetting. Where jetting is required, an outer steel pipe pile casing (up to 42-inch in diameter) may be installed using a vibratory hammer before installation of the concrete pile. Approximately 300 casings (60 percent of the 504 concrete piles) will be installed prior to installing the concrete piles. The casing will be driven and the sediment and sand removed from the casing prior to installing the permanent pile. The casing will be removed using a vibratory hammer.

*Segment 3b—Willoughby Spit Laydown Area*

This segment includes the Willoughby Spit Laydown Area which is a temporary construction staging and laydown area that will include the installation and removal of temporary piers. This segment is located in Construction Area 4 as shown in Figure 1.

Temporary Docks on Spuds and Piles at the Willoughby Spit Laydown Area—HRCP has been granted use of property on Willoughby Spit next to the South Trestle-Bridge to be used for laydown areas and as a base for marine operations. Two temporary piers will be constructed to allow barge access: One will be a fixed pier on 44 36-inch steel pipe piles, and the other will be a floating dock on 8 36-inch steel pipe (spuds) piles. Piles will be installed using vibratory and impact hammers, as well as a pile template. The pile template will be supported by four temporary steel piles up to 36-inch in diameter (Table 7). The temporary piers, including the steel pile foundations, will be removed upon completion of the Project via vibratory hammer.

Temporary Finger Piers on Timber Piles at the Willoughby Spit Laydown Area—The existing bulkheads and piers located on the inside of Willoughby Spit will be repaired to provide access for crew boats and similar-sized vessels. Three timber piers will replace the existing piers and will be constructed using 36 16-inch CCA timber piles, each pier consisting of 12 16-inch CCA timber piles. The piles will be installed using a vibratory hammer. Any existing timber piers will be pulled out of place.

HRCP plans to employ five methods of pile installation including vibratory hammer, impact hammer, pre-drilling, jetting, and use of DTH hammers. More than one installation method could be used within a day and at each location and multiple piles could be installed and/or removed concurrently. Steel pipe piles will most likely be installed using a combination of vibratory (ICE 416L or similar) and impact hammers (S35 or similar). Approximately 80 percent of the time steel pipe piles will be installed using a vibratory hammer while an impact hammer will be used approximately 20 percent of the time. Most piles will be advanced using vibratory methods and then impact driven to final tip elevation.

Temporary steel pile templates will be used to set permanent piles. Templates will be positioned and held in place using spuds or steel pipe piles, up to 36-inch diameter with one at each corner of the template. Template piles are temporary and generally do not bear significant vertical loads, therefore installation (*i.e.,* driving) and removal of template piles requires minimal driving time, estimated at approximately 5 minutes per spud (see Table 7). Permanent concrete piles will be installed using an impact hammer only, although permanent concrete piles may also be installed via jetting at Willoughby Bay. During jetting, high-pressure water is sprayed out of the bottom of the pile to help penetrate dense sand layers and allow pile driving with lower hammer impact energies. Jetting will only be conducted at depth once sufficient resistance to pile installation has been met. Where jetting is required, an outer steel pipe pile casing may be installed before

installation of the square concrete piles at Willoughby Bay. Casings will be driven using a vibratory hammer and the sediment and sand removed from the casing prior to driving the permanent concrete pile. HRCP assumed, and NMFS agrees, that jetting will be quieter than vibratory installation of the same pile size, but data for this activity are limited; therefore, sound source levels (SSLs) for vibratory installation were applied to jetting.

Pre-drilling will be performed on the 54-inch concrete cylinder permanent piles without the use of a casing in the open. The drill, drill steel, and auger will be in leads and either attached to the pile leads or used independently and indexed to the template to resist rotation. A 54-inch diameter auger 10-feet or less in height is expected to be employed. Pre-drilling will be conducted to loosen soils directly underneath the pile to maximize pile advancement before the drive and shorten the length of driving time. Pre-drilling may reduce driving times by as much as 50 percent and pre-drilling depth is expected to be less than half the pile length. HRCP may drill to within 3–4 diameters above the final tip elevation in cases of dense sand. HRCP assumed and NMFS agrees that use of the drill, drill turntable, drill steel, drill auger, and drill bit will not result in harassment. These devices have low source levels and, therefore, low signal-to-noise ratios. The signal characteristics (continuous noise) would be occurring in a relatively noisy coastal environment where low-level continuous noise is common. Therefore, they would be unlikely to provoke a reaction consistent with what we would consider to be harassment. Therefore, harassment zone sizes were not estimated for these activities. These devices simply rotate in the sediments and do not displace them without creating a hole. No pile is installed during pre-drilling, and much less energy is expended than during pile installation. The equipment and nature of the act of pre-drilling in soils produce minimal noise and the pre-drilling will significantly reduce the driving time which in turn reduces the total noise levels.

The pile installation methods used will depend on sediment depth and conditions at each pile location. Table 2 through Table 7 provides additional information on the pile driving operation including estimated pile driving times. Note that the sum of the days of pile installation and removal is greater than the anticipated number of days because more than one pile installation method will be used within a day and at each location. The overall number of anticipated days of pile installation and removal is 312 per year, based on a six-day work week for years 1–4. Year 5 will require an estimated 181 days of in-water work. It is possible that installation and removal numbers might shift from one month to another depending on schedule constraints.

HRCP will employ a bubble curtain when installing steel pipe piles in water depths greater than 20 feet to minimize hydroacoustic impacts caused by the impact hammer. Bubble curtains will be used at the South Island to install a portion of the permanent settlement reduction piles and deep foundation piles and at the South Trestle to install a portion of the Temporary MOT Trestle, Jump Trestle, and Work Trestle.

Before installing steel pipe piles near shorelines protected with rock armor and/or rip rap (*e.g.,* South Island shoreline; North Shore shoreline) the rock armoring that protects the shoreline will need to be temporarily shifted to an adjacent area to allow for the installation of the piles. The rock armor should only be encountered at the shoreline and at relatively shallow depths below the mudline. Any rock armor stone and/or rip rap that has been moved will be reinstalled near its original location following the completion of pile installation.

DTH pile installation uses both rotary and percussion-type drill devices and will be used frequently. The device consists of a drill bit that drills through stone using both rotary and pulse impact mechanisms. This breaks up the stone to allow removal of the fragments and insertion of the pile. The pile is usually advanced at the same time that drilling occurs. Drill cuttings are expelled from the top of the pile using compressed air and will be directed through a pipe to a designated location for waste.

Piles may be also be installed without moving the armor stone by first drilling through the stone with a DTH hammer. It is estimated that drilling with a DTH hammer will be used for approximately 1 to 2 hours per pile, when necessary. It is anticipated that approximately 7 percent of the North Shore Work Trestle piles, 4 percent of the North Trestle Jump Trestle piles, 7 percent of the North Trestle Demolition Trestle piles, 100 percent of the North Trestle Casings, 14 percent of the South Trestle Work Trestle piles, 6 percent of the South Trestle Jump Trestle piles, 10 percent of the South Trestle Temporary MOT Trestle piles, 17 percent of the South Trestle Demolition Trestle piles, 100 percent of the South Trestle Casings, and 10 percent of the South Island deep foundation piles may require installation with a DTH hammer (See Table 2 through Table 6).

Temporary steel sheet piles and steel pipe piles will be removed using a vibratory hammer or cut to approximately 3 feet below the mudline. Temporary concrete piles will only be removed by cutting to approximately 3 feet below the mudline.

Table 2 through 6 below show the number and types of piles planned for installation and removal each year by component and segment while Table 7 shows the total number of template piles over five years by location.

TABLE 2—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR ONE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT

| Project component | Pile size/ type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Trestle (Segment 1b)** | | | | | | | | | | | | |
| Permanent Piles. | 54-inch Concrete Cylinder Pipe. | 188 | 0 | 140 | ..... | ..... | 188 | ..... | 2,100 | 1 | 376 | 188 |
| Casing ..... | 60-inch Steel Pipe. | 15 | 0 | 60 | 15 | 120 | ..... | ..... | ..... | 3 | 30 | 5 |
| North Shore Abutment. | AZ 700–19 Steel Sheet. | 63 | 63 | 20 | ..... | ..... | 126 | 30 | ..... | 10 | 63 | 13 |

TABLE 2—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR ONE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT—Continued

| Project component | Pile size/ type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Island (Segment 2a)** | | | | | | | | | | | | |
| Hampton Creek Approach Channel Marker. | Existing, 36-inch Steel Pipe. | 1 | 1 | ..... | ..... | ..... | 1 | 50 | ..... | 1 | 2 | 1 |
| North Island Expansion. | AZ 700–26 Steel Sheet. | 176 | 176 | 40 | ..... | ..... | 352 | 30 | ..... | 10 | 176 | 35 |
| **Willoughby Bay (Segment 3c)** | | | | | | | | | | | | |
| Work Trestle | 36-inch Steel Pipe. | 212 | 0 | 100 | ..... | ..... | 212 | 50 | 40 | 2 | 177 | 106 |
| Moorings (Safe Haven). | 42-inch Steel Pipe. | 40 | 0 | 60 | ..... | ..... | 40 | 30 | ..... | 6 | 20 | 7 |
| Permanent Piles. | 24-inch Concrete Square Pipe. | 402 | 0 | 140 | ..... | ..... | 402 | ..... | 2,100 | 1 | 804 | 402 |
| Casing ..... | 42-inch Steel Pipe. | 240 | 240 | 60 | ..... | ..... | 480 | 30 | ..... | 6 | 160 | 80 |
| **Willoughby Spit (Segment 3b)** | | | | | | | | | | | | |
| Dock on Spuds, Floating Dock. | 36-inch Steel Pipe. | 8 | 0 | 100 | ..... | ..... | 8 | 50 | 40 | 3 | 7 | 3 |
| Dock on Piles, Fixed Pier. | 36-inch Steel Pipe. | 44 | 0 | 100 | ..... | ..... | 44 | 50 | 40 | 3 | 37 | 15 |
| Finger Piers on Timber Piles. | 16-inch CCA* Timber. | 36 | 0 | 60 | ..... | ..... | 36 | 30 | ..... | 4 | 18 | 9 |
| **South Trestle (Segment 3a)** | | | | | | | | | | | | |
| Work Trestle | 36-inch Steel Pipe. | 156 | 0 | 100 | 22 | 120 | 134 | 50 | 40 | 2 | 130 | 78 |
| Temporary MOT* Trestle. | 36-inch Steel Pipe. | 113 | 0 | 100 | 11 | 120 | 102 | 50 | 40 | 2 | 85 | 51 |
| Casing ..... | 42-inch Steel Pipe. | 30 | 0 | 60 | ..... | ..... | 30 | 30 | ..... | 6 | 15 | 5 |
| Permanent Piles. | 54-inch Concrete Cylinder Pipe. | 252 | 0 | 140 | ..... | ..... | 252 | ..... | 2,100 | 1 | 504 | 252 |
| Casing ..... | 60-inch Steel Pipe. | 65 | 0 | 60 | 65 | 120 | ..... | ..... | ..... | 3 | 130 | 22 |
| **South Island (Segment 2a)** | | | | | | | | | | | | |
| Settlement Reduction Piles. | 24-inch Steel Pipe. | 24 | 0 | 85 | ..... | ..... | 24 | 60 | 40 | 6 | 24 | 4 |
| Deep Foundation Piles. | 30-inch Steel Pipe, Concrete Filled. | 82 | 0 | 85 | 8 | 120 | 74 | 60 | 40 | 6 | 82 | 14 |
| Moorings ..... | 42-inch Steel Pipe. | 25 | 0 | 60 | ..... | ..... | 25 | 30 | ..... | 6 | 13 | 4 |
| South Island Abutment. | AZ 700–19 Steel Sheet. | 12 | 0 | 20 | ..... | ..... | 12 | 30 | ..... | 10 | 6 | 2 |
| Total ..... | ..... | 2,184 | 480 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 1,296 |

TABLE 3—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR TWO FOR EACH HRBT PROJECT COMPONENT AND SEGMENT

| Project component | Pile size/ type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Trestle (Segment 1b)** | | | | | | | | | | | | |
| North Shore Work Trestle. | 36-inch Steel Pipe. | 0 | 194 | 100 | ..... | ..... | 194 | 50 | 40 | 3 | 162 | 65 |
| Work Trestle | 36-inch Steel Pipe. | 182 | ..... | 100 | 12 | 120 | 170 | 50 | 40 | 2 | 152 | 91 |
| Jump Trestle | 36-inch Steel Pipe. | 42 | 38 | 100 | 3 | 120 | 77 | 50 | 40 | 2 | 65 | 39 |

TABLE 3—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR TWO FOR EACH HRBT PROJECT COMPONENT AND SEGMENT—Continued

| Project component | Pile size/ type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Permanent Piles. | 54-inch, Concrete Cylinder Pipe. | 102 | 0 | 140 | ..... | ..... | 102 | ..... | 2,100 | 1 | 204 | 102 |
| **North Island (Segment 2a)** | | | | | | | | | | | | |
| North Island Abutment. | AZ 700–19 Steel Sheet. | 96 | 0 | 20 | ..... | ..... | 96 | 30 | ..... | 10 | 48 | 10 |
| Willoughby Bay (Segment 3c). | | | | | | | | | | | | |
| Jump Trestle | 36-inch Steel Pipe. | 84 | 76 | 100 | ..... | ..... | 160 | 50 | 40 | 2 | 134 | 80 |
| Work Trestle | 36-inch Steel Pipe. | 0 | 126 | 100 | ..... | ..... | 126 | 50 | ..... | 2 | 105 | 63 |
| Permanent Piles. | 24-inch Concrete Square Pipe. | 102 | 0 | 140 | ..... | ..... | 102 | ..... | 2,100 | 1 | 204 | 102 |
| Casing ..... | 42-inch Steel Pipe. | 60 | 60 | 60 | ..... | ..... | 120 | 30 | ..... | 6 | 60 | 20 |
| **South Trestle (Segment 3a)** | | | | | | | | | | | | |
| Work Trestle | 36-inch Steel Pipe. | 100 | 0 | 100 | 14 | 120 | 86 | 50 | 40 | 2 | 84 | 50 |
| Jump Trestle | 36-inch Steel Pipe. | 175 | 175 | 100 | 10 | 120 | 350 | 50 | 40 | 2 | 292 | 175 |
| Temporary MOT* Trestle. | 36-inch Steel Pipe. | 105 | 0 | 100 | 10 | 120 | 95 | 50 | ..... | 2 | 80 | 48 |
| Permanent Piles. | 54-inch Concrete Cylinder Pipe. | 168 | 0 | 140 | ..... | ..... | 168 | ..... | 2,100 | 1 | 336 | 168 |
| **South Island (Segment 2a)** | | | | | | | | | | | | |
| Settlement Reduction Piles. | 24-inch Steel Pipe, Steel. | 370 | 0 | 85 | ..... | ..... | 370 | 60 | 40 | 6 | 370 | 62 |
| Deep Foundation Piles. | 30-inch Steel Pipe, Concrete Filled. | 425 | 0 | 85 | 42 | 120 | 383 | 60 | 40 | 6 | 425 | 71 |
| South Island Abutment. | AZ 700–19 Steel Sheet. | 12 | 24 | 20 | ..... | ..... | 36 | 30 | ..... | 10 | 18 | 4 |
| South Island Expansion. | AZ 700–26 Steel Sheet. | 378 | 378 | 70 | ..... | ..... | 756 | 30 | ..... | 10 | 189 | 76 |
| Total ..... | ..... | 2,401 | 1,071 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 1,226 |

TABLE 4—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR THREE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT

| Project component | Pile size/type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Trestle (Segment 1b)** | | | | | | | | | | | | |
| Jump Trestle | 36-inch Steel Pipe. | 228 | 232 | 100 | 9 | 120 | 451 | 50 | 40 | 2 | 376 | 226 |
| Permanent Piles. | 54-inch, Concrete Cylinder Pipe. | 187 | 0 | 140 | ..... | ..... | 187 | ..... | 2,100 | 1 | 374 | 187 |
| North Shore Abutment. | AZ 700–19 Steel Sheet. | 62 | 62 | 20 | ..... | ..... | 124 | 30 | ..... | 10 | 62 | 13 |
| **North Island (Segment 2a)** | | | | | | | | | | | | |
| North Island Abutment. | AZ 700–19 Steel Sheet. | 32 | 128 | 20 | ..... | ..... | 160 | 30 | ..... | 10 | 80 | 16 |
| **Willoughby Bay (Segment 3c)** | | | | | | | | | | | | |
| Jump Trestle | 36-inch Steel Pipe. | 460 | 468 | 100 | ..... | ..... | 928 | 50 | 40 | 2 | 774 | 464 |
| Work Trestle | 36-inch Steel Pipe. | 0 | 86 | 100 | ..... | ..... | 86 | 50 | ..... | 2 | 72 | 43 |
| **South Trestle (Segment 3a)** | | | | | | | | | | | | |
| Jump Trestle | 36-inch Steel Pipe. | 245 | 245 | 100 | 14 | 120 | 476 | 50 | 40 | 2 | 397 | 238 |

TABLE 4—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR THREE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT—Continued

| Project component | Pile size/type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Demolition Trestle. | 36-inch Steel Pipe. | 15 | 0 | 100 | 2 | 120 | 13 | 50 | 40 | 2 | 13 | 30 |
| Work Trestle | 36-inch Steel Pipe. | 0 | 182 | 100 | ..... | ..... | 182 | 50 | ..... | 2 | 152 | 91 |
| Temporary MOT* Trestle. | 36-inch Steel Pipe. | 0 | 110 | 100 | ..... | ..... | 110 | 50 | ..... | 2 | 92 | 55 |
| Permanent Piles. | 54-inch Concrete Cylinder Pipe. | 196 | 0 | 140 | ..... | ..... | 196 | ..... | 2,100 | 1 | 392 | 196 |
| **South Island (Segment 2a)** | | | | | | | | | | | | |
| South Island Abutment. | AZ 700–19 Steel Sheet. | 46 | 46 | 20 | ..... | ..... | 92 | 30 | ..... | 10 | 46 | 10 |
| Total ..... | ..... | 1,471 | 1,559 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 1,569 |

TABLE 5—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR THREE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT

| Project component | Pile size/type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Trestle (Segment 1b)** | | | | | | | | | | | | |
| Demolition Trestle. | 36-inch Steel Pipe. | 344 | 172 | 100 | 24 | 120 | 492 | 50 | 40 | 2 | 410 | 246 |
| Permanent Piles. | 54-inch, Concrete Cylinder Pipe. | 85 | 0 | 140 | ..... | ..... | 85 | ..... | 2,100 | 1 | 170 | 85 |
| North Shore Abutment. | AZ 700–19 Steel Sheet. | 62 | 62 | 20 | ..... | ..... | 124 | 30 | ..... | 10 | 62 | 13 |
| **South Trestle (Segment 3a)** | | | | | | | | | | | | |
| Demolition Trestle. | 36-inch Steel Pipe. | 57 | 72 | 100 | 10 | 120 | 119 | 50 | 40 | 2 | 99 | 60 |
| Work Trestle | 36-inch Steel Pipe. | 0 | 74 | 100 | ..... | ..... | 74 | 50 | ..... | 2 | 62 | 37 |
| Temporary MOT* Trestle. | 36-inch Steel Pipe. | 0 | 108 | 100 | ..... | ..... | 108 | 50 | ..... | 2 | 90 | 54 |
| Permanent Piles. | 54-inch Concrete Cylinder Pipe. | 194 | 0 | 140 | ..... | ..... | 194 | ..... | 2,100 | 1 | 388 | 194 |
| **South Island (Segment 2a)** | | | | | | | | | | | | |
| TBM Platform | 36-inch Steel Pipe. | 0 | 216 | 140 | ..... | ..... | 216 | 60 | ..... | 2 | 216 | 108 |
| Conveyor Trestle. | 36-inch Steel Pipe. | 0 | 84 | 100 | ..... | ..... | 84 | 50 | ..... | 3 | 70 | 42 |
| Total ..... | ..... | 742 | 788 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 839 |

TABLE 6—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR FIVE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT

| Project component | Pile size/type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Trestle (Segment 1b)** | | | | | | | | | | | | |
| Moorings ..... | 42-inch Steel Pipe. | 0 | 36 | 60 | ..... | ..... | 36 | 30 | ..... | 6 | 18 | 6 |
| Moorings ..... | 24-inch Steel Pipe. | 0 | 30 | 60 | ..... | ..... | 30 | 30 | ..... | 6 | 15 | 5 |
| Work Trestle | 36-inch Steel Pipe. | 0 | 182 | 100 | ..... | ..... | 182 | 50 | ..... | 2 | 152 | 91 |
| Demolition Trestle. | 36-inch Steel Pipe. | 0 | 172 | 100 | ..... | ..... | 172 | 50 | ..... | 2 | 144 | 86 |

TABLE 6—NUMBERS AND TYPES OF PILES TO BE INSTALLED AND REMOVED DURING LOA YEAR FIVE FOR EACH HRBT PROJECT COMPONENT AND SEGMENT—Continued

| Project component | Pile size/type and material | Total number of piles to be installed | Total number of piles to be removed | Embedment length (feet) | Number of piles down-the-hole | Average down-the-hole duration per pile (minutes) | Number of piles vibrated/ hammered | Average vibratory duration per pile (minutes) | Approximate number of impact strikes per pile | Number of piles per day per hammer | Estimated total number of hours of installation and removal | Number of days of installation and removal |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **North Island (Segment 2a)** | | | | | | | | | | | | |
| Moorings | 42-inch Steel Pipe. | 0 | 80 | 60 | | | 80 | 30 | | 6 | 40 | 14 |
| **Willoughby Bay (Segment 3c)** | | | | | | | | | | | | |
| Moorings | 42-inch Steel Pipe. | 0 | 50 | 60 | | | 50 | 30 | | 6 | 25 | 9 |
| Moorings | 24-inch Steel Pipe. | 0 | 18 | 60 | | | 18 | 30 | | 6 | 9 | 3 |
| Moorings (Safe Haven) | 42-inch Steel Pipe. | 0 | 90 | 60 | | | 90 | 30 | | 6 | 45 | 15 |
| **Willoughby Spit (Segment 3b)** | | | | | | | | | | | | |
| Dock on Spuds, Floating Dock. | 36-inch Steel Pipe. | 0 | 8 | 100 | | | 8 | 50 | | 3 | 7 | 3 |
| Dock on Piles, Fixed Pier. | 36-inch Steel Pipe. | 0 | 44 | 100 | | | 44 | 50 | | 3 | 37 | 15 |
| Finger Piers on Timber Piles. | 16-inch CCA*, Timber. | 0 | 36 | 60 | | | 36 | 30 | | 4 | 18 | 9 |
| **South Trestle (Segment 3a)** | | | | | | | | | | | | |
| Moorings | 42-inch Steel Pipe. | 0 | 41 | 60 | | | 41 | 30 | | 6 | 21 | 7 |
| Moorings | 24-inch Steel Pipe. | 0 | 18 | 60 | | | 18 | 30 | | 6 | 9 | 3 |
| **South Island (Segment 2a)** | | | | | | | | | | | | |
| Mooring | 42-inch Steel Pipe. | 0 | 25 | 60 | | | 25 | 30 | | 6 | 13 | 5 |
| Total | | 0 | 830 | | | | | | | | | 271 |

TABLE 7—NUMBERS OF TEMPLATE PILES (UP TO 36-INCH STEEL PIPE PILES) TO BE INSTALLED AND REMOVED USING A VIBRATORY HAMMER FOR THE HRBT PROJECT

| Project component/location | Pile size/type and material | Estimated number of template piles to be installed | Estimated number of template piles to be removed | Average down-the-hole duration per pile (minutes) | Average vibratory duration per template pile (minutes) | Number of piles per day per component (install and removal) |
|---|---|---|---|---|---|---|
| North Trestle Permanent Piles | 54-inch Concrete Cylinder Pipe | 750 | 750 | | 5 | 8 |
| South Trestle Permanent Piles | 54-inch Concrete Cylinder Pipe | 1080 | 1080 | | 5 | 8 |
| Willoughby Bay Permanent Piles | 24-inch Concrete Square Pipe | 672 | 672 | | 5 | 8 |
| Willoughby Spit Fixed Pier* | 36-inch Steel Pipe | 59 | 59 | | 5 | 16 |
| Willoughby Spit Floating Pier* | 36-inch Steel Pipe | 11 | 11 | | 5 | 16 |
| South Island Deep Foundation Piles. | 30-inch Steel Pipe, Concrete Filled. | 676 | 676 | 120 | 5 | 16 |
| South Island Settlement Reduction Piles. | 24-inch Steel Pipe | 526 | 526 | | 5 | 16 |
| Estimated Total Template Pile Driving Actions. | | 3,774 | 3,774 | | | |
| Total number of Temporary Template Pile Driving action. | | 7,584 | | | | |

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

## Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SAR); *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region* and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found

on NMFS' website (*https://www.fisheries.noaa.gov/find-species*).

Table 8 lists all species with expected potential for occurrence in the project area and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs (*e.g.,* Hayes *et al.,* 2020). All values presented in Table 8 are the most recent available at the time of publication and are available in the 2019 SARs (Hayes *et al.,* 2020).

TABLE 8—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA

| Common name | Scientific name | Stock | ESA/ MMPA status; strategic (Y/N) [1] | Stock abundance (CV, $N_{min}$, most recent abundance survey) [2] | PBR | Annual M/SI [3] |
|---|---|---|---|---|---|---|
| **Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)** | | | | | | |
| Family Balaenopteridae (rorquals): | | | | | | |
| Humpback whale | *Megaptera novaeangliae* | Gulf of Maine | –,–; N | 1,396 (0; 1,380; see SAR). | 22 | 12.15 |
| **Superfamily Odontoceti (toothed whales, dolphins, and porpoises)** | | | | | | |
| Family Delphinidae: | | | | | | |
| Bottlenose dolphin | *Tursiops truncatus* | Western North Atlantic (WNA) Coastal, Northern Migratory. | –,–; Y | 6,639 (0.41; 4,759; 2011) | 48 | 6.1–13.2 |
| | | WNA Coastal, Southern Migratory. | –,–; Y | 3,751 (0.06; 2,353; 2011) | 23 | 0–14.3 |
| | | Northern North Carolina Estuarine System (NNCES). | –,–; Y | 823 (0.06; 782; 2013) | 7.8 | 0.8–18.2 |
| Family Phocoenidae (porpoises): | | | | | | |
| Harbor porpoise | *Phocoena phocoena* | Gulf of Maine/Bay of Fundy | –, –; N | 95,543 (0.31; 74,034; see SAR). | 851 | 217 |
| **Order Carnivora—Superfamily Pinnipedia** | | | | | | |
| Family Phocidae (earless seals): | | | | | | |
| Harbor seal | *Phoca vitulina* | WNA | –; N | 75,834 (0.15; 66,884, see SAR). | 2,006 | 350 |
| Gray seal [4] | *Halichoerus grypus* | WNA | –; N | 27,131 (0.19, 23,158, see SAR). | 1,359 | 5,410 |

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

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

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

[4] The NMFS stock abundance estimate applies to U.S. population only, however the actual stock abundance is approximately 451,431.

As indicated above, all five species (with seven managed stocks) in Table 8 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take. While North Atlantic right whales (*Eubalaena glacialis*), minke whales (*Balaenoptera acutorostrata acutorostrata*), and fin whales (*Balaenoptera physalus*) have been documented in the area, the temporal and/or spatial occurrence of these whales is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here.

Based on sighting data and passive acoustic studies, the North Atlantic right whale could occur off Virginia year-round (DoN 2009; Salisbury *et al.,* 2016). They have also been reported seasonally off Virginia during migrations in the spring, fall, and winter (CeTAP 1981, 1982; Niemeyer *et al.,* 2008; McLellan 2011b, 2013; Mallette *et al.,* 2016a, 2016b, 2017, 2018a; Palka *et al.,* 2017; Cotter 2019). Right whales are known to frequent the coastal waters of the mouth of the Chesapeake Bay (Knowlton *et al.,* 2002) and the area is a seasonal management area (November 1–April 30) mandating reduced ship speeds out to approximately 20 nautical miles for the species; however, the project area is further inside the Bay.

North Atlantic right whales have stranded in Virginia, one each in 2001, 2002, 2004, 2005: Three during winter (February and March) and one in summer (September) (Costidis *et al.,* 2017, 2019). In January 2018, a dead, entangled North Atlantic right whale

was observed floating over 60 miles offshore of Virginia Beach (Costidis *et al.,* 2019). All North Atlantic right whale strandings in Virginia waters have occurred on ocean-facing beaches along Virginia Beach and the barrier islands seaward of the lower Delmarva Peninsula (Costidis *et al.,* 2017). Due to the low occurrence of North Atlantic right whales near the project area, NMFS is not proposing to authorize take of this species.

Fin whales have been sighted off Virginia (Cetacean and Turtle Assessment Program (CeTAP) 1981, 1982; Swingle *et al.,* 1993; DoN 2009; Hyrenbach *et al.,* 2012; Barco 2013; Mallette *et al.,* 2016a, b; Aschettino *et al.,* 2018; Engelhaupt *et al.,* 2017, 2018; Cotter 2019), and in the Chesapeake Bay (CeTAP 1981, 1982; Morgan *et al.,* 2002; Barco 2013; Aschettino *et al.,* 2018); however, they are not likely to occur in the project area. Sightings have been documented around the Chesapeake Bay Bridge Tunnel (CBBT), which is approximately 17 km from the project site, during the winter months (CeTAP 1981, 1982; Barco 2013; Aschettino *et al.,* 2018).

Eleven fin whale strandings have occurred off Virginia from 1988 to 2016 mostly during the winter months of February and March, followed by a few in the spring and summer months (Costidis *et al.,* 2017). Six of the strandings occurred in the Chesapeake Bay (three on eastern shore; three on western shore) with the remaining five occurring on the Atlantic coast (Costidis *et al.,* 2017. Documented strandings near the project area have occurred: February 2012, a dead fin whale washed ashore on Oceanview Beach in Norfolk (Swingle *et al.,* 2013); December 2017, a live fin whale stranded on a shoal in Newport News and died at the site (Swingle *et al.,* 2018); February 2014, a dead fin whale stranded on a sand bar in Pocomoke Sound near Great Fox Island, Accomack (Swingle *et al.,* 2015); and, March 2007, a dead fin whale near Craney Island, in the Elizabeth River, in Norfolk (Barco 2013). Only stranded fin whales have been documented in the project area; no free-swimming fin whales have been observed. Due to the low occurrence of fin whales in the project area, NMFS is not proposing to authorize take of this species.

Minke whales have been sighted off Virginia (CeTAP 1981, 1982; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.,* 2016a, b; McLellan 2017; Engelhaupt *et al.,* 2017, 2018; Cotter 2019), near the CBBT (Aschettino *et al.,* 2018), but sightings in the project area are from strandings (Jensen and Silber 2004; Barco 2013; DoN 2009). In August 1994, a ship strike incident involved a minke whale in Hampton Roads (Jensen and Silber 2004; Barco 2013). It was reported that the animal was struck offshore and was carried inshore on the bow of a ship (DoN 2009). Twelve strandings of minke whales have occurred in Virginia waters from 1988 to 2016 (Costidis *et al.,* 2017). There have been six minke whale stranding from 2017 through 2020 in Virginia waters. Because all known minke whale occurrences in the project area are due to strandings, NMFS is not proposing to authorize take of this species.

Humpback Whale

Humpback whales are distributed worldwide in all major oceans and most seas. Most humpback whale sightings are in nearshore and continental shelf waters; however, humpback whales frequently travel through deep oceanic waters during migration (Calambokidis *et al.,* 2001; Clapham, P.J. and Mattila, D.K., 1990). Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. Humpback whales in the project area are expected to be from the West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland. The West Indies DPS was delisted in 2016. Bettridge *et al.* (2003) estimated the size of the West Indies DPS at 12,312 (95 percent CI 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.,* 2003; Smith *et al.,* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.,* 2015).

Although humpback whales are migratory between feeding areas and calving areas, individual variability in the timing of migrations may result in the presence of individuals in high-latitude areas throughout the year (Straley, 1990). Records of humpback whales off the U.S. mid-Atlantic coast (New Jersey to North Carolina) from January through March suggest these waters may represent a supplemental winter feeding ground used by juvenile and mature humpback whales of U.S. and Canadian North Atlantic stocks (LaBrecque *et al.,* 2015).

The immediate project area is not within normal humpback whale feeding or migration areas. They are most likely to occur near the mouth of the Chesapeake Bay and coastal waters of Virginia Beach between January and March; however, they could be found in the area year-round, based on shipboard sighting and stranding data (Barco and Swingle, 2014; Aschettino *et al.,* 2015; 2016; 2017; 2018). Photo-identification data support the repeated use of the mid-Atlantic region by individual humpback whales. Results of the vessel surveys show site fidelity in the survey area for some individuals and a high level of occurrence within shipping channels (Aschettino *et al.,* 2015; 2016; 2017; 2018). Nearshore surveys conducted in early 2015 reported 61 individual humpback whale sightings, and 135 individual humpback whale sightings in late 2015 through May 2016 (Aschettino *et al.,* 2016). Subsequent surveys confirmed the occurrence of humpback whales in the nearshore survey area: 248 individuals were detected in 2016–2017 surveys (Aschettino *et al.,* 2017), 32 individuals were detected in 2017–2018 surveys (Aschettino *et al.,* 2018), and 80 individuals were detected in 2019 surveys (Aschettino *et al.,* 2019). Sightings in the Hampton Roads area in the vicinity of Naval Station (NAVSTA) Norfolk were reported in nearshore surveys and through tracking of satellite-tagged whales in 2016, 2017 and 2019. The numbers of whales detected, most of which were juveniles, reflect the varying level of survey effort and changes in survey objectives from year to year, and do not indicate abundance trends over time. Therefore, humpback whales could occur near the Project area and incidental take could result from exposure to underwater sounds during pile driving and removal.

Bottlenose Dolphin

Along the U.S. East Coast and northern Gulf of Mexico, there are currently 53 management stocks identified by NMFS in the western North Atlantic and Gulf of Mexico, including oceanic, coastal, and estuarine stocks (Hayes *et al.,* 2020; Waring *et al.,* 2016).

The population structure of bottlenose dolphins off Virginia is complex. There are two morphologically and genetically distinct bottlenose dolphin morphotypes (distinguished by physical differences) described as coastal and offshore forms (Duffield *et al.,* 1983; Duffield, 1986). The offshore form is larger in total length and skull length, and has wider nasal bones than the coastal form. Both inhabit waters in the western North Atlantic Ocean and Gulf of Mexico (Curry and Smith, 1997;

Mead and Potter, 1995) along the U.S. Atlantic coast. The coastal morphotype of bottlenose dolphin is continuously distributed along the Atlantic coast south of Long Island, New York, around the Florida peninsula, and along the Gulf of Mexico coast. This type typically occurs in waters less than 20 meters deep (Waring *et al.,* 2015). The range of the offshore bottlenose dolphin includes waters beyond the continental slope (Kenney R. D., 1990), and offshore bottlenose dolphins may move between the Gulf of Mexico and the Atlantic (Wells *et al.,* 1999). Bottlenose dolphins are the most abundant marine mammal along the Virginia coast and within the Chesapeake Bay, typically traveling in groups of 2 to 15 individuals, but occasionally in groups of over 100 individuals (Engelhaupt *et al.,* 2014; 2015; 2016).

Two coastal stocks are likely to be present in the HRBT project area: Western North Atlantic Northern Migratory Coastal stock and Western North Atlantic Southern Migratory Coastal stock. Additionally, the Northern North Carolina Estuarine System stock may occur in the project area.

The northern migratory coastal stock is best defined by its distribution during warm water months when the stock occupies coastal waters from the shoreline to approximately the 20-m isobath between Assateague, Virginia, and Long Island, New York (Garrison *et al.* 2017). The stock migrates in late summer and fall and, during cold water months (best described by January and February), occupies coastal waters from approximately Cape Lookout, North Carolina, to the North Carolina/Virginia border (Garrison *et al.* 2017b). Historically, common bottlenose dolphins have been rarely observed during cold water months in coastal waters north of the North Carolina/Virginia border, and their northern distribution in winter appears to be limited by water temperatures. Overlap with the southern migratory coastal stock in coastal waters of northern North Carolina and Virginia is possible during spring and fall migratory periods, but the degree of overlap is unknown and it may vary depending on annual water temperature (Garrison *et al.* 2016). When the stock has migrated in cold water months to coastal waters from just north of Cape Hatteras, North Carolina, to just south of Cape Lookout, North Carolina, it overlaps spatially with the Northern North Carolina Estuarine System (NNCES) Stock (Garrison *et al.* 2017b).

The southern migratory coastal stock migrates seasonally along the coast between North Carolina and northern Florida (Garrison *et al.* 2017b). During January–March, the southern migratory coastal stock appears to move as far south as northern Florida. During April–June, the stock moves back north past Cape Hatteras, North Carolina (Garrison *et al.* 2017b), where it overlaps, in coastal waters, with the NNCES stock (in waters ≤1 km from shore). During the warm water months of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay.

The NNCES stock is best defined as animals that occupy primarily waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July–August). Members of this stock also use coastal waters (≤1 km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. A community of NNCES dolphins are likely year-round Bay residents (Patterson, Pers. Comm).

Vessel surveys conducted along coastal and offshore transects from NAVSTA Norfolk to Virginia Beach in most months from August 2012 to August 2015 reported bottlenose dolphins throughout the survey area, including the vicinity of NAVSTA Norfolk (Engelhaupt *et al.,* 2014; 2015; 2016). The final results from this project confirmed earlier findings that bottlenose dolphins are common in the study area, with highest densities in the coastal waters in summer and fall months. However, bottlenose dolphins do not completely leave this area during colder months, with approximately 200–300 individuals still present in winter and spring months (Engelhaupt *et al.,* 2016).

### Harbor Porpoise

Harbor porpoises inhabit cool temperate-to-subpolar waters, often where prey aggregations are concentrated (Watts and Gaskin, 1985). Thus, they are frequently found in shallow waters, most often near shore, but they sometimes move into deeper offshore waters. Harbor porpoises are rarely found in waters warmer than 63 degrees Fahrenheit (17 degrees Celsius) (Read 1999) and closely follow the movements of their primary prey, Atlantic herring (Gaskin 1992).

In the western North Atlantic, harbor porpoise range from Cumberland Sound on the east coast of Baffin Island, southeast along the eastern coast of Labrador to Newfoundland and the Gulf of St. Lawrence, then southwest to about 34 degrees North on the coast of North Carolina (Waring *et al.,* 2016). During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada (Waring *et al.,* 2016). Harbor porpoises sighted off the mid-Atlantic during winter include porpoises from other western North Atlantic populations (Rosel *et al.,* 1999). There does not appear to be a temporally coordinated migration or a specific migratory route to and from the Bay of Fundy region (Waring *et al.,* 2016). During fall (October to December) and spring (April to June), harbor porpoises are widely dispersed from New Jersey to Maine, with lower densities farther north and south (LaBrecque *et al.,* 2015).

Based on stranding reports, passive acoustic recorders, and shipboard surveys, harbor porpoise occur in coastal waters primarily in winter and spring months, but there is little information on their presence in the Chesapeake Bay. They do not appear to be abundant in the HRBT project area in most years, but this is confounded by wide variations in stranding occurrences over the past decade. Since 1999, stranding incidents have ranged widely from a high of 40 in 1999 to 2 in 2011, 2012, and 2016 (Barco *et al.* 2017).

### Harbor Seal

The Western North Atlantic stock of harbor seals occurs in the HRBT project area. Harbor seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported from southern New England to the mid-Atlantic region (DiGiovanni *et al.,* 2011; Hayes *et al.,* 2017; Kenney R. D. 2019; Waring *et al.,* 2016). Harbor seals are the most common seal in Virginia (Barco and Swingle 2014) and regular sightings of seals in Virginia have become a common occurrence in winter and early spring (Costidis *et al.,* 2019). Winter haulout sites for harbor seals have been documented in the Chesapeake Bay at the CBBT, on the Virginia Eastern Shore, and near Oregon Inlet, North Carolina (Waring *et al.,* 2016; Rees *et al.,* 2016; Jones *et al.,* 2018).

Harbor seals regularly haul out on rocks around the portal islands of the CBBT and on mud flats on the nearby southern tip of the Eastern Shore from December through April (Rees *et al.,* 2016; Jones *et al.,* 2018). Seals captured in 2018 on the Eastern Shore and tagged with satellite-tracked tags that lasted from 2 to 5 months spent at least 60 days in Virginia waters before departing

the area. All tagged seals returned regularly to the capture site while in Virginia waters, but individuals utilized offshore and Chesapeake Bay waters to different extents (Ampela *et al.,* 2019). The area that was utilized most heavily was near the Eastern Shore capture site, but some seals ranged into the Chesapeake Bay.

Gray Seal

The Western North Atlantic stock of gray seal occurs in the project area. The western North Atlantic stock is centered in Canadian waters, including the Gulf of St. Lawrence and the Atlantic coasts of Nova Scotia, Newfoundland, and Labrador, Canada, and the northeast U.S. continental shelf (Hayes *et al.,* 2017). Gray seals range south into the northeastern United States, with strandings and sightings as far south as North Carolina (Hammill *et al.,* 1998; Waring *et al.,* 2004). Gray seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported in southern New England (DiGiovanni *et al.,* 2011; Kenney R.D., 2019; Waring *et al.,* 2016). Recent sightings included a gray seal in the lower Chesapeake Bay during the winter of 2014 to 2015 (Rees *et al.,* 2016). Along the coast of the United States, gray seals are known to pup at three or more colonies in Massachusetts and Maine.

Gray seals are uncommon in Virginia and in the Chesapeake Bay. Only 15 gray seal strandings were documented in Virginia from 1988 through 2013 (Barco and Swingle, 2014). They are rarely found resting on the rocks around the portal islands of the CBBT from December through April alongside harbor seals. Seal observation surveys conducted at the CBBT recorded one gray seal in each of the 2014/2015 and 2015/2016 seasons while no gray seals were reported during the 2016/2017 and 2017/2018 seasons (Rees *et al.,* 2016, Jones *et al.,* 2018). Sightings have been reported off Virginia and near the project area during the winter and spring (Barco 2013; Rees *et al.,* 2016; Jones *et al.,* 2018; Ampela *et al.,* 2019).

*Unusual Mortality Events*

An unusual mortality event (UME) is defined under Section 410(6) of the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. Currently, ongoing UME investigations are underway for pinnipeds along the Northeast coast, and humpback whales along the Atlantic coast.

Northeast Pinniped UME

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared an UME. Additionally, seals showing clinical signs have been stranding as far south as Virginia, although not in elevated numbers; therefore, the UME investigation now encompasses all seal strandings from Maine to Virginia. Lastly, while take is not proposed for these species in this proposed rule, ice seals (harp and hooded seals) have also started stranding with clinical signs, again not in elevated numbers, and those two seal species have also been added to the UME investigation. Additional information is available at *https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Atlantic Humpback Whale UME

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida. This event has been declared an UME. A portion of the whales have shown evidence of pre-mortem vessel strike; however, this finding is not consistent across all whales examined, and additional research is needed. Additional information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2020-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

*Marine Mammal Hearing*

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 9.

TABLE 9—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

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

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

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

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (three cetacean and two phocid pinniped species) have the reasonable potential to co-occur with the proposed construction activities. Please refer to Table 8. Of the cetacean species that may be present, one is classified as a low-frequency cetacean (*i.e.,* humpback whale) one is classified as a mid-frequency cetacean (*i.e.,* bottlenose dolphin), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

**Potential Effects of Specified Activities on Marine Mammals and Their Habitat**

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

*Description of Sound Sources*

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

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include vibratory pile driving and pile removal, impact pile driving, jetting, and DTH pile installation. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than one second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI 1986; NIOSH 1998; ANSI 2005; NMFS, 2018). Non-impulsive sounds (*e.g.,* aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.,* 2007).

Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak sound pressure levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.,* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002; Carlson *et al.,* 2005). A DTH hammer is used to place hollow steel piles or casings by drilling. A DTH hammer is a drill bit that drills through the bedrock using a pulse mechanism that functions at the bottom of the hole. This pulsing bit breaks up rock to allow removal of debris and insertion of the pile. The head extends so that the drilling takes place below the pile. The sounds produced by DTH hammers were previously thought to be continuous. However, recent sound source verification (SSV) monitoring has shown that DTH hammer can create sound that can be considered impulsive (Denes *et al.* 2019). Since sound from DTH activities has both impulsive and continuous components, NMFS characterizes sound from DTH pile installation as being impulsive when evaluating potential Level A harassment (*i.e.,* injury) impacts and as being non-impulsive when assessing potential Level B harassment (*i.e.* behavior) effects.

The likely or possible impacts of HRCP's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile driving and removal.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving and removal is the primary means by which marine mammals may be harassed from HRCP's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.* 2007). In general, exposure to pile driving noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by

marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.* 2004; Southall *et al.* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

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

*Permanent Threshold Shift (PTS)*—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.* 1958, 1959; Ward 1960; Miller 1974; Ahroon *et al.* 1996; Henderson *et al.* 2008). PTS levels for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS 2018).

*Temporary Threshold Shift (TTS)*—TTS is a temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Based on data from cetacean TTS measurements (see Southall *et al.* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.* 2000; Finneran *et al.* 2000, 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SELcum) in an accelerating fashion: At low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise sound exposure level (SEL).

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

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018). Installing piles requires a combination of impact pile driving and vibratory pile driving. For this project, these activities would not occur at the same time and there would be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the ensonified area and not remaining for extended periods of time, the potential for TS declines.

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

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience,

current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.* 1995; Wartzok *et al.* 2003; Southall *et al.,* 2007; Weilgart 2007; Archer *et al,.* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

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

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

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

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

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

*Masking*—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.,* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked. The project area contains numerous, naval, commercial, and recreational vessels; therefore, it is possible that background underwater sound levels in the area are elevated, meaning that continuous noise from sources such as vibratory pile driving would be less likely to cause disruption of behavioral patterns when detected.

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

Airborne noise would primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels exceeding the acoustic thresholds. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above

water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been taken by Level B harassment because of exposure to underwater sound above the behavioral harassment thresholds, which are, in all cases, larger than those associated with airborne sound. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

*Marine Mammal Habitat Effects*

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

A localized increase in turbidity near the seafloor during construction would occur in the immediate area surrounding the area where piles are installed (and removed in the case of the temporary piles). The sediments on the sea floor will be disturbed during pile driving; however, suspension will be brief and localized and is unlikely to measurably affect marine mammals or their prey in the area. In general, turbidity associated with pile installation is localized to about a 25-ft (7.6-meter) radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

*In-Water Construction Effects on Potential Foraging Habitat*

The proposed activities would not result in permanent impacts to habitats used directly by marine mammals except for the actual footprint of the project. The total seafloor area affected by pile installation and removal is small compared to the vast foraging area available to marine mammals in the project area and lower Chesapeake Bay.

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

*In-Water Construction Effects on Potential Prey (Fish)*

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* fish). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

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

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.,* 1992; Skalski *et al.,* 1992; Santulli *et al.,* 1999; Paxton *et al.,* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Wardle *et al.,* 2001; Jorgenson and Gyselman, 2009; Cott *et al.,* 2012).

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

The most likely impact to fish from pile driving activities at the project areas would be temporary behavioral avoidance of the area. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

In summary, given the relatively small areas being affected, and the fact that these areas do not include habitat of particularly high quality or importance, pile driving and removal activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to

contribute to adverse impacts on their populations.

**Estimated Take**

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

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines harassment as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as noise generated from in-water pile driving (vibratory and impact) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for low- and high-frequency species and phocids because predicted auditory injury zones are larger than for mid-frequency species. Auditory injury is unlikely to occur for mid-frequency species. The proposed mitigation and monitoring measures are expected to minimize the severity of such taking to the extent practicable.

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

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

*Acoustic Thresholds*

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

*Level B Harassment for non-explosive sources*—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of Level B harassment. NMFS predicts that marine mammals are likely to experience behavioral disturbance in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

HRCP's proposed activity includes the use of continuous (vibratory pile driving, DTH pile installation) and impulsive (impact pile driving, DTH pile installation), sources, and therefore the 120 and 160 dB re 1 μPa (rms) criteria are applicable. Note that the 120 dB criterion is used for DTH pile installation, as the continuous noise produced through the activity will produce the largest harassment isopleths.

*Level A harassment for non-explosive sources*—NMFS' *Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing* (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). As noted previously, HRCP's proposed activity includes the use of impulsive (impact pile driving, DTH pile installation) and non-impulsive (vibratory pile driving/removal, DTH pile installation) sources.

These thresholds are provided in the Table 10 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 10—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

| Hearing group | PTS onset acoustic thresholds * (received level) | |
|---|---|---|
| | Impulsive | Non-impulsive |
| Low-Frequency (LF) Cetaceans/ | *Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB | *Cell 2:* $L_{E,LF,24h}$: 199 dB. |
| Mid-Frequency (MF) Cetaceans | *Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB | *Cell 4:* $L_{E,MF,24h}$: 198 dB. |
| High-Frequency (HF) Cetaceans | *Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB | *Cell 6:* $L_{E,HF,24h}$: 173 dB. |
| Phocid Pinnipeds (PW) (Underwater) | *Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB | *Cell 8:* $L_{E,PW,24h}$: 201 dB. |
| Otariid Pinnipeds (OW) (Underwater) | *Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB | *Cell 10:* $L_{E,OW,24h}$: 219 dB. |

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ($L_{pk}$) has a reference value of 1 µPa, and cumulative sound exposure level ($L_E$) has a reference value of 1µPa$^2$s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

*Ensonified Area*

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* vibratory pile driving, vibratory pile removal, impact pile driving, jetting, and DTH pile installation).

Sound source levels (SSLs) for each method of installation and removal were estimated using empirical measurements from similar projects in Norfolk and Little Creek (Craney Island), elsewhere in Virginia, or outside of Virginia (California, Florida, Washington, Alaska) (Table 11). It is assumed that jetting will be quieter than vibratory installation of the same pile size, but data for this activity are limited; therefore, SSLs for vibratory installation have been applied to jetting.

DTH pile installation includes drilling (non-impulsive sound) and hammering (impulsive sound) to penetrate rocky substrates (Denes *et al.* 2016; Denes *et al.* 2019; Reyff and Heyvaert 2019). DTH pile installation was initially thought be a primarily non-impulsive noise source. However, Denes *et al.* (2019) concluded from a study conducted in Virginia, nearby the location for this project, that DTH should be characterized as impulsive based on Southall *et al.* (2007), who stated that signals with a >3 dB difference in sound pressure level in a 0.035-second window compared to a 1-second window can be considered impulsive. Therefore, DTH pile installation is treated as both an impulsive and non-impulsive noise source. In order to evaluate Level A harassment, DTH pile installation activities are evaluated according to the impulsive criteria. Level B harassment isopleths are determined by applying non-impulsive criteria and using the 120 dB threshold which is also used for vibratory driving. This approach ensures that the largest ranges to effect for both Level A and Level B harassment are accounted for in the take estimation process.

The source level employed to derive Level B harassment isopleths for DTH pile installation of all pile sizes was derived from the Denes *et al.* (2016) study at Kodiak, Alaska. The median source value for drilling was reported to be 166 dB RMS.

The source level employed to derive Level A harassment isopleths for DTH pile installation of piles/holes above 24-inch up to 42-inch in diameter came from a combination of (whichever higher for given metric) Reyff and Heyvaert (2019), Denes *et al.* (2019), and Reyff (2020). For pile/holes 60-inch in diameter, values were provided by Reyff (Reyff personal communication) and are shown in Table 11. Note that during some driving scenarios bubble curtains will be used to reduce sound source levels by 7 dB from the values recorded by Denes *et al.* (2019) at the nearby Chesapeake Bay Bridge Tunnel. These are also noted in Table 11.

TABLE 11—SUMMARY OF PROJECT SOUND SOURCE LEVELS

[a 10 m]

| Method and pile type | Sound source level at 10 meters | | | Literature source |
|---|---|---|---|---|
| Vibratory Hammer | dB rms | | | |
| 42-inch steel pile | 168 | | | Austin *et al.* 2016. |
| 36-inch steel pile | 167 | | | DoN 2015. |
| 30-inch steel pile, concrete filled | 167 | | | DoN 2015. |
| 24-inch steel pile | 161 | | | DoN 2015. |
| 16-inch CCA timber pile * | 162 | | | Caltrans 2015. |
| AZ 700–19 steel sheet pile | 160 | | | Caltrans 2015. |
| AZ 700–26 steel sheet pile | 160 | | | Caltrans 2015. |
| Jetting | dB rms | | | |
| 42-inch steel pile | 161 | | | Austin *et al.* 2016. |
| DTH Pile Installation | dB rms | dB SEL | dB peak | |
| 30-inch and 36-inch steel pipe piles | 166 | 164 | 196 | Denes *et al.* 2016, 2019; Reyff and Heyvaert 2019; Reyff 2020. |
| 60-inch steel pipe pile | 166 | 175 | 196 | Denes *et al.* 2016; Reyff pers. comm. |

TABLE 11—SUMMARY OF PROJECT SOUND SOURCE LEVELS—Continued

[a 10 m]

| Method and pile type | | | | |
|---|---|---|---|---|
| Impact Hammer | dB rms | dB SEL | dB peak | |
| 36-inch steel pile | 193 | 183 | 210 | Caltrans 2015; Chesapeake Tunnel Joint Venture 2018. |
| 36-inch steel pile, attenuated** | 186 | 176 | 203 | Caltrans 2015; Chesapeake Tunnel Joint Venture 2018 +. |
| 30-inch steel pile, concrete filled | 195 | 186 | 216 | DoN 2015. |
| 30-inch steel pile, concrete filled, attenuated**. | 188 | 179 | 209 | DoN 2015. |
| 24-inch steel pile | 190 | 177 | 203 | Caltrans 2015. |
| 24-inch steel pile, attenuated** | 183 | 170 | 196 | Caltrans 2015. |
| 54-inch concrete cylinder pile*** | 187 | 177 | 193 | MacGillivray *et al.* 2007. |
| 24-inch concrete square pile | 176 | 166 | 188 | Caltrans 2015. |

**Note:** *It is assumed that noise levels during pile installation and removal are similar. dB = decibel: SEL = sound exposure level; dB peak = peak sound level; rms = root mean square; DoN = Department of the Navy; CCA = Chromated Copper Arsenate, Caltrans = California Department of Transportation.*

** SSL taken from 12-inch timber piles in Norfolk, Virginia.*

*** SSLs are a 7 dB reduction from Chesapeake Tunnel Joint Venture 2018 values due to usage of a bubble curtain.*

**** SSLs taken from 36-inch concrete square piles, no project specific information provided.*

*+ The primary literature source for 36-inch steel pipe attenuated piles is Caltrans 2015; however, the Chesapeake Tunnel Joint Venture 2018 is also cited due to the proximity of the project to the HRBT Project.*

Simultaneous use of hammers could result in increased SPLs and harassment zone sizes given the proximity of the component driving sites and the rules of decibel addition. Impact pile installation is projected to take place concurrently at 3 to 4 locations and there is the potential for as many as 7 pile installation locations operating concurrently. NMFS (2018b) handles overlapping sound fields created by the use of more than one hammer differently for impulsive (impact hammer and Level A harassment zones for drilling with a DTH hammer) and continuous sound sources (vibratory hammer and Level B harassment zones for drilling with a DTH hammer) (See Table 12). It is unlikely that the two impact hammers would strike at the same instant, and therefore, the SPLs will not be adjusted regardless of the distance between impact hammers. In this case, each impact hammer will be considered to have its own independent Level A and Level B harassment zones and drilling with a DTH hammer will be considered to have its own independent Level A harassment zones. It will be unlikely that more than one DTH hammer will be used within a day at more than one location; therefore, only one DTH hammer was included in the multiple hammer calculations for Level B harassment zones.

When two continuous noise sources, such as vibratory hammers, have overlapping sound fields, there is potential for higher sound levels than for non-overlapping sources. The method described below was used by Washington State Department of Transportation (WSDOT) and has been used by NMFS (WSDOT 2020).

When two or more vibratory hammers are used simultaneously, and the isopleth of one sound source encompasses the sound source of another isopleth, the sources are considered additive and combined using the following rules (Table 12) for addition of two simultaneous vibratory hammers, the difference between the two SSLs is calculated, and if that difference is between 0 and 1 dB, 3 dB are added to the higher SSL; if difference is between 2 or 3 dB, 2 dB are added to the highest SSL; if the difference is between 4 to 9 dB, 1 dB is added to the highest SSL; and with differences of 10 or more decibels, there is no addition.

TABLE 12—RULES FOR COMBINING SOUND LEVELS GENERATED DURING PILE INSTALLATION

| Hammer types | Difference in SSL | Level A harassment zones | Level B harassment zones |
|---|---|---|---|
| Vibratory, Impact | Any | Use impact zones | Use vibratory zone. |
| Impact, Impact | Any | Use zones for each pile size and number of strikes. | Use zone for each pile size. |
| Vibratory, Vibratory | 0 or 1 dB | Add 3 dB to the higher source level | Add 3 dB to the higher source level. |
| | 2 or 3 dB | Add 2 dB to the higher source level | Add 2 dB to the higher source level. |
| | 4 to 9 dB | Add 1 dB to the higher source level | Add 1 dB to the higher source level. |
| | 10 dB or more | Add 0 dB to the higher source level | Add 0 dB to the higher source level. |

When three or more continuous sound sources are used concurrently, such as vibratory hammers, the three overlapping sources with the highest SSLs are identified. Of the three highest SSLs, the lower two are combined using

the above rules, then the combination of the lower two is combined with the highest of the three.

It is common for pile installation to start and stop multiple times as each pile is adjusted and its progress is measured and documented. For short durations, it is anticipated that multiple hammers could be in use simultaneously. Following an approach modified from WSDOT in their Biological Assessment manual and described in Table 13, decibel addition calculations were carried out for possible combinations of vibratory installations of 24-, 30-, 36-, and 42-inch steel pipe piles throughout the Project area.

**Table 13 -- Possible Vibratory Pile Combinations**

| Method | Pile Diameter (Inches) | | 24 | 24+24 | 30/36 | 42 | 30/36+24 | 24+42 | 30/36+30/36 | 42+30/36 | 42+42 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | SSL (dB) | 161 | 164 | 167 | 168 | 168 | 169 | 170 | 171 | 171 |
| Vibratory | 24 | 161 | **164** | **166** | **168** | **169** | **169** | **169** | **171** | **171** | **172** |
| | DTH | 166 | **167** | **168** | **170** | **170** | **170** | **171** | **172** | **172** | **172** |
| | 30/36 | 167 | **168** | **169** | **170** | **171** | **171** | **171** | **172** | **172** | **172** |
| | 42 | 168 | **169** | **169** | **171** | **171** | **171** | **172** | **172** | **172** | **173** |

These source levels are used to compute the Level A harassment zones and to estimate the Level B harassment zones.

*Level A Harassment Zones*

When the NMFS' Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment take. However, these tools offer the best way to predict appropriate isopleths when more sophisticated 3D modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as in-water pile driving activities during the HRBT project, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would incur PTS.

Inputs used in the User Spreadsheet (Table 14 and Table 15) and the resulting isopleths are reported below (Table 14). Level A harassment thresholds for impulsive sound sources (impact pile driving, DTH pile installation) are defined for both SELcum and Peak SPL, with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the effective Level A harassment isopleth.

For purposes of estimated take by Level A harassment, NMFS assumed that the strike rate for impact pile installation was 50 percent of the estimated number of strikes displayed in Table 14 and 15. Similarly, for vibratory driving NMFS assumed that the driving time for each pile was 50 percent of the estimated total. For the DTH hammer calculations, Reyff and Heyvaert 2019 identified a strike rate of 10 Hz. This was also reduced by 50 percent to 5 Hz which to achieve the same 50 percent Level A harassment reduction as was done for impact and vibratory driving. Strikes per Pile values were not altered when calculating Level A harassment zones for DTH pile installation.

Since the marine mammals proposed for authorization are highly mobile, it is unlikely that an animal would remain within an established Level A harassment zone for the entire duration or number of strikes associated with installation or removal of a specified number of piles throughout a given day. This was done to provide more realistic take estimates by Level A harassment. NMFS applied this reduction across all pile sizes, types, and installation/removal methods as shown in Tables 14 and 15. Additionally, note that under some driving scenarios a 7 dB attenuation was applied to impact installation of 24-inch steel, 30-inch Steel, and 36-inch steel due to use of bubble curtains as shown in Table 14.

The calculated Level A isopleths for different size pile and driving types are shown in Tables 16–18.

BILLING CODE 3510–22–P

**Table 14 -- User Spreadsheet Input Parameters Used for Calculating Level A Harassment Isopleths for Vibratory and Impact Hammers***

| Model Parameter | Steel Sheet | 16-inch Timber | 24-inch Steel | | | 24-inch Concrete | 30-inch Steel, Concrete Filled | | | 36-inch Steel | | | | | | 42-inch Steel | 54-inch Concrete | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Vib | Vib | Vib | Imp | Imp - Bubble | Imp | Vib | Imp | Imp - Bubble | Vib | Vib | Vib | Vib | Imp | Imp - Bubble | Vib | Jetting | Imp |
| Spreadsheet Tab | A.1 | A.1 | A.1 | E.1 | E.1 | E.1 | A.1 | E.1 | E.1 | A.1 | A.1 | A.1 | A.1 | E.1 | E.1 | A.1 | A.1 | E.1 |
| Weighting Factor Adjustment (kHz) | 2.5 | 2.5 | 2.5 | 2 | 2 | 2 | 2.5 | 2 | 2 | 2.5 | 2.5 | 2.5 | 2.5 | 2 | 2 | 2.5 | 2.5 | 2 |
| Sound Pressure Level ($SPL_{rms}$) | 160 | 162 | 161 | 190 | 183 | 176 | 167 | 195 | 188 | 167 | 167 | 167 | 193 | 186 | 166 | 168 | 187 | 166 |
| $SEL_{ss}$ ($L_{E, p, single\ strike}$) at 10 meters | - | - | - | 177 | 170 | 166 | - | 186 | 179 | - | - | - | - | 183 | 176 | - | - | 177 |
| $L_{p, 0\text{-}pk}$ at 10 meters | - | - | - | 203 | 196 | 188 | - | 216 | 209 | - | - | - | - | 210 | 203 | - | - | 193 |
| Number of piles within 24-hour period | 10 | 4 | 6 | 6 | 6 | 1 | 6 | 6 | 6 | 1 | 8/16 | 2/3 | 2 | 2/3 | 2 | 6 | 1 | 1 |

BILLING CODE 3510–22–C

| | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Estimated Duration to drive a single pile (min) | 30 | 30 | 30/60 | - | - | - | 60 | - | - | 50 | 5 | 50 | 60 | - | - | 30 | - | - |
| 50% of Duration to drive a single pile (min) | 15 | 15 | 15/30 | - | - | - | 30 | - | - | 25 | 2.5 | 25 | 30 | - | - | 15 | 15 | - |
| Transmission loss coefficient | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 | 15 |
| Distance from sound pressure level ($SPL_{rms}$) measurement (m) | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| 50% of Strikes per pile | - | - | - | 20 | 20 | 1,050 | - | 20 | 20 | - | - | - | - | 20 | 20 | - | - | 1,050 |
| Estimated Strikes per pile | - | - | - | 40 | 40 | 2,100 | - | 40 | 40 | - | - | - | - | 40 | 40 | - | - | 2,100 |

**To provide a more realistic estimate of take by Level A harassment, NMFS assumes that an animal would occur within the vicinity of the construction activity for 50 percent of the pile installation and removal time. HRCP has implemented this reduction across all pile sizes, types, and installation and removal methods. For purposes of vibratory installation, the duration of installation was reduced by half to accomplish the reduction. For impact installation, the number of strikes per pile was reduced by half to accomplish the reduction.*

TABLE 15—USER SPREADSHEET INPUT PARAMETERS USED FOR CALCULATING LEVEL A HARASSMENT ISOPLETHS FOR DRILLING WITH A DTH HAMMER *

| Model parameter | 30-inch steel, concrete filled | 36-inch steel | 60-inch steel |
|---|---|---|---|
| | DTH | DTH | DTH |
| Spreadsheet Tab | E.2 | E.2 | E.2 |
| Weighting Factor Adjustment (kilohertz) | 2 | 2 | 2 |
| $SEL_{ss}$ ($L_{E, p, single\ strike}$) at 10 meters | 164 | 164 | 175 |
| $L_{p, 0\text{-}pk}$ at 10 meters | 196 | 196 | 196 |
| Number of piles per day | 6 | 2 | 3 |
| Duration to drive a pile (minutes) | 120 | 120 | 120 |
| Transmission loss coefficient | 15 | 15 | 15 |
| Distance from source (meters) | 10 | 10 | 10 |
| Estimated Number of Strikes per 24-hour period | 432,000 | 144,000 | 216,000 |
| 50% of Strikes per 24-hour period | 216,000 | 72,000 | 108,000 |
| Strike rate (Hz) average strikes per second | 10 | 10 | 10 |
| 50% of Strike rate (Hz) average strikes per second | 5 | 5 | 5 |

** To provide a more realistic estimate of take by Level A harassment, NMFS assumes that an animal would occur within the vicinity of the construction activity for 50 percent of the pile installation and removal time, which equates to 50 percent of the piles planned for installation and removal. HRCP has implemented this reduction across all pile sizes, types, and installation and removal methods. For drilling with a DTH hammer installation, the strike rate (Hz) was reduced by half to accomplish the reduction. A 10 Hz strike rate was identified from Reyff and Heyvaert 2019 which was then reduced by 50% to 5 Hz to accomplish the 50% Level A reduction.*

TABLE 16—CALCULATED DISTANCES TO LEVEL A HARASSMENT ISOPLETHS DURING VIBRATORY INSTALLATION, AND VIBRATORY REMOVAL AND JETTING INSTALLATION WITH NO ATTENUATION

| Project component | Pile size/type | Minutes per pile (reduced by half) | Number of piles per day | Level A harassment isopleth distance (meters) | | | | Level A Harassment isopleth areas ($km^2$) | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Cetaceans | | | Pinnipeds | Cetaceans | | | Pinnipeds |
| | | | | LF | MF | HF | PW | LF | MF | HF | PW |
| **Vibratory Hammer North Trestle** | | | | | | | | | | | |
| Moorings | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Template Piles | 36-inch Pipe, Steel | 2.5 | 8 | 9 | 1 | 13 | 5 | <0.01 | | | |
| North Shore Work Trestle, Jump Trestle, Work Trestle, Demolition Trestle. | 36-inch Pipe, Steel | 25 | 2 | 16 | 2 | 23 | 10 | <0.01 | | | |
| Moorings | 24-inch Pipe, Steel | 15 | 6 | 9 | 1 | 14 | 6 | <0.01 | | | |
| North Shore Abutment | AZ 700–19 Sheet, Steel | 15 | 10 | 11 | 1 | 16 | 7 | <0.01 | | | |
| **North Island** | | | | | | | | | | | |
| Moorings | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Hampton Creek Approach Channel Marker. | Existing, 36-inch Pipe, Steel | 25 | 1 | 10 | 1 | 15 | 6 | <0.01 | | | |
| North Island Expansion | AZ 700–26 Sheet, Steel | 15 | 10 | 11 | 1 | 16 | 7 | <0.01 | | | |
| North Island Abutment | AZ 700–19 Sheet, Steel | | | | | | | | | | |
| South Island Abutment | AZ 700–19 Sheet, Steel | 15 | 10 | 11 | 1 | 16 | 7 | <0.01 | | | |
| South Island Expansion | AZ 700–26 Sheet, Steel | | | | | | | | | | |
| Settlement Reduction Piles | 24-inch Pipe, Steel | 30 | 6 | 15 | 2 | 21 | 9 | | | | |
| Deep Foundation Piles | 30-inch Pipe, Steel, Concrete Filled | 30 | 6 | 36 | 4 | 53 | 22 | | | | |
| TBM Platform | 36-inch Pipe, Steel | 30 | 2 | 18 | 2 | 26 | 11 | | | | |
| Conveyor Trestle | 36-inch Pipe, Steel | 25 | 3 | 20 | 2 | 30 | 13 | | | | |
| Moorings | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Template Piles | 36-inch Pipe, Steel | 2.5 | 16 | 14 | 2 | 20 | 8 | <0.01 | | | |
| **South Trestle** | | | | | | | | | | | |
| Template Piles | 36-inch Pipe, Steel | 2.5 | 8 | 9 | 1 | 13 | 5 | <0.01 | | | |
| Moorings, Casings | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Work Trestle, Jump Trestle, Demolition Trestle, Temporary MOT Trestle. | 36-inch Pipe, Steel | 25 | 2 | 16 | 2 | 23 | 10 | | | | |
| Moorings | 24-inch Pipe, Steel | 15 | 6 | 9 | 1 | 14 | 6 | | | | |
| **Willoughby Bay** | | | | | | | | | | | |
| Moorings | 24-inch Pipe, Steel | 15 | 6 | 9 | 1 | 14 | 6 | <0.01 | | | |
| Work Trestle, Jump Trestle | 36-inch Pipe, Steel | 25 | 2 | 16 | 2 | 23 | 10 | | | | |
| Moorings (Safe Haven) | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Casing | 42-inch Pipe, Steel | 15 | 6 | 27 | 3 | 39 | 16 | <0.01 | | | |
| Template Piles | 36-inch Pipe, Steel | 2.5 | 8 | 9 | 1 | 13 | 5 | <0.01 | | | |
| **Willoughby Spit Laydown Area** | | | | | | | | | | | |
| Finger Piers on Timber Piles | 16-inch CCA, Timber | 15 | 4 | 8 | 1 | 12 | 5 | <0.01 | | | |
| Dock on Spuds, Dock on Piles | 36-inch Pipe, Steel | 25 | 3 | 20 | 2 | 30 | 13 | <0.01 | | | |
| Template Piles | 36-inch Pipe, Steel | 2.5 | 16 | 14 | 2 | 20 | 8 | <0.01 | | | |
| **Jetting Willoughby Bay** | | | | | | | | | | | |
| Casing | 42-inch Pipe, Steel | 15 | 1 | 3 | 1 | 4 | 2 | <0.01 | | | |

TABLE 17—CALCULATED DISTANCES TO LEVEL A HARASSMENT ISOPLETHS DURING IMPACT INSTALLATION AND DTH PILE INSTALLATION WITH NO ATTENUATION

| Project component | Pile size/type | Number of strikes per pile or strike rate* (reduced by half) | Number of piles per day | Level A harassment isopleth distance (meters) | | | | Level A harassment isopleth areas ($km^2$) | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Cetaceans | | | Pinnipeds | Cetaceans | | | Pinnipeds |
| | | | | LF | MF | HF | PW | LF | MF | HF | PW |
| **North Trestle** | | | | | | | | | | | |
| Permanent Piles | 54-inch Pipe, Concrete Cylinder | 1,050 | 1 | 411 | 15 | 490 | 220 | 0.53 | <0.001 | 0.75 | 0.15 |
| Work Trestle, Jump Trestle, Demolition Trestle. | 36-inch Pipe, Steel | 20 | 2 | 117 | 5 | 140 | 63 | 0.04 | <0.001 | 0.06 | 0.01 |
| **South Island** | | | | | | | | | | | |
| Settlement Reduction Piles | 24-inch Pipe, Steel | 20 | 6 | 97 | 4 | 116 | 52 | 0.02 | <0.001 | 0.03 | 0.01 |
| Deep Foundation Piles | 30-inch Pipe, Steel, Concrete Filled | 20 | 6 | 386 | 14 | 459 | 207 | 0.35 | <0.001 | 0.49 | 0.10 |
| **South Trestle** | | | | | | | | | | | |
| Work Trestle, Jump Trestle, Demolition Trestle, Temporary MOT Trestle. | 36-inch Pipe, Steel | 20 | 2 | 117 | 5 | 140 | 63 | 0.04 | <0.001 | 0.06 | 0.01 |
| Permanent Piles | 54-inch Pipe, Concrete Cylinder | 1,050 | 1 | 411 | 15 | 490 | 220 | 0.53 | <0.001 | 0.75 | 0.15 |
| **Willoughby Bay** | | | | | | | | | | | |
| Work Trestle, Jump Trestle | 36-inch Pipe, Steel | 20 | 2 | 117 | 5 | 140 | 63 | 0.04 | <0.001 | 0.06 | 0.01 |
| Permanent Piles | 24-inch Pipe, Concrete Square | 1,050 | 1 | 76 | 3 | 91 | 41 | 0.02 | <0.001 | 0.03 | <0.01 |
| **Willoughby Spit Laydown Area** | | | | | | | | | | | |
| Dock on Spuds, Dock on Piles | 36-inch Pipe, Steel | 20 | 3 | 154 | 6 | 183 | 82 | 0.12 | 0.09 | <0.001 | 0.03 |
| **DTH Pile Installation* North Trestle** | | | | | | | | | | | |
| Work Trestle, Jump Trestle, Demolition Trestle. | 36-inch Pipe, Steel | 36,000 | 2 | 936 | 34 | 1,115 | 501 | 1.81 | <0.01 | 2.27 | 0.78 |
| Casing | 60-inch Pipe, Steel | 36,000 | 3 | 6,633 | 236 | 7,901 | 3,550 | 34.04 | 0.18 | 43.75 | 13.03 |
| **South Island** | | | | | | | | | | | |
| Deep Foundation Piles | 30-inch Pipe, Steel, Concrete Filled | 36,000 | 6 | 1,946 | 70 | 2,318 | 1,042 | 8.28 | <0.01 | 11.30 | 2.49 |
| **South Trestle** | | | | | | | | | | | |
| Work Trestle, Jump Trestle, Temporary MOT Trestle, Demolition Trestle. | 36-inch Pipe, Steel | 36,000 | 2 | 936 | 34 | 1,115 | 501 | 2.67 | <0.01 | 3.67 | 0.79 |
| Casing | 60-inch Pipe, Steel | 36,000 | 3 | 6,633 | 236 | 7,901 | 3,550 | 77.50 | 0.18 | 102.16 | 27.12 |

** For DTH Hammer calculations, a 10 Hz strike rate was identified from Reyff and Heyvaert 2019 which was then reduced by 50% to 5 Hz to accomplish the 50% Level A harassment reduction. Strikes per Pile values were not reduced for DTH methods.*

TABLE 18—CALCULATED DISTANCES TO LEVEL A HARASSMENT ISOPLETHS DURING IMPACT INSTALLATION WITH ATTENUATION

| Project component | Pile size/type | Number of strikes per pile (reduced by half) | Number of piles per day | Level A harassment isopleth distance (meters) | | | | Level A harassment isopleth areas ($km^2$) | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Cetaceans | | | Pinnipeds | Cetaceans | | | Pinnipeds |
| | | | | LF | MF | HF | PW | LF | MF | HF | PW |
| **Impact Hammer South Island** | | | | | | | | | | | |
| Settlement Reduction Piles | 24-inch Pipe, Steel | 20 | 6 | 33 | 2 | 40 | 18 | <0.01 | | | |
| Deep Foundation Piles | 30-inch Pipe, Steel, Concrete Filled | 20 | 6 | 132 | 5 | 157 | 71 | 0.04 | <0.001 | 0.06 | 0.01 |
| **South Trestle** | | | | | | | | | | | |
| Temporary MOT Trestle Jump Trestle. Work Trestle. | 36-inch Pipe, Steel | 20 | 2 | 40 | 2 | 48 | 22 | <0.001 | 0.007 | 0.002 | |

Level B Harassment Zones

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography.

The general formula for underwater TL is:

$TL = B * Log10 (R1/R2)$,

Where

TL = transmission loss in dB

B = transmission loss coefficient; for practical spreading equals 15

R1 = the distance of the modeled SPL from the driven pile, and

R2 = the distance from the driven pile of the initial measurement

The recommended TL coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most

appropriate assumption for HRCP's proposed activity.

Using the practical spreading model, HRCP determined underwater noise would fall below the behavioral effects threshold of 120 dB rms for marine mammals at a maximum radial distance of 15,849 m for vibratory pile driving of 42- and 36-inch diameter piles. Other activities including impact driving and vibratory installation sheet piles have smaller Level B harassment zones. All Level B harassment isopleths are reported in Table 19 below. It should be noted that based on the geography of the project area, and pile driving locations, in many cases sound will not reach the full distance of the Level B harassment isopleth. The radial distances provided in Table 19 and Table 20 are shown as calculated. However, the land areas presented in these tables take into account truncation by various land masses in the project area and only shows the in-water ensonified area.

TABLE 19—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS FOR DIFFERENT PILE SIZES AND TYPES AND METHODS OF INSTALLATION AND REMOVAL WITH NO ATTENUATION

| Location and component | Method and pile type | Level B isopleth (m), unattenuated | Level B area unattenuated ($km^2$) |
|---|---|---|---|
| **Vibratory Hammer (Level B Isopleth = 120 dB)** | | | |
| **North Trestle** | | | |
| Moorings | 42-inch steel piles | 15,849 | 96.78 |
| Template Piles | 36-inch steel piles | 13,594 | 85.53 |
| Demolition Trestle | 36-inch steel piles | 13,594 | 85.53 |
| North Shore Work Trestle | 36-inch steel piles | 13,594 | 85.53 |
| Jump Trestle | 36-inch steel piles | 13,594 | 85.53 |
| Work Trestle | 36-inch steel piles | 13,594 | 85.53 |
| Moorings | 24-inch steel piles | 5,412 | 25.34 |
| North Shore Abutment | AZ 700–19 steel sheet piles | 4,642 | 19.81 |
| **North Island** | | | |
| Moorings North | 42-inch steel piles | 15,849 | 103.86 |
| Moorings South | 42-inch steel piles | 15,849 | 201.04 |
| Hampton Creek Approach Channel Marker | 36-inch steel pile | 13,594 | 93.99 |
| North Island Expansion North | AZ 700–26 steel sheet piles | 4,642 | 26.06 |
| North Island Expansion South | AZ 700–26 steel sheet piles | 4,642 | 36.73 |
| North Island Abutment North | AZ 700–19 steel sheet piles | 4,642 | 26.06 |
| North Island Abutment South | AZ 700–19 steel sheet piles | 4,642 | 36.73 |
| **South Island** | | | |
| Moorings | 42-inch steel piles | 15,849 | 246.86 |
| Template Piles | 36-inch steel piles | 13,594 | 81.75 |
| TBM Platform | 36-inch steel piles | 13,594 | 81.75 |
| Conveyor Trestle | 36-inch steel piles | 13,594 | 81.75 |
| Deep Foundation Piles | 30-inch steel piles, concrete filled | 13,594 | 194.04 |
| Settlement Reduction Piles | 24-inch steel piles | 5,412 | 45.10 |
| South Island Expansion | AZ 700–26 steel sheet piles | 4,642 | 34.69 |
| South Island Abutment | AZ 700–19 steel sheet piles | 4,642 | 34.69 |
| **South Trestle** | | | |
| Moorings, Casings | 42-inch steel piles | 15,849 | 305.30 |
| Template Piles | 36-inch steel piles | 13,594 | 235.60 |
| Temporary MOT Trestle | 36-inch steel piles | 13,594 | 235.60 |
| Jump Trestle | 36-inch steel piles | 13,594 | 235.60 |
| Work Trestle | 36-inch steel piles | 13,594 | 235.60 |
| Demolition Trestle | 36-inch steel piles | 13,594 | 235.60 |
| Moorings | 24-inch steel piles | 5,412 | 55.87 |
| **Willoughby Bay** | | | |
| Moorings (Safe Haven) | 42-inch steel piles | 15,849 | 5.52 |
| Moorings | 42-inch steel piles | 15,849 | 5.52 |
| Casing | 42-inch steel piles | 15,849 | 5.52 |
| Template Piles | 36-inch steel piles | 13,594 | 5.52 |
| Work Trestle | 36-inch steel piles | 13,594 | 5.52 |
| Jump Trestle | 36-inch steel piles | 13,594 | 5.52 |
| Moorings | 24-inch steel piles | 5,412 | 5.52 |
| **Willoughby Spit Laydown Area** | | | |
| Template Piles | 36-inch steel piles | 13,594 | 74.45 |
| Dock on Spuds | 36-inch steel piles | 13,594 | 74.45 |
| Dock on Piles | 36-inch steel piles | 13,594 | 74.45 |

TABLE 19—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS FOR DIFFERENT PILE SIZES AND TYPES AND METHODS OF INSTALLATION AND REMOVAL WITH NO ATTENUATION—Continued

| Location and component | Method and pile type | Level B isopleth (m), unattenuated | Level B area unattenuated ($km^2$) |
|---|---|---|---|
| Finger Piers | 16-inch CCA timber piles | 6,310 | 40.62 |
| **DTH Pile Installation (Level B Isopleth = 120 dB)** | | | |
| North Trestle Casings | 60-inch steel piles | 11,659 | 72.28 |
| North Trestle Work Trestle, Jump Trestle, Demolition Piles, Templates. | 36-inch steel piles | 11,659 | 72.28 |
| South Island Deep Foundation Piles | 30-inch steel piles, concrete filled | 11,659 | 152.79 |
| South Trestle Casings | 60-inch steel piles | 11,659 | 184.12 |
| South Trestle Work Trestle, Jump Trestle, Demolition Trestle, Temporary MOT Trestle, Templates. | 36-inch steel piles | 11,659 | 14.12 |
| Willoughby Bay Templates | 36-inch steel piles | 11,659 | 5.52 |
| **Jetting (Level B Isopleth = 120 dB) Willoughby Bay** | | | |
| Casing | 42-inch steel piles | 5,412 | 5.52 |
| **Impact Hammer (Level B Isopleth = 160 dB) North Trestle** | | | |
| Permanent Piles | 54-inch concrete cylinder piles | 631 | 1.14 |
| Work Trestle | 36-inch steel piles | 1,585 | 3.81 |
| Jump Trestle | 36-inch steel piles | 1,585 | 3.81 |
| Demolition Trestle | 36-inch steel piles | 1,585 | 3.81 |
| **South Island** | | | |
| Deep Foundation Piles | 30-inch steel piles, concrete filled | 2,154 | 9.91 |
| Settlement Reduction Piles | 24-inch steel piles | 1,000 | 2.29 |
| **South Trestle** | | | |
| Permanent Piles | 54-inch concrete cylinder piles | 631 | 1.25 |
| Work Trestle | 36-inch steel piles | 1,585 | 6.84 |
| Jump Trestle | 36-inch steel piles | 1,585 | 6.84 |
| Temporary MOT Trestle | 36-inch steel piles | 1,585 | 6.84 |
| Demolition Trestle | 36-inch steel piles | 1,585 | 6.84 |
| **Willoughby Bay** | | | |
| Permanent Piles | 24-inch concrete cylinder piles | 117 | 0.04 |
| Work Trestle | 36-inch steel piles | 1,585 | 3.15 |
| Jump Trestle | 36-inch steel piles | 1,585 | 3.15 |
| **Willoughby Spit Laydown Area** | | | |
| Dock on Spuds | 36-inch steel piles | 1,585 | 6.03 |
| Dock on Piles | 36-inch steel piles | 1,585 | 6.03 |

TABLE 20—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS FOR INSTALLATION AND REMOVAL OF STEEL PIPE PILES WITH ATTENUATION BUBBLE CURTAIN

| Location and component | Method and pile type | Level B isopleth (m), attenuated | Level B area attenuated ($km^2$) |
|---|---|---|---|
| **Impact Hammer (Level B Isopleth = 160 dB) South Island** | | | |
| Deep Foundation Piles | 30-inch steel piles, concrete filled | 736 | 1.25 |
| Settlement Reduction Piles | 24-inch steel piles | 341 | 0.27 |
| **South Trestle** | | | |
| Temporary MOT Trestle, Work Trestle, Jump Trestle | 36-inch steel piles | 541 | 0.68 |

The daily duration in which more than one vibratory hammer or DTH pile installation could occur is difficult to predict and quantify. As noted previously, DTH pile installation is considered by NMFS to be both impulsive and continuous. Therefore, decibel addition will not be used to calculate Level A harassment zones during concurrent DTH pile installation activities. The Level A harassment zones for each DTH activity will be based on a single DTH hammer. To simplify implementation of Level A harassment zones for use of more than one vibratory hammer within a day and/or during simultaneous use of multiple vibratory hammers with overlapping isopleths, whether at a single site or multiple sites, Level A harassment zone sizes were calculated for the longest anticipated duration of the largest pile sizes that could be installed within a day. For example, if 18 42-inch steel pipe piles were installed with a vibratory hammer on a single day by multiple hammers with overlapping sound fields, the Level A harassment zone for each of the functional hearing groups likely to be present near the project area would remain smaller than 100 meters as shown in Table 21 with the largest Level A harassment zone being 81 m for harbor porpoises. However, it is highly unlikely that a harbor porpoise could accumulate enough sound from the installation of multiple piles in multiple locations for the duration required to meet the calculated Level A harassment threshold. Furthermore, installation of 18 42-inch steel pipe piles likely represents an unrealistic level of efficiency that will not be achieved in the field. Other combinations of pile sizes and numbers would result in Level A harassment zones smaller than 100 meters. To be precautionary, shutdown zones outlined in Table 21 for each species will be implemented for each vibratory hammer on days when it is anticipated that multiple vibratory hammers will be used, whether at a single or multiple sites. This mitigation measure would also minimize the need for onsite coordination among project sites and components.

TABLE 21—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS FOR INSTALLATION OF 42-INCH PILES BY MULTIPLE VIBRATORY HAMMERS

| Pile size/type | Minutes per pile (reduced by half) | Number of piles per day | Level A harassment isopleth distance (meters) | | | |
|---|---|---|---|---|---|---|
| | | | Cetaceans | | | Pinnipeds |
| | | | LF | MF | HF | PW |
| 42-inch Pipe, Steel | 15 | 18 | 55 | 5 | 81 | 33 |

**Note:** LF = Low-frequency; MF = Mid-frequency; HF = High frequency; PW = Phocids in water. Table does not stipulate the number of active vibratory hammers, as Level A effects are cumulative. The piles per day could be split between multiple hammers and not affect the size of Level A zones.

The size of the Level B harassment zone during concurrent operation of multiple vibratory hammers will depend on the combination of sound sources due to decibel addition of multiple hammers producing continuous noise. The distances to Level B harassment isopleths during simultaneous installation of piles using two or more vibratory hammers is shown in Table 22. As noted previously, pile installation often involves numerous stops and starts of the hammer for each pile. Therefore, decibel addition is applied only when the adjacent continuous sound sources experience overlapping sound fields, which generally requires close proximity of driving locations. Furthermore, it is expected to be a rare event when three or more 30-, 36-, or 42-inch piles are being installed simultaneously with vibratory hammers.

TABLE 22—DISTANCES TO LEVEL B HARASSMENT ISOPLETHS FOR MULTIPLE HAMMER ADDITIONS

| Combined SSL (dB) | Distance to level B isopleth (meters) |
|---|---|
| 164 | 8,577 |
| 165 | 10,000 |
| 166 | 11,659 |
| 167 | 13,594 |
| 168 | 15,849 |
| 169 | 18,478 |
| 170 | 21,544 |
| 171 | 25,119 |
| 172 | 29,286 |
| 173 | 34,145 |

*Marine Mammal Occurrence and Take Calculation and Estimation*

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. We describe how the information provided above is brought together to produce a quantitative take estimate.

Humpback Whale

While humpback whales are observed near the mouth of the Chesapeake Bay and the nearshore waters of Virginia during winter and spring months, they are relatively rare in the project area. Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Humpback whale sighting data collected by the U.S. Navy near Naval Station Norfolk and Virginia Beach from 2012 to 2015 (Table 22) (Engelhaupt *et al.* 2014, 2015, 2016) and in the mid-Atlantic (including the Chesapeake Bay) from 2015 to 2019 (Table 23) (Aschettino *et al.* 2015, 2016, 2017a, 2018, 2019) did not produce high enough sample sizes to calculate densities, or survey data were not collected during systematic line-transect surveys. However, humpback whale densities have been calculated for populations off the coast of New Jersey, resulting in a density estimate of 0.000130 animals per square kilometer or one humpback whale within the area (off the coast of New Jersey) on any given day of the year (Whitt *et al.* 2015). In the project area, a similar density may be expected, although the project area is much smaller. Aschettino *et al.* (2018) observed and tracked two individual humpback whales in the Hampton Roads (in the James River) area of the project area and over the 5-year project period (2015–2019), tracked 12 individual humpback whales west of the CBBT (Movebank 2020). Based on these data, and the known movement of humpback whales from November through April at the mouth of the Chesapeake Bay, HRCP requested two takes every month from May to October and three to four each month from November through April for the

duration of in-water pile installation and removal. NMFS concurs with the request and therefore, is proposing to authorize a total of 172 takes of humpback whales over the 5-year Project period (Table 24). The largest Level A harassment zone of 6,633 meters for LF cetaceans is associated with drilling with a DTH installation of 60-inch steel pipe piles (casings) (Table 17). It is unlikely but possible that a humpback whale could enter this area. Therefore, HRCP requested and NMFS is proposing to authorize eight humpback whale takes by Level A harassment (2 per year excluding Year 5), 35 Level B harassment takes each year for Years 1–4, and 24 Level B harassment takes for Year 5 (Table 24).

TABLE 23—SUMMARY OF INDIVIDUAL HUMPBACK WHALE SIGHTINGS BY MONTH FROM 2012 TO 2019 IN THE CHESAPEAKE BAY

| Month | Engelhaupt surveys | | | | Aschettino surveys | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 2012 | 2013 | 2014 | 2015 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
| January | ..... | 0 | 0 | 7 | 56 | 43 | 106 | 1 | 30 | 243 |
| February | ..... | 0 | 0 | 0 | 5 | 30 | 84 | 0 | 32 | 151 |
| March | ..... | ..... | ..... | 0 | 0 | 10 | 7 | 0 | 1 | 18 |
| April | ..... | 2 | 1 | 0 | 0 | ..... | ..... | ..... | 1 | 4 |
| May | ..... | 0 | 1 | 0 | 0 | 1 | ..... | ..... | 4 | 6 |
| June | ..... | ..... | 0 | ..... | ..... | ..... | ..... | ..... | ..... | 0 |
| July | ..... | 0 | 0 | 0 | ..... | ..... | ..... | 1 | ..... | 1 |
| August | ..... | 0 | ..... | 0 | ..... | ..... | ..... | ..... | ..... | 0 |
| September | 0 | 1 | 0 | ..... | ..... | ..... | ..... | ..... | ..... | 1 |
| October | 0 | 0 | 0 | ..... | ..... | ..... | 2 | ..... | ..... | 2 |
| November | 0 | 0 | 0 | ..... | ..... | 21 | 8 | 0 | ..... | 29 |
| December | ..... | ..... | 9 | ..... | 42 | 30 | 21 | 11 | ..... | 113 |
| Total | 0 | 3 | 11 | 7 | 103 | 135 | 228 | 13 | 68 | 568 |

**Source: Engelhaupt et al. 2014, 2015, 2016 (2012–2015 inshore survey data only; not dedicated humpback whale surveys); Aschettino et al. 2015, 2016, 2017a, 2018, 2019 (2015–2019). Monthly survey data from the 2019–2020 season have not been published; however, Aschettino et al. 2020b reported that during the 2019/2020 field season, which began 21 December 2019 and concluded 27 March 2020, resulted in 44 humpback whale sightings of 60 individuals.*

**Table 24 -- Summary of the Estimated Numbers of Humpback Whales Potentially Exposed to Level A and Level B Harassment Sound Levels per Month per Year**

| Year | Sept | Oct | Nov | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Level A | Level B | Annual Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Year 1 | 2 | 2 | 4 | 4 | 4 | 4 | 4 | 3 | 2 | 2 | 2 | 2 | 2 | 35 | 37 |
| Year 2 | 2 | 2 | 4 | 4 | 4 | 4 | 4 | 3 | 2 | 2 | 2 | 2 | 2 | 35 | 37 |
| Year 3 | 2 | 2 | 4 | 4 | 4 | 4 | 4 | 3 | 2 | 2 | 2 | 2 | 2 | 35 | 37 |
| Year 4 | 2 | 2 | 4 | 4 | 4 | 4 | 4 | 3 | 2 | 2 | 2 | 2 | 2 | 35 | 37 |
| Year 5 | 2 | 2 | 4 | 4 | 4 | 4 | 4 | - | - | - | - | - | | 24 | 24 |
| Monthly 5-Year Total | 10 | 10 | 20 | 20 | 20 | 20 | 20 | 12 | 8 | 8 | 8 | 8 | 8 | 164 | 172 |

Bottlenose Dolphin

The total estimated number of takes for bottlenose dolphins in the Project area was estimated using a combined approach of daily sighting rates and density methods from conventional line-transect vessel surveys near Naval Station Norfolk and adjacent areas near Virginia Beach, Virginia, from August 2012 through August 2015 (Engelhaupt *et al.* 2016).

HRCP estimated potential exposure using daily sighting data for areas west of the HRBT area and within the Core Monitoring Area (shown in Figure 11–1 in the LOA application) and used seasonal densities of bottlenose dolphins from Engelhaupt *et al.* (2016) for areas northeast of the HRBT Project and outside the Core Monitoring Area. The Core Monitoring Area will encompass the area south of the HRBT and north of the Hampton Roads Monitor-Merrimac Memorial Bridge-Tunnel (Interstate 664) with observers positioned at key areas to monitor the entire geographic area between the bridges. This is the area that will be ensonified during most of the pile installation and removal activities. Depending on placement, the observers will be able to view west/southwest towards Batten Bay and the mouth of the Nansemond River. The largest ensonified southwest radii extend to the south into the James and Nansemond rivers, areas where marine mammal abundance is anticipated to be low and approaching zero. Towards the northeast direction, the largest of the multiple hammer zones may reach beyond the Chesapeake Bay Bridge and Tunnel. However, concurrent vibratory installation of three or more 30-, 36-, or 42-inch piles will occur infrequently.

This approach also factored in the number of days of pile installation and removal, which is estimated to be 312 days per year for Years 1–4 and 181 days for Year 5. Due to the complex schedule and the inexact timeline in

which parts of the project may be completed ahead of or behind schedule, trying to quantify the exact number of days certain isopleths will be active for the purposes of take estimation is infeasible. However, these calculations reflect the best available data for the areas in and around the Project and represent a conservative estimate of potential exposure based on reasonable assumptions.

Sighting rates (numbers of dolphins per day) were determined for each of the four seasons from observations located in the inshore Chesapeake Bay zone (the Chesapeake Bay waters near Naval Station Norfolk) which were used to estimate potential exposure west of the project site and within the Core Monitoring Area. Sightings per season ranged from 5 in spring to 24 in fall while no bottlenose dolphins were sighted in the winter months in this inshore area (Table 25). Note that the winter sighting total of 0 was a result of truncating winter survey data to only include sighting data within the vicinity of the project location. Bottlenose dolphin abundance was highest in the fall, (24 sightings representing 245 individuals), followed by the spring ($n$ = 156), and summer ($n$ = 115). This data was utilized to calculate the number of dolphins per day that could be anticipated to occur in the project area during each season and year. The surveyed width for these surveys was two nautical miles, which encompasses the areas ensonified within the Core Monitoring Area during pile installation and removal (HDR-Mott MacDonald 2020). The number of anticipated days of in-water pile installation and removal for each month was multiplied by the average daily sighting rate estimate of the number of dolphins per month that could be exposed to project noise within the Core Monitoring Area. For the majority of piles being installed and/or removed, the ensonified area is constrained by surrounding land features and does not extend out into Chesapeake Bay. For piles with constrained sound fields, this method is sufficient to calculate potential exposure.

Table 25 depicts values in the average dolphins sighted per day column that are from within the Core Monitoring Area, which is smaller and closer to the river mouth. Values in the seasonal density column (individuals per km$^2$) are from outside the Core Monitoring Area which is farther out in the Bay and where there are likely to be more dolphins.

TABLE 25—AVERAGE DAILY SIGHTING RATES AND SEASONAL DENSITIES OF BOTTLENOSE DOLPHINS WITHIN THE PROJECT AREA

| Season | Number of sightings per season | Average number of dolphins sighted per day within core monitoring area | Seasonal density outside core monitoring area (individuals/km$^2$) |
|---|---|---|---|
| Spring, March–May | 5 | 17.33 | 1.00 |
| Summer, June–August | 14 | 16.43 | 3.55 |
| Fall, September–November | 24 | 27.22 | 3.88 |
| Winter, December–February | 0 | 0.00 | 0.63 |

*Source: Engelhaupt et al. 2016.*

For each month and year, the average area within the Level B harassment zones and outside the Core Monitoring Area was calculated and used to estimate potential exposure east of the project site and outside the Core Monitoring Area. The weighted average area within the relevant Level B harassment zones outside the Core Monitoring Area was used to calculate potential exposure or take of bottlenose dolphin for each month. The weighting incorporated the number of piles that produce the different zone sizes ensonified by each pile size/hammer/location. The number of piles with each different zone size was multiplied by its relevant ensonified area; those were then summed and the total was divided by the total number of piles.

For example, if there are 5 piles with a 20 km$^2$ Level B zone each and 2 piles with a 50 km$^2$ Level B zone, the formula would be:

((5 piles * 20 km$^2$/pile) + (2 piles * 50 km$^2$/pile))/(7 piles) = weighted average of 28.6 km$^2$.

The sum of potential exposures within the Core Monitoring Area (daily sighting rate method) and outside the Core Monitoring Area (density method for zones that extend into Chesapeake Bay) yields the total number of potential bottlenose dolphin exposures (Table 26) for each month and year.

BILLING CODE 3510–22–P

**Table 26 -- Monthly and Annual Estimated Exposures using Number/Day for Core Monitoring Area, and Density/km$^2$ for Areas Extending Outside the Core Monitoring Area into Chesapeake Bay**

| | Dec | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sept | Oct | Nov | Total Level A Takes | Total Level B Takes | Annual Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Dolphin density (#/km$^2$) | 0.63 | 0.63 | 0.63 | 1 | 1 | 1 | 3.55 | 3.55 | 3.55 | 3.88 | 3.88 | 3.88 | - | - | |
| Year 1 In CMA | 0 | 0 | 0 | 468 | 451 | 451 | 427 | 444 | 427 | 708 | 708 | 681 | 48 | 4,717 | 4,765 |
| Year 1 Out CMA | 476 | 428 | 953 | 539 | 539 | 539 | 1,914 | 1,022 | 1,022 | 2,989 | 2,980 | 2,963 | 164 | 16,198 | 16,362 |
| Year 2 In CMA | 0 | 0 | 0 | 468 | 451 | 451 | 427 | 444 | 427 | 708 | 708 | 681 | 48 | 4,715 | 4,763 |
| Year 2 Out CMA | 1,097 | 1,526 | 1,498 | 2,297 | 1,304 | 706 | 2,631 | 2,464 | 1,627 | 1,342 | 6,770 | 6,758 | 301 | 29,720 | 30,021 |
| Year 3 In CMA | 0 | 0 | 0 | 468 | 451 | 451 | 427 | 444 | 427 | 708 | 708 | 681 | 48 | 4,716 | 4,764 |
| Year 3 Out CMA | 2,070 | 2,090 | 1,537 | 240 | 1,622 | 1,622 | 0 | 0 | 5,122 | 0 | 0 | 14,058 | 306 | 30,256 | 30,562 |
| Year 4 In CMA | 0 | 0 | 0 | 468 | 451 | 451 | 427 | 444 | 427 | 708 | 708 | 681 | 48 | 4,716 | 4,764 |
| Year 4 Out CMA | 444 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 10,146 | 9,287 | 6,009 | 259 | 25,625 | 25,884 |
| Year 5 In CMA | 0 | 0 | 0 | 468 | 0 | 0 | 0 | 0 | 0 | 708 | 708 | 681 | 26 | 2,539 | 2,565 |
| Year 5 Out CMA | 0 | 267 | 227 | 360 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 9 | 843 | 852 |
| Monthly 5-Year Total | 4,086 | 4,311 | 4,216 | 7,976 | 5,267 | 4,669 | 6,254 | 5,260 | 9,479 | 18,016 | 22,576 | 33,192 | 1,257 | 124,045 | 125,302 |

BILLING CODE 3510–22–C

Level A harassment zones and areas are relatively small for bottlenose dolphins. The largest Level A harassment isopleth is 236 m for DTH pile installation of 60-inch steel pipe piles (casings) at the South Trestle and covers an area less than 0.18 km$^2$. Given the daily sightings rates shown in Table 24, and the small Level A harassment zones, HRCP and NMFS do not anticipate that bottlenose dolphins will

actually incur Level A harassment. However, because animals may enter into a PTS zone before being sighted, HRCP has requested authorization of Level A harassment for bottlenose dolphins as a precaution. Although NMFS does not agree that a brief sighting of a marine mammal within a Level A harassment zone calculated on the basis of accumulated energy necessarily means that the animal has experienced Level A harassment, we nevertheless propose to authorize take as requested by HRCP. HRCP assumed that approximately 1 percent of the total harassment exposures will be in the form of Level A harassment. HRCP has requested and NMFS is proposing to authorize 124,045 exposures by Level B harassment and 1,257 exposures by Level A harassment of bottlenose dolphins divided among the 5 project construction years (125,302 total exposures − 1,257 Level A harassment takes = 124,045 Level B harassment takes). However, due to the construction schedule, these takes will not occur equally during each year of the LOA. Year 3 of the LOA is expected to have 306 takes by Level A harassment and 30,256 takes by Level B harassment for a total of 30,562 proposed takes.

The total number of bottlenose dolphin takes by Level A and Level B harassment is expected to be split between three bottlenose dolphin stocks: Western North Atlantic Southern Migratory Coastal; Western North Atlantic Northern Migratory Coastal; and NNCES. There is insufficient data available to apportion the requested takes precisely to each of these three stocks present in the project area. Given that most of the NNCES stock are found in the Pamlico Sound Estuarine System, the Project will assume that no more than 200 of the requested takes will be from this stock during any given year. Since members of the Western North Atlantic Northern Migratory Coastal and Western North Atlantic Southern Migratory Coastal stocks are thought to occur in or near the Project area in greater numbers, HRCP will conservatively assume that no more than half of the remaining animals will belong to either of these stocks. Additionally, a subset of these takes would likely be comprised of Chesapeake Bay resident dolphins, although the size of that population is unknown. It is assumed that an animal will be taken once over a 24-hour period; however, the same individual may be taken multiple times over the duration of the project. Therefore, both the number of takes for each stock and the affected population percentages represent the maximum potential take numbers.

Harbor Porpoise

Harbor porpoises are rarely seen in the project area although they are known to occur in the coastal waters near Virginia Beach (Hayes *et al.* 2020). They have been sighted on rare occasions in the Chesapeake Bay closer to Norfolk. Density data does not exist for this species within the project area. Sighting data collected by the U.S. Navy near Naval Station Norfolk and Virginia Beach from 2012 to 2015 (Engelhaupt *et al.* 2014, 2015, 2016) did not produce high enough sample sizes to calculate densities. One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016).

HRCP estimated that one group of two harbor porpoises could be exposed to project-related underwater noise each month during the spring (March–May) for a total of 6 harbor porpoises takes (*i.e.,* 1 group of 2 individuals per month × 3 months per year = 6 harbor porpoises) per year for Years 1–4, and 4 harbor porpoise takes in Year 5.

The largest calculated Level A harassment zone for harbor porpoises extends 7,901 m from the noise source during DTH installation of 60-inch steel pipe piles (casings) at the South Trestle, for a harassment area of 102.16 $km^2$ (Table 17). However, HRCP has proposed a 100-meter shutdown zone for harbor porpoises. HRCP has requested small numbers of take by Level A harassment for harbor porpoises during the project. While NMFS does not agree that take by Level A harassment is likely, due to the duration of time a harbor porpoise would be required to remain within the Level A zone to accumulate enough energy to experience PTS, we nevertheless propose to authorize limited take as requested by HRCP. It is anticipated that 2 individuals may enter the Level A harassment zone during pile installation and removal each spring, for a total of 2 potential Level A harassment exposures per year. Therefore, NMFS is proposing to authorize 4 takes by Level B harassment each spring for Years 1–4 (6 total exposures − 2 Level A harassment takes = 4 Level B harassment takes). In Year 5, NMFS is proposing to authorize 2 takes by Level B harassment and 2 by Level A harassment.

Harbor Seal

HRCP estimated the expected number of harbor seals in the project area using systematic, land- and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from November 2014 through April 2019 (Rees *et al.* 2016; Jones *et al.* 2018; Jones and Rees 2020). The number of harbor seals sighted by month from 2014 through 2019, in the Chesapeake Bay waters, in the vicinity (lower Chesapeake Bay along the CBBT) of the Project, ranged from 0 to 170 individuals Table 27. During the months of June through October (Table 27 and Table 29) harbor seals are not anticipated to be present in the Chesapeake Bay.

TABLE 27—SUMMARY OF HISTORICAL HARBOR SEAL SIGHTINGS BY MONTH FROM 2014 TO 2019

| Month | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Monthly average |
|---|---|---|---|---|---|---|---|
| January | ..... | ..... | 33 | 120 | 170 | 7 | 82.5 |
| February | ..... | 39 | 80 | 106 | 159 | 21 | 81 |
| March | ..... | 55 | 61 | 41 | 0 | 18 | 43.8 |
| April | ..... | 10 | 1 | 3 | 3 | 4 | 4.2 |
| May | ..... | 3 | 0 | 0 | 0 | ..... | 0.8 |
| June | Seals not expected to be present. | | | | | ..... | 0 |
| July | Seals not expected to be present. | | | | | ..... | 0 |
| August | Seals not expected to be present. | | | | | ..... | 0 |
| September | Seals not expected to be present. | | | | | ..... | 0 |
| October | Seals not expected to be present. | | | | | ..... | 0 |
| November | 1 | 0 | 1 | 0 | 3 | ..... | 1.3 |

TABLE 27—SUMMARY OF HISTORICAL HARBOR SEAL SIGHTINGS BY MONTH FROM 2014 TO 2019—Continued

| Month | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Monthly average |
|---|---|---|---|---|---|---|---|
| December | 4 | 9 | 24 | 8 | 29 | ..... | 14.8 |

TABLE 28—HARBOR SEAL SURVEY EFFORT, TOTAL COUNT, MAX COUNT ON A SINGLE SURVEY DAY, AND THE AVERAGE NUMBER OF SEALS OBSERVED PER SURVEY DAY AT THE CBBT SURVEY AREA

| Field season | Number of survey days | Total seal count | Average daily seal count | Max daily seal count |
|---|---|---|---|---|
| 2014–2015 | 11 | 113 | 10 | 33 |
| 2015–2016 | 14 | 187 | 13 | 39 |
| 2016–2017 | 22 | 308 | 14 | 40 |
| 2017–2018 | 15 | 340 | 23 | 45 |
| 2018–2019 | 10 | 82 | 8 | 17 |
| Average | 14.4 | 186 | 13.6 | 34.8 |

TABLE 29—SUMMARY OF THE ESTIMATED NUMBERS OF HARBOR SEALS POTENTIALLY TAKEN BY LEVEL A AND LEVEL B HARASSMENT PER MONTH PER YEAR [1]

| Year | Nov | Dec | Jan | Feb | Mar | Apr | May | Level A | Level B | Annual total |
|---|---|---|---|---|---|---|---|---|---|---|
| Year 1 | 176.8 | 367.2 | 353.6 | 326.4 | 367.2 | 353.6 | 176.8 | 424 | 1,697 | 2,122 |
| Year 2 | 176.8 | 367.2 | 353.6 | 326.4 | 367.2 | 353.6 | 176.8 | 424 | 1,697 | 2,122 |
| Year 3 | 176.8 | 367.2 | 353.6 | 326.4 | 367.2 | 353.6 | 176.8 | 424 | 1,697 | 2,122 |
| Year 4 | 176.8 | 367.2 | 353.6 | 326.4 | 367.2 | 353.6 | 176.8 | 424 | 1,697 | 2,122 |
| Year 5 * | 176.8 | 367.2 | 353.6 | 326.4 | 367.2 | 0 | 0 | 318 | 1,273 | 1,591 |
| Monthly 5-Year Total | 884 | 1,836 | 1,768 | 1,632 | 1,836 | 1,414 | 707 | 2,015 | 8,062 | 10,077 |

[1] Harbor seals not expected June–October.

The estimated total number of harbor seals potentially exposed to in-water noise at harassment levels is 13.6 per day (the average of the 5-year average daily harbor seal count) (Table 28) for 156 days based on a 6-day work week from mid-November to mid-May. Seals are not expected to be present in the Chesapeake Bay from June through October. It is estimated that 13.6 harbor seals could be exposed per day to Project-related underwater noise for 156 days for a total of 2,122 exposures per year for Years 1–4. In Year 5, it is estimated that 1,591 harbor seals could be exposed to Project-related underwater noise from November through March (Table 29).

The largest Level A harassment isopleth associated with drilling with a DTH hammer of 60-inch steel pipe piles (casings) at the South Trestle for harbor seals is 3,550 meters (Table 17) with a Level A harassment zone of 27.12 $km^2$. It is possible that harbor seals could enter this or other Level A harassment zones undetected. While NMFS does not believe that take of harbor seals by Level A harassment is likely due to accumulated energy that would be required to experience injury, we nevertheless propose to authorize limited take as requested by HRCP. It is anticipated that up to 20 percent of the total exposures would be at or above the Level A harassment threshold. Therefore, HRCP has requested and NMFS proposes to authorize 1,697 takes by Level B harassment and 424 takes by Level A harassment for project years 1–4 and 1,273 Level B harassment takes and 318 Level A harassment takes of harbor seals for project year 5 (Table 29).

Gray Seal

Gray seals are expected to be very uncommon in the Project area. As described below, historical data indicate that approximately one gray seal has been seen per year in the Chesapeake Bay. Similar to the harbor seal, HRCP estimated the expected number of gray seals in the Project area using systematic, land- and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from 2014 through 2019 (Rees *et al.* 2016; Jones *et al.* 2018; Jones and Rees 2020). Gray seals are not expected to be present in the Chesapeake Bay during the months of March through December. Between 2015 and 2019 only three individual seals were observed, all in the month of February (*i.e.,* 2015, 2016 and 2018).

As a precautionary measure, HRCP assumed that there could be three gray seals taken by Level B harassment during each of the winter months (December through February). Therefore, HRCP requested and NMFS is proposing to authorize nine gray seal takes per year for years 1–4 (3 gray seals per month × 3 months per year = 9 gray seals) and 5 for project year five for a total of 41 takes of gray seals (Table 30). Given the size of the Level A harassment zones and potential for a gray seal to be present within the zone for sufficient duration to incur injury, nine takes by Level A harassment have also been requested (2 during years 1–4 and 1 during year 5). NMFS concurs with this assessment and is proposing to authorize seven takes by Level B harassment per year for years 1–4 (9 takes − 2 takes by Level A harassment = 7 takes by Level B harassment) and 4 takes for year 5 (5 total takes − 1 take by Level A harassment = 4 takes by Level B harassment). NMFS is also proposing to authorize 2 takes of gray seal per year by Level A harassment for years 1–4 and a single take for year 5.

Table 30 below summarizes proposed take numbers by species per project year while Table 31 describes the proposed authorized take for all the species described above as a percentage of stock abundance.

TABLE 30—ESTIMATED TAKE BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES

| Species | 2021 | | 2022 | | 2023 | | 2024 | | 2025 | | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Level A | Level B | Level A | Level B | Level A | Level B | Level A | Level B | Level A | Level B | |
| Humpback whale | 2 | 35 | 2 | 35 | 2 | 35 | 2 | 35 | 0 | 24 | 172 |
| Bottlenose dolphin | 212 | 20,915 | 349 | 34,435 | 354 | 34,972 | 307 | 30,341 | 35 | 3,382 | 125,302 |
| Harbor porpoise | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 4 | 2 | 2 | 30 |
| Harbor seal | 424 | 1,697 | 424 | 1,697 | 424 | 1,697 | 424 | 1,697 | 318 | 1,273 | 10,075 |
| Gray seal | 2 | 7 | 2 | 7 | 2 | 7 | 2 | 7 | 1 | 4 | 41 |

TABLE 31—MAXIMUM ANNUAL ESTIMATED TAKE BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE

| Species | Stock | Stock abundance | Level A harassment take | Level B harassment take | Percent of stock |
|---|---|---|---|---|---|
| Humpback Whale | Gulf of Maine | [b] 12,312 | 2 | 35 | 0.3 |
| Bottlenose Dolphin | WNA Coastal, Northern Migratory [a] | 6,639 | 175 | 17,386 | 264.5 |
| | WNA Coastal, Southern Migratory [a] | 3,751 | 175 | 17,386 | 468.2 |
| | NNCES [c] | 823 | 0 | 200 | 24.3 |
| Harbor Porpoise | Gulf of Maine/Bay of Fundy | 95,543 | 2 | 4 | <0.01 |
| Harbor Seal | Western North Atlantic | 75,834 | 424 | 1,697 | 2.8 |
| Gray Seal | Western North Atlantic | 451,531 | 2 | 7 | <0.01 |

[a] Take estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present would follow same probability of presence in the project area. Please see the Small Numbers section for additional information.
[b] West Indies DPS.
[c] Assumes multiple repeated takes of same individuals from small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see the Small Numbers section for additional information.

**Proposed Mitigation**

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

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

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned) the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In addition to the measures described later in this section, HRCP will employ the following mitigation measures:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;
- HRCP will conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For those marine mammals for which Level A or Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level A or Level B harassment zone; and
- If take reaches the authorized limit for an authorized species, pile installation/removal will shut down immediately if these species approach the Level A or Level B harassment zone to avoid additional take.

The following mitigation measures apply to HRCP's in-water construction activities.

*Time Restriction*

For pile driving, work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. Installation or removal of new piles will not commence after daylight hours.

*Shutdown Zones*

For all pile driving activities, HRCP will establish shutdown zones for a marine mammal species which correspond to the Level A harassment zones. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In some instances, however, large zone sizes will make it impossible to monitor the entirety of the Level A harassment zones.

During use of a single hammer the following measures will be employed by HRCP:

- A minimum 10-meter shutdown zone will be implemented for all species, pile sizes, and hammer types to prevent direct injury of marine mammals.
- A 15-meter shutdown zone will be implemented for seals to prevent direct injury.
- A 100-meter shutdown zone will be implemented for harbor porpoises when utilizing a DTH hammer and impact hammering to prevent direct injury.
- When the Level A harassment zone is larger than 50 meters, shutdown zones have been rounded up relative to the calculated Level A harassment zones as a precautionary measure. HRCP will also document the duration any animal spends within the Level A harassment zone.

When two or more vibratory hammers are in use HRCP will employ the following measures:

- A shutdown zone will be implemented for each species for each vibratory hammer on days when it is anticipated that multiple vibratory hammers will be used, whether at a single site or multiple sites.
- A 35-meter shutdown zone will be implemented for harbor seals and gray seals to prevent direct injury.
- An 85-meter shutdown zone will be implemented for harbor porpoise to prevent direct injury.
- A 55-meter shutdown zone will be implemented for humpback whales to prevent direct injury.

Calculated Level A harassment zones and shutdown zones for each activity and pile size and type are depicted in Table 32 and Table 33. Note that shutdown zones in Table 33 include a 7 dB reduction due to the use of bubble curtains. Compare shutdown zones in Table 32 with Level A harassment zones contained in Tables 16, 17 and 18. Under some pile driving scenarios, the Level A harassment zones are larger than the specified shutdown zones.

TABLE 32—SHUTDOWN ZONES WITH NO ATTENUATION FOR ALL SPECIES

| Method | Pile size and type | Minutes (min) per pile or strikes per pile | Number of piles installed or removed per day | Level A harassment isopleth distance (meters) | | | |
|---|---|---|---|---|---|---|---|
| | | | | Cetaceans | | | Pinnipeds |
| | | | | LF | MF | HF | |
| Vibratory Installation and Removal | 24-inch Pipe, Steel | 15 min | 6 | [1]10/55 | 10 | [2]14/85 | [3]15/35 |
| | | | | | | 15/55 | 21/85 |
| | 30-inch Pipe, Steel, Concrete Filled | 30 min | 6 | 36/55 | | 60/85 | |
| | 36-inch Pipe, Steel | 2.5 min | 8 | 10/55 | | 13/85 | |
| | | 2.5 min | 16 | 14/55 | | 20/85 | |
| | | 25 min | 1 | 10/55 | 15/85 | | |
| | | | 2 | 16/55 | | 23/85 | |
| | | | 3 | 20/55 | | 30/85 | |
| | | 30 min | 2 | 18/55 | | 26/85 | |
| | 42-inch Pipe, Steel | 15 min | 6 | 27/55 | | 39/85 | |
| | Sheet, Steel | 15 min | 10 | 11/55 | | 16/85 | |
| | 16-inch CCA, Timber | 15 min | 4 | 10/55 | | 12/85 | |
| Jetting | 42-inch Pipe, Steel | 15 min | 1 | 10 | | 10 | |
| Down-the-Hole Installation | 30-inch Pipe, Steel, Concrete Filled | 36,000 strikes* | 6 | 1,950 | 70 | 100 | |
| | 36-inch Pipe, Steel | | 2 | 940 | 34 | | |
| | 60-inch Pipe, Steel | | 3 | 6,640 | 240 | | |
| Impact Installation | 24-inch Pipe, Steel | 20 strikes | 6 | 100 | 10 | | |
| | 30-inch Pipe, Steel, Concrete Filled | | | 390 | 14 | | |
| | 36-inch Pipe, Steel | | 2 | 120 | 10 | | |
| | 36-inch Pipe, Steel | | 3 | 160 | 10 | | |
| | 24-inch Pipe, Concrete Square | 1,050 strikes | 1 | 80 | 10 | | |
| | 54-inch Pipe, Concrete Cylinder | | | 420 | 15 | | |

[1] A 55-meter shutdown zone will be implemented for humpback whales during concurrent vibratory driving of two or more hammers.
[2] A 85-meter shutdown zone will be implemented for harbor porpoise during concurrent vibratory driving of two or more hammers.
[3] A 35-meter shutdown zone will be implemented for harbor seals and gray seals during concurrent vibratory driving of two or more hammers.

TABLE 33—SHUTDOWN ZONES WITH ATTENUATION FOR ALL SPECIES

| Method | Pile size and type | Strikes per pile | Number of piles per day | Level A harassment isopleth distance (meters) | | | |
|---|---|---|---|---|---|---|---|
| | | | | Cetaceans | | | Pinnipeds |
| | | | | LF | MF | HF | PW |
| Impact Installation | 24-inch Pipe, Steel | 20 strikes | 6 | 33 | 10 | 40 | 18 |
| | 30-inch Pipe, Steel, Concrete Filled. | | | 140 | 10 | 160 | 80 |
| | 36-inch Pipe, Steel | 20 strikes | 2 | 40 | 10 | 48 | 22 |

*Protected Species Observers*

The placement of protected species observers (PSOs) during all pile driving and removal activities (described in the Proposed Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile driving and removal. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected. However, if work on a pile has already begun, work is allowed to continue until that pile is installed.

*Establishment of Level A and Level B Harassment Zones*

HRCP will establish monitoring zones based on calculated Level A harassment isopleths associated with specific pile driving activities and scenarios. These are areas beyond the established shutdown zones in which animals could be exposed to sound levels that could result in Level A harassment in the form of PTS. HRCP will also establish and monitor Level B harassment zones which are areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and 120 dB rms threshold during vibratory driving and DTH pile installation.

The Level A and Level B harassment monitoring zones are given in Tables 16–19.

*Monitoring for Level B Harassment*

HRCP will monitor the Level B harassment zones to the extent practicable, as well as Level A harassment zones extending beyond shutdown zones. HRCP will monitor at least a portion of the Level B harassment zone on all pile driving days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

*Bubble Curtains*

Use of air bubble curtain systems will be implemented by HRCP during impact driving of steel piles except in situations where the water depth is less than 20 ft in depth. The use of this sound attenuation device will reduce SPLs and the size of the zones of influence for Level A harassment and Level B harassment. Bubble curtains will meet the following requirements:

- The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column.
- The lowest bubble ring shall be in contact with the mudline and/or rock bottom for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline and/or rock bottom contact. No parts of the ring or other objects shall prevent full mudline and/or rock bottom contact.
- The bubble curtain shall be operated such that there is proper (equal) balancing of air flow to all bubblers.
- The applicant shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers and corrections to the attenuation device to meet the performance standards. This shall occur prior to the initiation of pile driving activities.

*Soft-Start*

The use of soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, HRCP will be required to provide an initial set of strikes from the hammer at reduced energy, with each strike followed by a 30-second waiting period. This procedure will be conducted a total of three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft start is not required during vibratory or DTH pile driving activities.

If a marine mammal is present within the shutdown zone, ramping up will be delayed until the PSO has determined, through sighting, that the animal(s) has moved outside the shutdown zone. If a marine mammal is present in the Level A or Level B harassment zone, ramping up may begin and a Level A or Level B harassment take will be recorded. If a marine mammal is present in the Level A or Level B harassment zone, HRCP may elect to delay ramping up to avoid a Level A or Level B harassment take. To avoid a take by Level A or Level B harassment, ramping up will begin only after the PSO has determined, through sighting, that the animal(s) has moved outside the corresponding Level A or Level B harassment zone or 15 minutes have passed.

*Pre-Activity Monitoring*

Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. If the Level A and Level B harassment zones have been observed for 30 minutes and non-permitted species are not present within the zone, soft start procedures can commence and work can continue even if visibility becomes impaired within the Level A or Level B harassment monitoring zones. When a marine mammal permitted for take by Level A or Level B harassment is present in the Level A or Level B harassment zone, activities may begin and Level A or Level B harassment take will be recorded as appropriate. If work ceases for more than 30 minutes, the pre-activity monitoring of both the Level B harassment and shutdown zone will commence again. Additionally, in-water construction activity must be delayed or cease, if poor environmental conditions restrict full visibility of the shut-down zone(s) until the entire shut-down zone(s) is visible.

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

**Proposed Monitoring and Reporting**

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. NMFS' MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104 (a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals. Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).

- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

HRCP will submit a Marine Mammal Monitoring Plan which must be approved by NMFS in advance of the start of construction.

*Visual Monitoring*

Marine mammal monitoring during pile driving and removal must be conducted by PSOs in a manner consistent with the following:

- Independent PSOs (*i.e.,* not construction personnel) who have no other assigned tasks during monitoring periods must be used;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience;
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction; and
- HRCP must submit PSO Curriculum Vitae for approval by NMFS prior to the onset of pile driving.

PSOs must have the following additional qualifications:

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

PSOs will be positioned at the best practical vantage point(s). The position(s) may vary based on construction activity and location of piles or equipment. At least one of the monitoring locations will have an unobstructed view of the pile being driven, and an unobstructed view of the Level A shutdown and Level B harassment zones, Core Monitoring Area, as well as the 100-meter shutdown zone.

Between one and four PSOs will be stationed at locations offering the best available views of the Level A and Level B harassment monitoring zones during in-water pile installation and removal, depending on where active in-water work is taking place. It is anticipated that a PSO will observe from the North Island when in-water pile installation is occurring at the North Island and North Trestle. If the view field is adequate, Level A and Level B harassment zones may be monitored for multiple pile driving locations by the same individual PSO. Two PSOs will be located at the South Island, where they will monitor for marine mammals passing into and out of the Core Monitoring Area as well as monitor the active hammer sites. This location also provides good views to the east for monitoring when zones extend beyond the Core Monitoring Area into Chesapeake Bay. One PSO will be stationed on Willoughby Spit or a similar location that offers the best available views of the Level A and Level B harassment monitoring zones during in-water pile installation and removal within Willoughby Bay. Finally, on days when use of multiple hammers is planned and it is anticipated that the Level B harassment isopleth will encompass the CBBT, a PSO will be located on one of the CBBT Portal Islands to monitor the extended ensonified area. A central position will generally be staffed by the lead PSO, who will monitor the shutdown zones and communicate with construction personnel about shutdowns and take management. PSOs at the pile installation and removal locations will be able to see at least a radius around the construction site that exceeds the largest Level A harassment zone. PSOs will watch for marine mammals entering and leaving the James River and will alert the lead PSO of the number and species sighted, so that no unexpected marine mammals will approach the construction site. This will minimize Level A harassment take of all species.

Decibel addition is not a consideration when sound fields do not overlap at the sound sources. Willoughby Bay is largely surrounded by land, and sound will be prevented from propagating to other Project construction sites. Therefore, Willoughby Bay will be treated as an independent site with its own monitoring and shutdown zones, as well as observer requirements when construction is taking place within the bay. The Bay is relatively small and will be monitored from the construction site by one to two observers.

*Reporting*

HRCP would submit an annual draft report for each construction year to NMFS within 90 calendar days of the completion of marine mammal monitoring. A final annual report will be prepared and submitted to NMFS within 30 days following receipt of comments on the draft report from NMFS.

The report will detail the monitoring protocol and summarize the data recorded during monitoring. Specifically, the report must include

- Dates and times (begin and end) of all marine mammal monitoring.
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory).
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance).
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.
- Age and sex class, if possible, of all marine mammals observed.
- PSO locations during marine mammal monitoring.
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).
- Description of any marine mammal behavior patterns during observation, including direction of travel and

estimated time spent within the Level A and Level B harassment zones while the source was active.

- Number of marine mammals detected within the harassment zones, by species.
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.

If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, HRCP shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, HRCP must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. HRCP must not resume their activities until notified by NMFS.

The report must include the following information:

i. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

ii. Species identification (if known) or description of the animal(s) involved;

iii. Condition of the animal(s) (including carcass condition if the animal is dead);

iv. Observed behaviors of the animal(s), if alive;

v. If available, photographs or video footage of the animal(s); and

vi. General circumstances under which the animal was discovered.

**Negligible Impact Analysis and Determination**

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in Table 31, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment, identified above, while activities are underway. No serious injury or mortality would be expected even in the absence of the proposed mitigation measures.

A limited number of animals could experience Level A harassment in the form of PTS if they remain within the Level A harassment zone long enough during certain impact driving scenarios. However, the number of animal affected and the degree of injury is expected to be limited to, at most, mild PTS. Furthermore, the reproduction or survival of the individual animals is not likely to affected. It is expected that, if hearing impairments occurs, most likely the affected animal would lose a few dB in its hearing sensitivity, which in most cases is not likely to affect its survival and recruitment.

HRCP's proposed pile driving activities and associated impacts will occur within a limited portion of the confluence of the Chesapeake Bay area. Localized noise exposures produced by project activities may cause short-term behavioral modifications in affected cetaceans and pinnipeds. However, as described previously, the mitigation and monitoring measures are expected to further reduce the likelihood of injury as well as reduce behavioral disturbances.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff 2006). Individual animals, even if taken multiple times, will most likely move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted along the Atlantic coast, which have taken place with no known long-term adverse consequences from behavioral harassment. Furthermore, many projects similar to this one are also believed to result in multiple takes of individual animals without any documented long-term adverse effects. Level B harassment will be minimized through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is located on a busy waterfront with high amounts of vessel traffic.

As previously described, UMEs have been declared for Northeast pinnipeds (including harbor seal and gray seal) and Atlantic humpback whales. However, we do not expect takes proposed for authorization in this action to exacerbate or compound upon these ongoing UMEs. As noted previously, no injury, serious injury, or mortality is expect or proposed for authorization,

and Level A and Level B harassment takes of humpback whale, harbor seal and gray seal will be reduced to the level of least practicable adverse impact through the incorporation of the proposed mitigation measures. For the WNA stock of gray seal, the estimated stock abundance is 451,431 animals, including the Canadian portion of the stock (estimated 27,131 animals in the U.S. portion of the stock). Given that only 7 takes by Level B harassment and two takes by Level A harassment are proposed for this stock annually, we do not expect this proposed authorization to exacerbate or compound upon the ongoing UME.

With regard to humpback whales, the UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.,* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.,* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.,* 12,312 (95 percent CI 8,688–15,954) whales in 2004–05 (Bettridge *et al.* 2003)), and appears to be experiencing consistent growth. Further, NMFS is proposing to authorize no more than 35 takes by Level B harassment annually of humpback whale.

For the WNA stock of harbor seals, the estimated abundance is 75,834 individuals. The estimated M/SI for this stock (350) is well below the PBR (2,006). As such, the proposed Level B harassment takes of harbor seal are not expected to exacerbate or compound upon the ongoing UMEs.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities will not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the relatively small area of the habitat that may be affected (with no known particular importance to marine mammals), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences. Furthermore, there are no known biologically important areas (BIAs), ESA-designated critical habitat, rookeries, or features of special significance for foraging or reproduction.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Authorized Level A harassment would be limited and of low degree;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks;
- The number of anticipated takes is very low for humpback whale, harbor porpoise, and gray seal;
- The specified activity and associated ensonifed areas are very small relative to the overall habitat ranges of all species and do not include habitat areas of special significance;
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

**Small Numbers**

As noted above, only small numbers of incidental take may be authorized under section 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The maximum annual take of take of humpback whale, harbor porpoise, harbor seal, and gray seal comprises less than one-third of the best available stock abundance estimate for each of these stocks (Table 31). The maximum number of animals authorized to be taken from these stocks would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

Three bottlenose dolphin stocks could occur in the project area: WNA Coastal Northern Migratory, WNA Coastal Southern Migratory, and NNCES stocks. Therefore, the estimated takes of bottlenose dolphin by Level B harassment would likely be portioned among these stocks. Based on the stocks' respective occurrence in the area, NMFS estimated that there would be no more than 200 takes from the NNCES stock each year over the five-year period, with the remaining takes evenly split between the northern and southern migratory coastal stocks. Based on consideration of various factors described below, we have determined the maximum number of individuals taken per year would likely comprise less than one-third of the best available population abundance estimate of either coastal migratory stock.

Both the WNA Coastal Northern Migratory and WNA Coastal Southern Migratory stocks have expansive ranges and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these stocks it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The WNA Coastal Northern Migratory stock

occurs during warm water months from coastal Virginia, including the Chesapeake Bay to Long Island, New York. The stock migrates south in late summer and fall. During cold-water months, dolphins may occur in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia border. During January-March, the WNA Coastal Southern Migratory stock appears to move as far south as northern Florida. From April to June, the stock moves back north to North Carolina. During the warm water months of July-August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of its mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Chesapeake Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~two months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur to only a small portion of either of the migratory coastal stocks.

Both migratory coastal stocks likely overlap with the NNCES stock at various times during their seasonal migrations. The NNCES stock is defined as animals that primarily occupy waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July-August). Animals from this stock also use coastal waters (≤1 km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. Comparison of dolphin photo-identification data confirmed that limited numbers of individual dolphins observed in Roanoke Sound have also been sighted in the Chesapeake Bay (Young, 2018). Like the migratory coastal dolphin stocks, the NNCES stock covers a large range. The spatial extent of most small and resident bottlenose dolphin populations is on the order of 500 $km^2$, while the NNCES stock occupies over 8,000 $km^2$ (LeBrecque *et al.,* 2015). Given this large range, it is again unlikely that a preponderance of animals from the NNCES stock would depart the North Carolina estuarine system and travel to the northern extent of the stock's range. However, recent evidence suggests that there is likely a small resident community of NNCES dolphins of indeterminate size that inhabits the Chesapeake Bay year-round (E. Patterson, NMFS, pers. comm.).

Many of the dolphin observations in the Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (J. Mann, Potomac-Chesapeake Dolphin Project, pers. comm.). Similarly, using available photo-identification data, Engelhaupt *et al.* (2016) determined that specific individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 km from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by Level B harassment. Furthermore, the existence of a resident dolphin population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals in any given year.

In summary and as described above, the following factors primarily support our determination regarding the incidental take of small numbers of the affected stocks of bottlenose dolphin:

- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of any one stock concentrated in a relatively small area such as the project area or the Chesapeake Bay;
- The Chesapeake Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries; and
- Many of the takes would likely be repeats of the same animals and likely from a resident population of the Chesapeake Bay.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

**Unmitigable Adverse Impact Analysis and Determination**

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

**Adaptive Management**

The regulations governing the take of marine mammals incidental to HRCP construction activities would contain an adaptive management component. The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from HRCP regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

**Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we

propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

**Request for Information**

NMFS requests interested persons to submit comments, information, and suggestions concerning HRCP's request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare a final rule and make final determinations on whether to issue the requested authorization. This notice and referenced documents provide all environmental information relating to our proposed action for public review.

**Classification**

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant. Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. HRCP is the sole entity that would be subject to the requirements in these proposed regulations, and HRCP is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

**List of Subjects in 50 CFR Part 217**

Administrative practice and procedure, Alaska, Endangered and threatened species, Exports, Fish, Imports, Indians, Labeling, Marine mammals, Oil and gas exploration, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation, Wildlife.

Dated: December 29, 2020.

**Samuel D. Rauch, III,**

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

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

## PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 217 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart W to read as follows:

### Subpart W—Taking and Importing Marine Mammals Incidental to Hampton Roads Connector Partners Construction at Norfolk, Virginia

Sec.



### Subpart W—Taking and Importing Marine Mammals Incidental to Hampton Roads Connector Partners Construction at Norfolk, Virginia

#### § 217.20 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the Hampton Roads Connector Partners (HRCP) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at the Hampton Roads Bridge Tunnel Expansion Project (HRBT).

(b) The taking of marine mammals by HRCP may be authorized in a Letter of Authorization (LOA) only if it occurs at the Hampton Roads Bridge Tunnel Expansion project location.

#### § 217.21 Effective dates.

Regulations in this subpart are effective from [EFFECTIVE DATE OF THE FINAL RULE] to [DATE 5 YEARS AFTER EFFECTIVE DATE OF THE FINAL RULE].

#### § 217.22 Permissible methods of taking.

(a) Under an LOA issued pursuant to §§ 216.106 of this chapter and 217.26, the Holder of the LOA (hereinafter ''HRCP'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.20(b) by Level A and Level B harassment associated with construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

(b) [Reserved]

#### § 217.23 Prohibitions.

(a) Except for the takings contemplated in § 217.22 and authorized by an LOA issued under §§ 216.106 of this chapter and 217.26, it is unlawful for any person to do any of the following in connection with the activities described in § 217.20:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.26;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

#### § 217.24 Mitigation requirements.

(a) When conducting the activities identified in § 217.20(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.26 must be implemented. These mitigation measures shall include but are not limited to:

(1) A copy of any issued LOA must be in the possession of HRCP, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) HRCP shall conduct briefings for construction supervisors and crews, the monitoring team, and HRCP staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine

mammal monitoring protocol, and operational procedures.

(3) For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 meters (m), HRCP shall cease operations and reduce vessel speed to the minimum level required to maintain steerage and safe working conditions.

(4) For all pile driving activity, HRCP shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(5) For all pile driving activity, HRCP shall implement shutdown zones with radial distances as identified in a LOA issued under §§ 216.106 of this chapter and 217.26. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(6) HRCP deploy protected species observers (observers or PSOs) as indicated in its Marine Mammal Monitoring Plan approved by NMFS.

(7) For all pile driving activities, between one and four observers shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures.

(8) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior shall be monitored and documented. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. Monitoring shall occur throughout the time required to drive a pile. If in-water pile installation and removal work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

(9) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. In the event of a delay, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal.

(10) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

(11) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), HRCP shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected.

(12) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. HRCP shall adhere to the following additional observer qualifications:

(i) Independent observers are required;

(ii) At least one observer must have prior experience working as an observer;

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience;

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and

(v) HRCP must submit PSO CVs for approval by NMFS prior to the beginning of pile driving and drilling.

(13) HRCP shall use soft start techniques for impact pile driving. Soft start for impact driving requires HRCP and those persons it authorizes to provide an initial set of three strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

(14) HRCP shall employ bubble curtain systems during impact driving of steel piles except under conditions where the water depth is less than 20 feet in depth. Bubble curtains must meet the following requirements:

(i) The bubble curtain must distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column.

(ii) The lowest bubble ring must be in contact with the mudline and/or rock bottom for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline and/or rock bottom contact. No parts of the ring or other objects shall prevent full mudline and/or rock bottom contact.

(iii) The bubble curtain must be operated such that there is proper (equal) balancing of air flow to all bubblers.

(iv) HRCP shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers and corrections to the attenuation device to meet the performance standards. This shall occur prior to the initiation of pile driving activities.

(b) [Reserved]

**§ 217.25 Requirements for monitoring and reporting.**

(a) HRCP shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) HRCP shall deploy observers as indicated in its approved Marine Mammal Monitoring Plan.

(c) Observers shall be trained in marine mammal identification and behaviors. Observers shall have no other construction-related tasks while conducting monitoring.

(d) HRCP shall monitor the Level B harassment zones and Level A harassment zones extending beyond the designated shutdown zones to the extent practicable.

(e) HRCP shall monitor the shutdown zones during all pile driving and removal activities.

(f) HRCP shall submit a draft annual monitoring report to NMFS within 90 work days of the completion of annual marine mammal monitoring. The report must detail the monitoring protocol and summarize the data recorded during monitoring. If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. Specifically, the report must include:

(1) Dates and times (begin and end) of all marine mammal monitoring.

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory).

(3) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance).

(4) The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.

(5) Age and sex class, if possible, of all marine mammals observed.

(6) PSO locations during marine mammal monitoring.

(7) Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).

(8) Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active.

(9) Number of marine mammals detected within the harassment zones, by species.

(10) Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.

(11) Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.

(g) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, HRCP shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, HRCP must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. HRCP must not resume their activities until notified by NMFS. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

### § 217.26 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to the regulations in this subpart, HRCP must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of the regulations in this subpart.

(c) If an LOA expires prior to the expiration date of the regulations in this subpart, HRCP may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, HRCP must apply for and obtain a modification of the LOA as described in § 217.27.

(e) The LOA shall set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the regulations in this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within thirty days of a determination.

### § 217.27 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations in this subpart; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under the regulations in this subpart were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations in this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) may be modified by NMFS under the following circumstances:

(1) HRCP may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with NMFS regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the regulations in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from HRCP's monitoring from previous years.

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by the regulations in this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to §§ 216.106 of this chapter and 217.26, a LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

### §§ 217.28–217.29 [Reserved]

[FR Doc. 2020–29125 Filed 1–7–21; 8:45 am]

BILLING CODE 3510–22–P


# FEDERAL REGISTER

Vol. 86 Friday,
No. 5 January 8, 2021

Part III

## Federal Communications Commission

47 CFR Part 51
Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services; Final Rule

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 51**

**[WC Docket No. 19–308; FCC 20–152; FRS 17221]**

## Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission eliminates unbundling requirements, subject to reasonable transition periods, for enterprise-grade DS1 and DS3 loops here there is evidence of actual and potential competition, for broadband-capable DS0 loops and subloops in the most densely populated areas, for operations support systems nationwide except for the purposes of managing remaining UNEs, number portability, and interconnection, and for voice-grade narrowband loops, multiunit premises subloops, and network interface devices nationwide. The Commission preserves unbundling requirements for DS0 loops in less densely populated areas and DS1 and DS3 loops in areas without sufficient evidence of competition. The Commission further eliminates unbundled dark fiber transport provisioned from wire centers within a half-mile of competitive fiber networks, but provides an eight-year transition period for existing circuits so as to avoid stranding investment and last-mile deployment by competitive LECs that may harm consumers. The *Report and Order* also forbears from remaining Avoided-Cost Resale obligations. In all, the Commission ends unbundling and resale requirements where they stifle technology transitions and broadband deployment, but preserves unbundling requirements where they are still necessary to realize the 1996 Act's goal of robust intermodal competition benefiting all Americans.

**DATES:** Effective February 8, 2021.

**FOR FURTHER INFORMATION CONTACT:** For further information, please contact Megan Danner, Competition Policy Division, Wireline Competition Bureau, at *Megan.Danner@fcc.gov,* 202.418.1151.

**SUPPLEMENTARY INFORMATION:** The full text of this document, WC Docket No. 19–308; FCC 20–1522, adopted on October 27, 2020, and released on October 28, 2020, is available for public inspection on the Commission's website at: *https://docs.fcc.gov/public/attachments/FCC-20-152A1.pdf.*

### I. Introduction

1. The Telecommunications Act of 1996 (the 1996 Act) changed the focus of telecommunications law and policy from the regulation of monopolies to the encouragement of robust intermodal competition. Few of its effects were as consequential as ending the local exchange monopolies held by incumbent local exchange carriers (LECs) and opening local markets to competition. To facilitate new entry into the local exchange market, the 1996 Act imposed special obligations on incumbent LECs, including requirements to offer these new competitive carriers unbundled network elements and retail telecommunications services for resale, both on a rate-regulated basis.

2. In the nearly quarter-century since the passage of the 1996 Act, the telecommunications marketplace has transformed from a marketplace dominated by monopolies to a marketplace characterized by competition and technological innovation. Former monopolist incumbent LECs are now one of many intermodal competitors, facing fierce competition from competitive LECs, cable providers, and wireless providers, among others. And that competition has itself shifted from siloed markets to the internet, as increasingly local and long distance voice, data, video, and nearly all communications technologies are delivered via broadband connections. The Commission has repeatedly adjusted the incumbent LEC-specific obligations in the 1996 Act to account for changed circumstances.

3. In this document, we continue on that path of modernizing our unbundling and resale regulations. We eliminate unbundling requirements, subject to a reasonable transition period, for enterprise-grade DS1 and DS3 loops where there is evidence of actual and potential competition, for broadband-capable DS0 loops in the most densely populated areas, and for voice-grade narrowband loops nationwide. But we preserve unbundling requirements for DS0 loops in less densely populated areas and DS1 and DS3 loops in areas without sufficient evidence of competition. We eliminate unbundled dark fiber transport provisioned from wire centers within a half-mile of competitive fiber networks, but provide an eight-year transition period for existing circuits so as to avoid stranding investment and last-mile deployment by competitive LECs that may harm consumers. In all, we end unbundling and resale requirements where they stifle technology transitions and broadband deployment, but preserve unbundling requirements where they are still necessary to realize the 1996 Act's goal of robust intermodal competition benefiting all Americans.

### II. Background

4. The 1996 Act and implementing Commission regulations imposed a number of obligations on incumbent LECs to promote competitive entry into the telecommunications marketplace, including obligations to unbundle network elements to other carriers on a rate-regulated basis and to offer telecommunications services for resale on a rate-regulated basis. In the 24 years since the passage of the 1996 Act, the Commission has continually reviewed and, when warranted, reduced incumbent LEC unbundling and resale obligations to encourage competition and development of advanced telecommunications capability within the changing communications marketplace. The Commission has consistently aimed to promote sustainable facilities-based competition, recognizing that permanent unbundling obligations can reduce incentives for both incumbent and competitive LECs to deploy next-generation networks.

#### *A. The 1996 Act's Market-Opening Provisions*

5. Before the enactment of the 1996 Act, incumbent LECs controlled more than 99% of the local voice marketplace because of their ''virtually ubiquitous'' networks and subsequently low relative incremental costs. To open this monopolized market, Congress required, among other things, incumbent LECs to offer their competitors unbundled network elements and telecommunications services for resale on a discounted basis.

6. *Unbundled Network Elements.* Section 251(c)(3) of the Communications Act of 1934, as amended (the Act) sets forth incumbent LECs' unbundling obligations. Following Congress's directive that the Commission determine which network elements should be subject to the unbundling rules, the Commission created a list of unbundled network elements (UNEs) that competitive LECs can lease from incumbent LECs in order to provide competitive local service. When identifying network elements subject to unbundling obligations, section 251(d)(2) requires that the Commission consider, ''at a minimum,'' whether ''the failure to provide access to such network elements would impair the ability of the telecommunications

carrier seeking access to provide the services that it seeks to offer.'' The statute also requires that the Commission determine whether access to proprietary network elements is ''necessary.'' However, the Commission does not currently require incumbent LECs to make any proprietary network elements available on an unbundled basis. The identified UNEs were then to be made available at cost-based rates. Parties may negotiate agreed-upon rates for UNEs, which the state must then approve. If the parties cannot come to an agreement, the rates are set by state arbitration and will be ''based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element'' and ''may include a reasonable profit.''

7. The impairment inquiry considers whether a hypothetical ''reasonably efficient competitor'' would be impaired when lack of access to a particular network element creates a barrier to entry that renders entry uneconomic. The Commission presumes that the reasonably efficient competitor would use ''reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible.'' The impairment inquiry makes reasonable inferences about competition, including that if competitive providers have successfully entered using their own facilities in one market, other providers could enter similar markets on a similar basis. The Commission's impairment determinations account for the existence of intermodal competition, as ''[t]he fact that an entrant has deployed its own facilities—regardless of the technology chosen—may provide evidence that any barriers to entry can be overcome.'' Furthermore, the courts and the Commission have interpreted section 251(d)(2)'s ''at a minimum'' language to allow the Commission to consider other factors ''rationally related to the goals of the Act,'' even where impairment exists. The Commission has identified broadband deployment, as called for by section 706 of the 1996 Act, as one such goal.

8. When first implementing section 251(d)(2) and adopting the unbundling requirements, the Commission acknowledged that the availability of UNEs to competitive LECs ''is a necessary precondition to the development of self-provisioned network facilities.'' Consistent with its preference for facilities-based competition, the Commission expected UNEs to provide competitors a means to enter the local marketplace in order to obtain a sufficient subscriber base and revenue to support the development of their own competitive facilities. The Commission also recognized that rural areas face higher deployment costs and longer deployment timeframes.

9. *Avoided-Cost Resale.* In addition to unbundling obligations, section 251 includes an Avoided-Cost Resale provision that requires incumbent LECs to ''offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.'' Congress defined the methodology to determine wholesale rates as ''retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.'' As a practical matter, incumbent LECs implement this Avoided-Cost Resale obligation by incorporating in their interconnection agreements with competitive LECs discounted rates established by each state for the incumbent LECs' telecommunications services. The Avoided-Cost Resale obligations in section 251(c)(4) go beyond the more general resale requirement in section 251(b)(1) of the Act, which applies to incumbent and competitive LECs alike, and does not include a wholesale discount rate mandate. Avoided-Cost Resale services are predominately used by competitive LECs today to provision legacy TDM voice services to business and government customers.

10. *Forbearance.* Section 10 of the Act, as amended by the 1996 Act, requires the Commission to forbear from applying any requirement of the Act or one of its regulations to a telecommunications carrier or telecommunications service if and only if the Commission determines that: (1) Enforcement of the requirement ''is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory,'' (2) enforcement of that requirement ''is not necessary for the protection of consumers,'' and (3) ''forbearance from applying that requirement is consistent with the public interest.'' Forbearance is warranted only if all three criteria are satisfied. In making the public interest determination, the Commission must also consider, pursuant to section 10(b) of the Act, ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.''

11. The Commission has broad discretion in analyzing whether the forbearance criteria have been satisfied, and ''the agency [may] reasonably interpret[] the statute to allow the forbearance analysis to vary depending on the circumstances.'' When the Commission undertakes a competitive analysis, ''the statute imposes no particular mode of market analysis or level of geographic rigor.'' In addition, the Commission can consider the section 706 goal of fostering the deployment of advanced telecommunications capabilities in making forbearance decisions. In considering forbearance from unbundling obligations, the Commission is entitled to rely on its expert predictive judgment and may balance ''the positive short-term impact of unbundling'' against the ''longer-term positive impact that *not* unbundling would have . . . .'' Furthermore, the Commission may forbear without conducting a competitive analysis when changed circumstances have rendered a regulatory requirement unnecessary for other reasons.

12. *Unbundling and Resale Obligations Since 1996.* Pursuant to the provisions of the 1996 Act, the Commission has over the years reassessed and, when warranted, reduced its unbundling and resale requirements to account for changes in communications service markets where competition among incumbent and competitive LECs has flourished. Congress expressly authorized the Commission to forbear from any regulatory obligations, including section 251(c) obligations, once the agency determined that they are no longer necessary, and encouraged the Commission to use forbearance and other means to encourage deployment of advanced telecommunications capability and remove barriers to infrastructure deployment. With respect to forbearing from section 251(c), Congress first required that section to be fully implemented. The Commission has specifically found that section 251(c) has been fully implemented—*i.e.,* that the Commission has adopted rules implementing the statute and that those rules have become effective.

13. In its initial orders implementing section 251(c)(3), the Commission adopted nationwide unbundling obligations for local loops used to serve mass market and enterprise customers on a technology-neutral basis, for dedicated and shared interoffice transport, and various other network elements. The courts rejected these initial attempts, in whole or in part, for a variety of reasons, including that overly-broad unbundling is inappropriate. For example, the

Supreme Court vacated the Commission's first order implementing broad unbundling regulations because it failed ''to apply *some* limiting standard, rationally related to the goals of the Act,'' as the Act requires. In a separate opinion, Justice Breyer observed that ''given the Act's basic purpose, it requires a convincing explanation of why facilities should be shared or unbundled where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available.'' Justice Breyer went on to explain that unbundling ''by itself does not automatically mean increased competition. It is in the *un* shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge.'' The D.C. Circuit later vacated and remanded the Commission's next attempt to adopt unbundling rules, because, among other things, the agency failed to weigh potential negative effects of unbundling on incentives to invest in facilities-based competition, failed to analyze impairment on a sufficiently granular level, and did not adequately consider the role of intermodal competition. Citing Justice Breyer's separate opinion, the D.C. Circuit explained that ''mandatory unbundling comes at a cost, including disincentives to research and development by both incumbent LECs, competitive LECs and the tangled management inherent in shared use of a common resource.''

14. Following the D.C. Circuit's remand, the Commission issued the *Triennial Review Order* in 2003 (68 FR 52276, Sept. 2, 2003), at the same time as the local markets were seeing the increased deployment of next-generation fiber-based loops. Considering section 251(c)(3)'s ''at a minimum'' language, the Commission declined to require unbundling for most fiber-based loops because it seemed likely to undermine important goals of the 1996 Act, specifically the exhortation in section 706 to encourage deployment of advanced telecommunications capability to all Americans by removing barriers to investment. The Commission recognized that unbundling fiber-based loops could reduce incentives for both incumbent and competitive LECs to deploy advanced facilities. The Commission reasoned that refraining from imposing such obligations would increase incentives for incumbent LECs to develop and deploy innovative new networks, while forcing competitive LECs to ''seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market,'' with consumers benefitting from the race to build next-generation networks and increased competition in broadband service. The Court of Appeals for the D.C. Circuit affirmed the Commission's decision not to require the unbundling of fiber-based loops, but remanded many other aspects of the *Triennial Review Order,* including the Commission's nationwide impairment determinations with respect to dedicated transport elements and its decision that wireless carriers were impaired without access to unbundled dedicated transport.

15. In 2004, in response to the D.C. Circuit's remand, the Commission adopted the *Triennial Review Remand Order* (70 FR 8940, Feb. 24, 2005). Acknowledging that certain markets were already sufficiently competitive and that competition could be expected to develop in markets with similar characteristics, the Commission limited incumbent LECs' DS1 and DS3 loop unbundling obligations to buildings served by incumbent LEC wire centers without sufficient competitive presence and service demand. It also limited the DS1, DS3, and dark fiber interoffice transport unbundling obligations depending on the level of current and anticipated competition by classifying wire centers into tiers ''based on indicia of the potential revenues and suitability for competitive transport deployment.'' The Commission also declined to require unbundling of network elements for competitors to use exclusively for providing long distance and mobile voice services because of the presence of pervasive competition in those markets that occurred without reliance on UNEs. Although the Commission declined to eliminate unbundling requirements for competitors seeking to offer local telephone service, despite evidence of some intermodal competition, it acknowledged that ending those unbundling obligations ''might someday be appropriate, upon findings of sufficient facilities-based competition in the local exchange market.'' The Commission ultimately imposed unbundling obligations only in those situations where it found unbundling ''does not frustrate sustainable, facilities-based competition.''

16. While the *Triennial Review Remand Order* was the last time the Commission applied its impairment inquiry to consider the extent to which unbundling obligations should apply, the Commission has refined and reduced its unbundling rules by forbearing from UNE loop and transport obligations where there is evidence of facilities-based deployment and competition, or that continued unbundling requirements slow the transition to next-generation services. For example, in 2005, the Commission granted the incumbent LEC Qwest relief from UNE loop and transport obligations in portions of its service territory in the Omaha Metropolitan Statistical Area (MSA) where a facilities-based cable competitor had substantially built out its local network in competition with Qwest. The Commission relied on the ''substantial intermodal competition'' presented by the cable competitor, Cox, over its ''own extensive facilities'' and, though noting that it had earlier determined that intermodal competition from cable providers ''had not blossomed into a full substitute'' for wireline voice service, determined that Cox had changed those circumstances within the Omaha MSA as a result of its investment in the network infrastructure in that area. In 2007, the Commission granted similar relief to ACS of Anchorage in wire centers located in the Anchorage study area ''where the level of facilities-based competition by the local cable operator [GCI] ensures that market forces will protect the interests of consumers and that such regulation, therefore, is unnecessary.'' In 2015, to further its goal of advancing the TDM to IP transition for next generation networks and services, the Commission eliminated one of the last unbundling requirements applicable to next-generation networks by granting forbearance on a forward-looking basis to incumbent LECs from the requirement to make available a 64 kbps voice-grade channel over overbuilt fiber loops.

17. More recently, in 2019, in response to USTelecom's petition for forbearance, we granted forbearance from certain loop and transport unbundling and resale obligations that had become increasingly outdated due to competitive fiber deployment, technological change, and intermodal competition. Throughout this Order, when referencing the *BDS Remand Order/UNE Transport Forbearance Order* (84 FR 38566, Aug. 7, 2019), we cite the portions containing the Commission's findings in response to the Eighth Circuit's partial remand of *Business Data Services in an internet Protocol Environment et al.,* WC Docket Nos. 16–143 et al., Report and Order, 32 FCC Rcd 3459 (2017) (82 FR 25660, June 2, 2017) (*BDS Order*), as the *BDS Remand Order,* and we cite the portions addressing aspects of the May 2018 forbearance petition filed by USTelecom—The Broadband Association (USTelecom) as the *UNE Transport Forbearance Order.* In two

orders (the *UNE Transport Forbearance Order* (84 FR 38566, Aug. 7, 2019) and *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* (34 FCC Rcd 6503, Aug. 2, 2019), collectively, *2019 UNE Forbearance Orders*), we determined that forbearance from unbundling obligations was warranted for: (1) DS1/DS3 dedicated interoffice transport (UNE DS1/DS3 Transport) between price cap incumbent LEC wire centers within a half mile of competitive fiber network deployment; (2) two-wire and four-wire analog voice-grade copper loops, including the attached equipment (UNE Analog Loops) for price cap incumbent LECs throughout the entirety of their service areas; and (3) Avoided-Cost Resale obligations throughout the entirety of price cap incumbent LECs' service areas. We found that these obligations, which are overwhelmingly used to provide TDM-based local voice service, were no longer necessary based on ''the sweeping changes in the communications marketplace'' since 1996, including the increasing migration of consumers of all types to ''newer, any-distance voice services over next-generation wireline and wireless networks,'' as well as the wide range of intermodal competitors in the voice marketplace. We further found that ''the public interest is no longer served by maintaining these legacy regulatory obligations and their associated costs.''

18. *Current Unbundling and Resale Requirements.* Currently, the Commission's unbundling rules, subject to forbearance as described above, require that incumbent LECs unbundle (1) mass market copper digital and xDSL-capable loops (collectively, UNE DS0 Loops) nationwide; (2) UNE Analog Loops in non-price cap incumbent LEC service areas; (3) the TDM capabilities, features, and functionalities of hybrid fiber-copper loops nationwide; (4) enterprise loops (*i.e.,* DS1 and DS3 loops) subject to the limitations adopted in the *Triennial Review Remand Order* reflecting current and potential competition (UNE DS1 and DS3 Loops); (5) subloops, including subloops for multiunit premises wiring, nationwide; (6) network interface devices nationwide; (7) dedicated interoffice transport (*i.e.,* DS1, DS3, and dark fiber transport) subject to limitations reflecting potential competition in the *Triennial Review Remand Order* and our forbearance for UNE DS1/DS3 Transport in wire centers within a half mile of competitive fiber in the *UNE Transport Forbearance Order;* (8) operations support systems nationwide; and (9) 911/E911 databases nationwide. As discussed above, the Commission has at times granted requested forbearance relief to petitioning carriers for particular UNEs in specific geographic markets. Incumbent LECs are also required to maintain access to a 64 kbps channel over fiber loops for existing customers. The Commission has not found impairment with respect to any new unbundled network elements since 2004. In addition, non-price cap incumbent LECs must offer Avoided-Cost Resale to requesting carriers in their local exchange service areas.

19. In November 2019, we adopted the *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services Notice of Proposed Rulemaking* (*NPRM*) (85 FR 472, Jan. 6, 2020) to comprehensively reexamine the Commission's current unbundling rules in light of the substantial changes in voice and broadband service competition in the communications landscape. The *NPRM* sought comment on proposals to modernize and update incumbent LECs' remaining unbundling and resale obligations to better reflect the current marketplace realities of intermodal voice and broadband competition. The sole unbundling obligation that the *NPRM* did not propose to modify or eliminate is the requirement to unbundle 911/E911 databases. The Commission also sought comment on the costs and benefits of its proposals, as well as proposed transition time frames.

20. Various parties, particularly incumbent and competitive LECs, vigorously debated the issues raised by the *NPRM* in comments and reply comments filed in February and March 2020, and in *ex parte* letters filed thereafter. On August 5, 2020, INCOMPAS, USTelecom, and many of their respective members (Joint Parties), ''in recognition of the current state of competition in the communications marketplace,'' filed a compromise resolution (Compromise Proposal) in this docket for the Commission to consider regarding whether and to what extent incumbent LECs must continue to provide access to unbundled DS0 loops and associated copper subloops, DS1 loops, DS3 loops, and OSS. Specifically, aside from the trade associations, INCOMPAS and USTelecom, the parties to this agreement include: Many of USTelecom's incumbent LEC members—AT&T Services, Inc., CenturyLink, Inc. (now Lumen), Consolidated Communications, Inc., Frontier Communications Corp., and Verizon Communications Inc.—and many of INCOMPAS' competitive LEC members—Allstream Business US, LLC, Digital West, First Communications, LLC, Biddeford Internet Corporation d/b/a GWI, IdeaTek Telecom, Mammoth Networks and Visionary Broadband, SnowCrest ISP & SnowCrest Telephone, Socket Telecom, LLC, TelNet Worldwide, Inc., and TPx Communications. Windstream Services, LLC signed as a member of both trade associations, in its capacity as an incumbent LEC and competitive LEC. The Joint Parties discussed but did not reach a compromise regarding dark fiber transport at that time and avoided-cost resale. The Joint Parties did not discuss UNE Analog Loops in non-price cap areas, 64 kbps voice-grade channels over last-mile fiber loops, Multiunit Premises UNE Subloops, NIDs, and the TDM capabilities, features, and functionalities of hybrid loops. The Joint Parties emphasized that the Compromise Proposal was a ''bargained-for, negotiated outcome that reflects trade-offs and concessions between'' nearly every interested competitive LEC and incumbent LEC in this docket that have previously disputed the appropriate scope of the Commission's unbundling rules at the Commission, in this proceeding and in other proceedings, and in court. The Joint Parties further noted that the Compromise Proposal ''necessarily departs in at least some ways from the specific positions each individual signatory has advanced in this proceeding,'' but each proposal is a direct response to the record in this proceeding. The Joint Parties also assert that these resolutions are lawful and are logical outgrowths of the *NPRM* proposals, ''within the reasonable range of conclusions supported by the record,'' and in the public interest.

21. On September 14, 2020, INCOMPAS, USTelecom, and many of their respective members, representing a majority of buyers and sellers of UNE Dark Fiber Transport, additionally reached a compromise proposal with regard to UNE Dark Fiber Transport. The parties agreed that the Commission should forbear and find non-impairment vis-a-vis Tier 3 wire centers located within half a mile of alternative fiber, subject to an eight-year transition period for existing UNE Dark Fiber Transport.

### *B. Today's Communications Marketplace*

22. The communications marketplace has dramatically transformed since Congress passed the 1996 Act. Incumbent LECs controlled 99.7% of the local telephone service market at that time. Incumbent LECs' wireline voice subscriptions now account for only approximately 39% of all wireline voice

subscriptions and only 9% of all voice subscriptions across all technologies. The fixed voice marketplace, once monopolized by incumbent LECs, now includes cable companies offering VoIP, fixed wireless providers, over-the-top VoIP providers, as well as competitive and incumbent LECs. As for fixed broadband, incumbent LECs are just one of many intermodal competitors, providing only about 22% of residential broadband subscriptions at or above 25/3 Mbps, which the Commission has defined as advanced telecommunications capability. Connections data are collected at the census tract level. Incumbent LEC affiliation is determined at the holding company level and the census block level. The incumbent LEC's connections are counted as within the incumbent's study area if any portion of its study area overlaps the census tract. Cable providers provide approximately 75% of 25/3 Mbps residential subscriptions. As of December 31, 2019, 99% of Americans had access to three providers of mobile voice and broadband. As of the date of this Order, December 2019 is the latest data available to the Commission, so we cannot report coverage after the T-Mobile/Sprint merger, and this data treats T-Mobile and Sprint as separate providers. Finally, as the Commission found in the *BDS Order,* the enterprise market is subject to ''intense competition,'' with 95% of census blocks with business data services demand in price cap MSAs, representing 99% of business establishments, featuring at least one competitive provider in addition to the incumbent LEC.

23. The communications marketplace has also seen rapid technological change. In the enterprise services marketplace, DS1 and DS3 loops, dominated by incumbent LECs, have been increasingly replaced by packet-based services, provided by a range of providers who benefit from a ''considerably more level playing field'' compared to TDM-based services. The copper-to-fiber and TDM-to-IP transitions have also increasingly reached residential consumers, as incumbent LECs have been retiring last-mile copper and replacing it with fiber or fixed wireless technologies. And of course, American consumers have themselves transitioned to newer technologies, increasingly moving from fixed legacy voice to fixed or nomadic voice over internet protocol (VoIP) and mobile voice services, and from DSL to broadband provided over fiber and fixed and mobile wireless. The widespread deployment of 5G wireless networks will only accelerate this process.

## III. Discussion

24. In this document, we modernize our unbundling rules in light of the dramatic changes to the communications marketplace since 2004, when the Commission last examined unbundling obligations through the impairment lens. We eliminate, subject to a transition period, unbundling obligations for loops, transport, and other elements where record evidence shows that they are no longer necessary for reasonably efficient competitors to enter the market. Recognizing that some unbundling obligations have continued benefits in providing competitive telecommunications services and broadband access in rural areas, where competitive entry is harder because of entry barriers to fixed broadband services, including sunk costs, we maintain several unbundling requirements, including for mass market broadband-capable loops in less densely populated areas. Sunk costs are investments that have no scrap value or value in an alternative use, *e.g.,* a fiber cable connecting a customer's location to the provider's network. Most wireline network costs are sunk for at least twenty years. In addition, entrants may face other entry barriers including achieving scale economies and absolute cost disadvantages. Scale economies can be a barrier to entry if entrants are likely to attract fewer customers than competitors, making it more difficult for the entrant to compete against its competitors if it faces higher average cost and the market retail price is close to its competitor's average cost. Absolute cost advantages can occur if the incumbent providers have privileged access to resources. An incumbent firm may also have other first mover advantages, *e.g.,* because they have a relatively high penetration rate for their services and consumers face high costs in switching providers. We find that our impairment and forbearance findings, when taken together with the necessary transition periods and conditions we adopt for each element, best fulfill our statutory responsibilities and promote our policy objectives.

### *A. UNE Loops*

25. Loops are the ''last mile of a carrier's network,'' connecting end-users to the network to access voice, broadband, and other technologies. Under existing law, incumbent LECs must provide at least some limited unbundled access nationwide to (1) DS1 and DS3 loops and associated subloops, (2) DS0 loops and associated subloops, and (3) the TDM-capabilities, features, and functionalities of hybrid copper-fiber loops. Subject to previous grants of forbearance, incumbent LECs must also provide unbundled access to UNE Analog Loops in non-price cap incumbent LEC service areas and to 64-kbps channels over fiber loops that were ordered before 2015.

#### 1. UNE DS1 and DS3 Loops

26. We proposed in the *NPRM* to find that competitive LECs are no longer impaired in those counties and study areas deemed competitive in the *BDS Order* and *Rate-of-Return (RoR) BDS Order* (83 FR 67098, Dec. 28, 2018) (collectively, Competitive Counties), subject to a carve-out for UNE DS1 Loops used for residential purposes. Based on the record in this proceeding, as well as the Commission's findings in the *BDS Order,* we adopt a modified version of this proposal and find that unbundled access to DS1 and DS3 loops in the Competitive Counties, where demand for business data services is most highly concentrated, is unwarranted because competitive LECs are no longer impaired without access to these UNEs, and thus, incumbent LECs no longer need to provide unbundled access in these locations, subject to the transition periods and associated conditions we adopt. Moreover, we find that continued unbundling of those network elements is not warranted because it frustrates the congressionally mandated policy goal of ensuring the deployment of next-generation networks and services. Further, independent of our non-impairment finding, we find that, subject to the transition periods and conditions, forbearance from these obligations in the Competitive Counties is warranted. The record overwhelmingly supports this conclusion. INCOMPAS, USTelecom, and most of their members participating in this proceeding agree that both the non-impairment finding and forbearance conclusions are appropriate for the Competitive Counties, subject to the transition periods and associated conditions we also adopt. None of these findings, however, apply to non-competitive counties, where UNE DS1 and DS3 Loops will remain available, subject to the limits established in the *Triennial Review Remand Order.* Finally, we decline to adopt a residential carve-out for UNE DS1 Loops, finding that the costs and burdens associated with such an exemption outweigh the benefits.

27. *Background.* Our rules require that incumbent LECs make DS1 and DS3

loops, which are predominantly used to provision service to enterprise customers, available as UNEs on a limited basis. These loops operate at a total digital signal speed of 1.544 Mbps and 44.736 Mbps, respectively. The Commission adopted these unbundling requirements for DS1 and DS3 loops more than 16 years ago. The Commission based its impairment analysis at that time on two factors: The existence of actual competition and the inference to be drawn from the potential for competition in similar markets. The Commission found that ''the presence of fiber-based collocations in a wire center service area is a good indicator of the potential for competitive deployment of fiber rings'' and ''a wire center service area's business line count is indicative of its location in or near a large central business district, which is likely to house multiple competitive fiber rings (and thus numerous splice points) with laterals to multiple buildings.'' When viewed together, the Commission explained, these characteristics ''are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely.'' It thus found that competitive LECs were not impaired without unbundled access to DS1 loops only in wire centers where there are at least 60,000 business lines and four or more fiber-based collocators. It also found that competitive LECs were not impaired without unbundled access to DS3 loops in wire centers where there are at least 38,000 business lines and four or more fiber-based collocators.

28. In explaining these findings, the Commission noted that its ''selection of specific criteria is not an exact science, and the Commission may exercise line-drawing discretion when rendering determinations based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.'' The Commission limited the availability of these UNEs to ten UNE DS1 Loops and one UNE DS3 Loop per building, respectively, finding that competitors are more likely to self-provision higher capacity loops at a certain level of bandwidth demand because of the greater economic feasibility resulting from the fact that ''revenue opportunities increase with the capacity level.'' It also indicated that even these revised unbundling obligations were designed to be removed ''over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets.''

29. In the more recent *BDS Order,* the Commission undertook a comprehensive analysis of the business data services market. Business data services refers to the dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections. This analysis focused extensively on the market for TDM-based DS1 and DS3 channel terminations, which are functionally identical products to UNE DS1 and DS3 Loops. The Commission found that ''[t]o a large extent in the business data services market, the competition envisioned in the [1996 Act] has been realized,'' and ''any prior advantage an incumbent might have enjoyed at lower bandwidths is now less competitively relevant in light of customer demand that attracts a number of traditional and non-traditional competitors that are improving legacy cable networks and expanding with new facilities to meet demand.''

30. Relying upon the most comprehensive data collected from both purchasers and providers of BDS services to date, including circuit-based and packet-based BDS providers and significant providers of best-efforts services, and Form 477 data, the Commission created a Competitive Market Test to determine which counties are competitive for purposes of business data services. Best-efforts services are internet access services generally marketed to residential and small business consumers, rather than enterprise consumers. Unlike dedicated packet-based BDS, best-efforts services often provide asymmetrical speeds and lack service performance guarantees. While the Commission found in the *BDS Order* that best-efforts services generally did not directly compete with fiber-based BDS, the Commission found that the underlying facilities used to provision best-efforts services were being modernized to provide competitive BDS. Providers report their broadband deployment to the Commission semi-annually using FCC Form 477. The Eighth Circuit upheld the portion of the *BDS Order* adopting the Competitive Market Test, while remanding other portions of the *BDS Order* on notice grounds. The Commission determined that combining these two data sets would ''approximate the full spectrum of competition in the business data services market, including competition from medium-term entrants.'' The Commission determined that basing the Competitive Market Test on ''the geographic unit of a county or county-equivalent'' would ''significantly reduce[] the over-and under-inclusivity issue posed by MSAs [metropolitan statistical areas] . . . and avoid[]the administrability issues posed by smaller geographic units of measure.'' It went on to determine that ''nearby [non-incumbent LEC wireline] competitors'' with ''nearby networks'' are ''effective competitor[s] in meeting BDS demand at a location if it either delivers BDS to a location or has a network within one half mile of the location with BDS demand, and/or is a cable company with a widespread HFC [hybrid fiber coax] network that surrounds the location with BDS demand.'' The Commission determined that a county will be deemed competitive when either (1) at least 50% of the locations with BDS demand within the county are within a half mile of a competitive provider's network, or (2) a cable competitor's network serves at least 75% of the census blocks with BDS demand within the county.

31. *Impairment Analysis.* UNE DS1 and DS3 Loops are functionally equivalent to DS1 and DS3 BDS end-user channel terminations, with the only real difference being their respective prices. Indeed, UNE DS1 and DS3 Loops and DS1 and DS3 BDS end-user channel terminations use the very same incumbent LEC facilities. So where there is evidence that competition for BDS DS1 and DS3 end-user channel terminations exists, as demonstrated by the Competitive Market Test, such competition also exists for UNE DS1 and DS3 Loops. And that competition includes packet-based alternatives to DS1 and DS3 Loops, which are more versatile and capable of handling the increasingly higher bandwidth needs of business customers, thus demonstrating that DS1 and DS3 loops are no longer a reasonably efficient technology to enter the enterprise marketplace in the Competitive Counties. The existence of actual and potential competition, intermodal or otherwise, in the Competitive Counties leads us to conclude that unbundling DS1 and DS3 loops is unwarranted even in the face of some level of impairment. Finally, continuing the unbundling obligations for DS1 and DS3 loops is at odds with Congress's mandate in section 706 that we take action to encourage the deployment of advanced telecommunications capabilities. Thus, consistent with our proposal in the *NPRM,* we find that where the Commission in the *BDS* proceeding found actual or potential competition, and subject to the transition periods in this Order, competitive LECs seeking to

enter the business data services market are no longer impaired without unbundled access to DS1 and DS3 Loops, and those UNE requirements are no longer necessary.

32. Given the demands for ever-increasing broadband speeds, and packet-based services, we find that a reasonably efficient competitor would not use UNE DS1 and DS3 Loops as a reasonably efficient technology for entering the enterprise services market in the Competitive Counties. The communications marketplace today is dramatically different from the one that existed when the Commission last addressed impairment over a decade ago. Incumbent LECs were the dominant providers of TDM-based DS1s and DS3s in 2004, and cable was only beginning to make inroads into the enterprise services market at that time. Today, TDM-based DS1 and DS3 loops are becoming obsolete in the face of increasing bandwidth demands and the transition to IP-based networks and services. Their availability will become further constrained as incumbent LECs move forward with retiring their copper facilities, deploying packet-based services, and phasing out TDM services like DS1 and DS3 business data services. Indeed, the Commission found in the *BDS Order* that ''[f]unctionally, TDM and packet-based services are broadly interchangeable in the business data services realm as both are used to provide connectivity for data network and point-to-point transmissions and both services can be delivered over the same network infrastructure.'' It thus went on to find that ''legacy TDM business data services suppliers would be constrained by the threat of potential customer loss to packet-based business data services suppliers.'' And it noted the diminishing use and availability of UNE DS1 and DS3 Loops. One competitive LEC commenter in this proceeding made this clear when it noted that the bandwidth available through bonding multiple DS1 loops ''might let a small business survive until another solution can be found.'' But where competition, or the potential for competition, exists, such other solution has, by definition, been found because that competition comes from facilities-based providers using non-incumbent LEC facilities. And that competition includes packet-based services, which are scalable for the ever-increasing bandwidth needs of enterprise customers. In light of this next-generation competition, we find that a reasonably efficient competitor would not use UNE DS1 and DS3 Loops when seeking to enter the enterprise marketplace in the Competitive Counties. Thus, where the Competitive Market Test has shown that a particular county or study area is competitive, we no longer require incumbent LECs to make UNE DS1 and DS3 Loops available after an appropriate transition period.

33. This actual and potential competition comes in many forms, including from cable and fixed wireless providers who entered, or are entering, the market without reliance on UNEs. The record demonstrates that cable providers are even more significant competitors for enterprise services today than they were when the Commission explained their significance three years ago in the *BDS Order.* And while the Commission previously found that fixed wireless had a limited role in the BDS marketplace, it noted ''the promise of 5G technology to provide quality high-bandwidth fixed wireless services to businesses in urban areas'' and found that ''fixed wireless services should be included in the product market discussion because they may have a competitive effect on the market.'' This is the competition envisioned by the 1996 Act, and we would be remiss to not take into account competition from these providers. Indeed, in the context of affirming the Commission's decision not to require incumbent LECs to unbundle the broadband capabilities of hybrid loops, the D.C. Circuit stated ''we agree with the Commission that robust intermodal competition from cable providers . . . means that even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs.'' To ignore this competition and to allow continued reliance on UNEs in these areas would slow the transition to next-generation services, in contravention of the goals of section 706 and our preference for sustainable facilities-based competition, goals we are permitted to consider based on our ''at a minimum'' authority.

34. We realize that the *BDS Order* examined competition on a county level, whereas the Commission made its 2004 impairment findings based on an analysis of the smaller geographical level of wire centers. The Commission specifically found that ''basing the competitive market test at the county level strikes the best balance between being sufficiently granular and administratively feasible,'' a finding upheld by the Eighth Circuit. This concept of striking a balance between granularity and administrability is equally relevant and important in the UNE context. We infer from the level of competition in the Competitive Counties now and the growth in competitive providers deploying in areas previously outside their footprints that these locations will ultimately become competitive. Thus, while some customers within a Competitive County may not currently have available to them the competition relied on by the Commission in deeming that county to be competitive, that number will be relatively small and will likely shrink over time. Indeed, the Commission noted in the *BDS Order* that it expected as much. This approach is consistent with the Commission's use of the impairment inquiry in 2004, when the Commission ''dr[e]w reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets.''

35. Some competitive LEC commenters assert that the Commission's reliance on the *BDS Order's* competitive findings is at odds with ''the level of competition required by the [*Triennial Review Remand Order's*] findings.'' We disagree. We note that INCOMPAS, along with the majority of its members that have filed comments in this proceeding, signed the Compromise Proposal that states that the competitive providers are no longer impaired in the Competitive Counties without access to UNE DS1 and DS3 Loops. As the Commission specifically found in the *BDS Order,* for the purposes of enterprise services, ''the largest benefits from competition come from the presence of a second provider, with added benefits of additional providers falling thereafter, in part because, consistent with other industries with large sunk costs, the impact of a second provider is likely to be particularly profound in the case of wireline network providers.'' This is consistent with the Commission's conclusion in the *Restoring internet Freedom Order* (83 FR 7852, Feb. 22, 2018) that the presence of two wireline internet service providers ''can be expected to produce more efficient outcomes than any regulated alternative'' relevant to our consideration in this context. Moreover, the competitive findings in the *BDS Order* support our findings of (1) no impairment, (2) the existence of intermodal competition supporting unbundling even in the face of some level of impairment, and (3) that eliminating this unbundling obligation furthers the goal of advancing deployment of next-generation facilities and services. The Commission found in the *BDS Order,* ''[t]o a large extent in the business data services market, the

competition envisioned in the Telecommunications Act of 1996 . . . has been realized.'' The existence of wireline competitors in the Competitive Counties demonstrates that market entry and thus competition without UNE DS1 and DS3 Loops is possible in these areas. Indeed, we found in last year's *BDS Remand Order* that the vast majority of business locations in Competitive Counties are served by wire centers within a half-mile of competitive fiber. And the Commission found in the *BDS Order* that the level of competition based on the Competitive Market Test was likely understated and that it will only continue to grow, and the competition that existed at the time of the 2015 Data Collection will not recede because those competitors have already incurred substantial sunk costs. Those competitors, including intermodal competitors providing advanced telecommunications capability over next-generation networks, did not need to rely on UNE DS1 and DS3 Loops to enter these markets. We thus disagree with commenters who assert that a reasonably efficient competitor would still need to rely on UNE DS1 and DS3 Loops to enter a new market.

36. We also disagree with competitive LEC objections to the Commission taking into consideration competition from cable providers in conducting its impairment analysis. Cable providers are much more significant competitors for enterprise services than they were 15 years ago when the Commission initially considered their role in the marketplace for determining unbundling obligations for DS1 and DS3 loops. Indeed, only three years later in the *Qwest Omaha Order* (20 FCC Rcd 19415, Dec. 2, 2005), the Commission viewed such providers as a source of competition for forbearance purposes. Fast forward almost a decade to the *BDS Order,* and the Commission noted the dramatic strides of cable providers in becoming ''formidable competitors'' over their own fiber and hybrid facilities in the business data services market. Cable providers now offer robust enterprise-grade business services that were not widely available in 2004, as found by the Commission in the *BDS Order,* including for multi-regional customers with low to medium bandwidth needs who still require enterprise-grade features. The Commission previously also found that 5G networks ''have the potential to represent a significant additional source of competition for the provision of business data services.'' And the BDS marketplace has only become more competitive in the seven years since the data collected in the 2015 Data Collection.

37. We also reject commenter arguments concerning the *Triennial Review Remand Order*'s finding that the availability of UNEs at that time served to constrain business data service pricing (such services were called special access services at the time). Today, the widespread intermodal competition and entry for enterprise services constrains pricing, making ''synthetic'' UNE-based competition unnecessary, particularly as the continued obligation to provide UNEs in Competitive Counties could reduce investment incentives for packet-based services. We reiterate that the 1996 Act's market-opening provisions were intended to foster competition, not support specific competitors or business models. We find the evidence of facilities-based competition for products and services here to be sufficient to demonstrate that reasonably efficient competitors have the ability to deploy their own services without the use of UNEs. While certain competitive LEC commenters may wish to continue relying on UNE DS1 and DS3 Loops for their business models, this does not mean that a reasonably efficient competitor is impaired without access to those UNEs. Indeed, the business data services on which these commenters rely are now subject to competition from other business data services, including through cable deployment that developed without the reliance on UNEs, an indication that there is no longer impairment.

38. We are further unpersuaded by commenter assertions that the findings in the *BDS Order* are flawed because they are based on Form 477 data, which have recently been the subject of challenges regarding their accuracy. As the Commission made clear in the *BDS Order,* its findings were not based solely on Form 477 data. Rather, its findings were based largely on the 2015 Data Collection (with respect to traditional competitive LECs). The Commission used the Form 477 data to supplement the 2015 Data Collection with respect to cable providers, which added only an additional 0.5% of all competitive counties and county equivalents.

39. *Forbearance Analysis.* Independent of our finding of non-impairment for UNE DS1 and DS3 Loops, we find that the forbearance criteria are met for UNE DS1 and DS3 Loop requirements in the same geographical areas—*i.e.,* the Competitive Counties. In doing so, we have the flexibility to conduct our forbearance analysis based on the specific circumstances at issue. Although we forbear from our UNE DS1 and DS3 Loop requirements in the Competitive Counties, we conclude that competitive LECs will be able to obtain DS1 and DS3 services as business data services or through section 251(b)(1) resale. And because the marketplace for DS1 and DS3 BDS channel terminations is competitive, the marketplace will discipline the prices of those services.

40. *Section 10(a)(1).* We conclude that enforcement of UNE DS1 and DS3 Loop obligations is not necessary to ensure just and reasonable rates. To the extent competitive LECs seek to continue purchasing DS1 and DS3 services, they are able to do so through commercial offerings. The Commission found in the *BDS Order* that market pressure from competitive alternatives, including packet-based services, will ensure reasonable prices. Thus, the existence of competitive alternatives already available or that could economically be made available will ensure reasonable prices and no harm to consumers. Indeed, we find that competition will more effectively ensure just and reasonable rates more effectively than maintenance of these UNE requirements. Accordingly, although these UNE obligations may have served to constrain DS1 and DS3 prices at reasonable levels 16 years ago, they no longer serve that purpose.

41. *Section 10(a)(2).* We find that the evolving marketplace and the statutory and regulatory safeguards that work to ensure just and reasonable rates also ensure that consumers will not be harmed by forbearance from enforcement of the UNE DS1 and DS3 Loops obligations. And as with ensuring just and reasonable rates, we find that competition will better protect consumers—in this instance, enterprise customers—from harm than continued enforcement of these outdated unbundling obligations. Moreover, absent the availability of UNE DS1 or DS3 Loops, competitors will still be able to purchase DS1 and DS3 end-user channel terminations as business data services via commercial agreements or pursuant to section 251(b)(1) resale, albeit at a higher price. Such higher prices, resulting from marketplace dynamics rather than regulatory mandates, will serve to encourage end-user customers to migrate to next-generation services, thus helping to advance Congress's goal as stated in section 706. The rules adopted in 2004 and still in force today placed limits on UNE DS1 and DS3 Loop availability, both by wire center characteristics and by the numerical cap. Competitors, including incumbent LECs outside of

their incumbent territories, already use DS1 and DS3 BDS end-user channel terminations to compete, including facilities purchased from other competitive LECs and from cable providers. And DS1 and DS3 end-user channel terminations are increasingly becoming obsolete in light of the pressure for applications requiring increasing bandwidth. Indeed, the Commission found in the *BDS Order* that ''use and availability of UNEs is diminishing.''

42. *Section 10(a)(3).* Finally, we find that forbearing from the UNE DS1 and DS3 Loop obligations in Competitive Counties is in the public interest as it promotes the policy of ensuring the deployment of next-generation networks and services. The Commission has found that ''[p]acket-based services represent the future of business data services'' and ''will lead to greater returns on investment and in turn, greater incentives for facilities-based entry into the business data services market.'' Continuing to enable reliance on legacy lower-speed technologies unnecessarily reduces incentives and thus slows this deployment in the face of competitive alternatives as well as commercially available DS1 and DS3 products at market-based prices. We find that the benefit of encouraging the deployment of advanced telecommunications capabilities and next-generation networks outweighs any loss of competitors in the market as long as some level of competition remains.

43. *UNE DS1/DS3 Loops in Non-Competitive and Grandfathered Counties.* We decline to extend our DS1 and DS3 loop unbundling relief to non-competitive and grandfathered counties, consistent with our proposal in the *NPRM.* A number of incumbent LEC commenters take the position that we should eliminate unbundling obligations for DS1 and DS3 loops in non-competitive counties as well, arguing that the existence of continued price cap regulation in those counties obviates the need for UNE DS1 and DS3 Loops. However, the fact that price cap regulation continues in these counties does not demonstrate that either the non-impairment or forbearance standard has been met. The Commission's findings in the *BDS Order* about actual and potential competition in these areas indicate that there is insufficient evidence to conclude that competition in the enterprise market currently exists or is likely to exist in the near future without the use of UNEs, and the continued existence of price cap regulation does not undermine those findings. Nor is there sufficient evidence in this proceeding to conclude that reasonably efficient competitors could enter in these areas without the use of UNE DS1 and DS3 Loops. And UNE DS1 and DS3 requirements in these locations continue to be necessary for the protection of consumers and for the public interest, based on the limited degree of competition found in those areas in the *BDS Order.*

44. We also decline to eliminate UNE DS1 and DS3 requirements in grandfathered counties, as one commenter requests. The *BDS Order* did not find these counties competitive based on the Competitive Market Test, but rather refrained from imposing new price cap regulation because they were previously granted Phase II pricing flexibility. In the *BDS Order,* the Commission determined not to reimpose price cap regulation in these counties because it favored a ''conservative'' approach to avoid regulatory disruption, rather than on other considerations, such as the underlying conditions when those areas were granted Phase II pricing flexibility. The interest in a conservative approach to regulatory disruption weighs in favor of retaining UNE DS1 and DS3 Loops in the grandfathered counties, as those UNEs are currently available in these locations and were not affected by Phase II pricing flexibility.

45. *No DS1 Residential Exemption.* In the *NPRM,* we proposed exempting from any non-impairment findings UNE DS1 Loops used for providing mass market broadband in rural census blocks of Competitive Counties. We decline to adopt such an exemption. The record in this proceeding does not support such an exemption, and we find that the burdens to incumbent LECs of administering any such exemption outweigh any benefits. The number of existing UNE DS1 Loops in rural census blocks of Competitive Counties is exceedingly small in the first place, and the subset of such loops used for residential purposes is orders of magnitudes smaller. According to AT&T, fewer than one percent of the UNE DS1 Loops it sells in rural census blocks within Competitive Counties serve residential addresses. We find that the small number of these UNEs used in rural areas does not warrant such treatment, particularly because the *BDS Order* found these specific areas to be competitive for DS1 and DS3 channel terminations. According to AT&T, fewer than one percent of the UNE DS1 Loops it sells in rural census blocks within Competitive Counties serve residential addresses. This is not surprising given that competitive LECs use UNE DS1 and DS3 Loops almost exclusively to provision service to enterprise customers. Moreover, to administer the proposed exemption on a going forward basis, incumbent LECs would be required to make costly modifications to their processes, which they would then need to update and monitor. Some incumbent LECs state they would also have to manually validate whether each new address, of which they receive hundreds daily, qualified for the exemption. One incumbent LEC commenter describes in detail the system changes necessary for a carrier to implement such an exemption and the substantial cost involved in implementing those changes. For example, Verizon describes the changes it would have to implement in order to accommodate a rural residential DS1 exemption, ''at a minimum'': (1) ''Create a new ''yes/no'' field in its provisioning and inventory systems to determine whether each individual end user address in Verizon's territory (millions of addresses) is located in census blocks subject to relief . . . [and] constantly update this data, including to incorporate the hundreds of new addresses added on a daily basis;'' (2) ''Build intelligence into the ordering system to limit the availability of the [DS1] UNE loops to only census blocks not subject to relief; (3) ''Modify billing systems if required to bill the UNE loops subject to relief at a different rate from those loops not subject to relief (*e.g.,* a different rate during a transition period);'' and (4) ''validating the residential and broadband classification of the circuit.'' Indeed, the cost per provider for implementing such changes could be ''at least hundreds of thousands of dollars.'' While INCOMPAS and NWTA point to one competitive LEC's use of UNE DS1 Loops to serve some residential customers based upon filings made in the 2018 USTelecom forbearance proceeding, neither this competitive LEC nor any other individual competitive LEC indicated any such use in in their filings in this proceeding or supported such an exemption. INCOMPAS and NWTA also pointed to Virginia Global, but that citation suffers from the same infirmities as the citation to Sonic. While INCOMPAS initially called for expanding the proposed exemption to enterprise customers, it was a party to the Compromise Proposal, which did not provide a DS1 exemption for residential or enterprise customers in the Competitive Counties. Because of the negligible benefits and significant costs, we decline to provide a residential DS1 exemption.

46. *Transition Period.* In the *NPRM,* we proposed a uniform transition period

for UNE DS1 and DS3 Loops that would provide a 36-month transition period for existing UNE DS1 and DS3 Loops without a period for new orders. Based on the record, we find that different transition plans for UNE DS1s and UNE DS3 Loops are warranted. Instead, for UNE DS1 Loop obligations, we adopt a two-part transition of 24 months for new orders and 42 months for existing UNE DS1 Loops. For existing UNE DS3 Loops, consistent with our proposal in the *NPRM,* we adopt a single transition period of 36 months with no additional period for placing new orders. Carriers may not convert existing special access circuits to UNEs after the effective date of this Order.

47. Our decision to adopt modified and different transition timeframes for these enterprise UNE loops is based on both record evidence and the Compromise Proposal between and among a majority of incumbent and competitive LEC stakeholders and participants in this proceeding, each of which individually would have preferred a shorter or longer transition period having different accompanying conditions than what their compromise proposal suggests. The Commission has long found compromise proposals negotiated by interested parties representing different interests to be reasonable and to serve the public interest. We acknowledge, however, the need to base our findings on an independent rationale. We find the transition periods contained in the Compromise Proposal to be reasonable and in the public interest, based both on the record in this proceeding and because the proposal has been advanced by most of the major buyers and sellers of these UNEs. We therefore adopt the following transition timeframes for eliminating the availability of UNE DS1 and DS3 Loops. We also reject Verizon's assertion that we should modify the ''provision-then-dispute'' process adopted in the *Triennial Review Remand Order* as we significantly reduce the availability of UNEs in this Order only to areas where they remain necessary, and there is no evidence in the record to support changing the process for obtaining UNEs in the limited areas where they remain.

48. First, we permit competitive LECs to order new UNE DS1 Loops for 24 months after the effective date of this order. This timeframe will enable competitive LECs to continue to execute short-term business plans and honor contractual obligations with new or existing customers, including small businesses, while they determine which alternative voice service option will best serve their customers' needs. Second, we adopt a 42-month grandfathering period for UNE DS1 Loops for all competitive LEC customers. We adopt a 36-month grandfathering period for UNE DS3 Loops for all competitive LEC customers, with no period included for new orders. The record demonstrates that demand for UNE DS3 Loops is *de minimis,* justifying a shorter grandfathering period and no transition period for new orders, as compared to UNE DS1 Loops.

49. We reject proposals for either a longer transition period or a shorter transition period and find the Compromise Proposal to be reasonable. Indeed, Puerto Rico Telephone Company, which was not a party to the INCOMPAS–USTelecom Compromise Proposal, supports the DS1 relief, transition period, and associated conditions because as a whole, it ''strikes a reasonable balance that modernizes regulatory requirements and promotes competition,'' providing additional evidence of its reasonableness. We find that these transition periods will provide competitive LECs with sufficient time to make alternative arrangements, particularly given the availability of DS1 and DS3 BDS channel terminations as discussed above, without continuing to impose these burdensome and costly requirements on incumbent LECs for longer than necessary.

50. The 42-month transition timeframe within which all UNE DS1 Loops (including any new UNE DS1 Loops ordered during the first 24 months) and the 36-month transition timeframe within which all UNE DS3 Loops must be transitioned to alternative arrangements will commence on the effective date of this order. These transition periods should provide more than enough time for competitive LECs and their customers to transition to alternative voice and broadband service arrangements as evidenced by the willingness of the major competitive LEC trade association and the majority of its members to support this timeframe. Competitive LECs that have provided record information about the length of their customer contracts have typically referenced contract lengths of a minimum of three years with business or government customers. To the extent competitive LECs have entered into longer-term contracts with their customers without securing long-term contracts with their suppliers, they have done so at their own risk like any other business does, and we see no reasonable basis for accommodating that risk. Moreover, the fact that the major incumbent LECs currently subject to these unbundling obligations have agreed to support this transition timeframe suggests the burdens they claim to incur as a result of continuing to provide such UNEs during the transition are outweighed by the benefit of a compromised transition proposal.

51. In addition, during the relevant transition periods for any competitive LEC customer, any UNE DS1 and DS3 Loops that a competitive LEC leases as of the effective date of this order shall be available for lease from the incumbent LEC at regulated UNE rates. Such rates are established either through negotiated interconnection agreements or through state-commission-arbitrated rates applying certain Commission-developed pricing formulas. Our forbearance action is not intended to upset pre-existing interconnection agreements or other contractual arrangements that may currently exist nor pre-existing state-commission-arbitrated rates during the transition period (including any already-adopted state commission scheduled changes in UNE rates), which should quell concerns of those fearing near-term price increases for UNE DS1 and DS3 Loops resulting from this Order. Of course, the transition mechanism we adopt is simply a default process, and competitive LECs and price cap LECs remain free to negotiate different arrangements superseding this transition period and replacing UNE DS1 and DS3 Loop arrangements with negotiated commercial arrangements at any earlier time. We find this approach will ensure an orderly transition for end-user customers of affected competitive LECs by mitigating any immediate rate changes that could otherwise be experienced by these end users if current rates for UNE DS1 and DS3 Loops were immediately eliminated. The transition timeframes we adopt will also work to ensure that consumers do not experience any undue service disruption as a result.

2. UNE DS0 Loops and Associated UNE Copper Subloops

52. We proposed in the *NPRM* to find that competitive LECs are no longer impaired in urban census blocks without unbundled access to DS0 loops. Based on the record in this proceeding, as well as Commission data, we adopt a modified version of this proposal and find that unbundled access to DS0 loops and their associated copper subloops in urbanized areas (areas of 50,000 or more people), the most densely populated areas of the country, is unwarranted because competitive LECs are no longer impaired without unbundled access to these UNEs. The Census Bureau divides the country into approximately eleven

million census blocks, the smallest unit of geography for which the Census Bureau provides demographic data. Census blocks are classified as being located in an urbanized area (where populations are over 50,000) or an urban cluster (where populations range from 2,500–50,000). Locations with fewer than 2,500 people are considered rural. As of the 2010 Census, 71.2% of Americans lived in urbanized areas, 9.5% lived in urban clusters, and 19.3% lived in rural areas. The record overwhelmingly supports this conclusion. We decline to extend unbundling relief in census blocks in rural areas and urban clusters.

53. Section 51.319(a)(1) of our rules requires incumbent LECs to make available on an unbundled basis digital copper loops and two-wire and four-wire copper loops conditioned to transmit digital signals (collectively, DS0s or UNE DS0 Loops). We exclude from the purview of this term UNE Analog Loops, which are addressed separately below. UNE DS0 Loops are used predominantly to serve residential and small and medium businesses. UNE Copper Subloops are the portions of the copper DS0 loops that are used to connect certain end-user premises with local loops.

54. USTelecom, INCOMPAS, and most of their members participating in this proceeding agree that, subject to the applicable transition period and associated conditions we adopt for UNE DS0 Loops in this Order, competitive LECs are no longer impaired without access to UNE DS0 Loops in urbanized areas. We agree with this assessment. We also find that continued unbundling of those network elements in urbanized areas frustrates the goal of ensuring deployment of advanced communications capability. Independently, we conclude that forbearance from the UNE DS0 Loop obligation is warranted in urbanized areas, subject to the transition period and associated conditions we adopt. Our findings of non-impairment and forbearance from UNE DS0 Loops and UNE Copper Subloops requirements do not apply to UNE DS0 Loops and associated UNE Copper Subloops in less densely populated urban clusters or rural areas where the record and Commission data do not provide sufficient evidence of entry by facilities-based competitors, intermodal or otherwise, without the use of UNE DS0 Loops.

55. *Background.* The current unbundling requirements for DS0 loops and copper subloops were adopted more than 17 years ago. At that time, the Commission found nationwide impairment without unbundled access to DS0 loops. In doing so, it noted that fiber deployment for the mass market was still in its infancy, wireless was not yet a suitable option for providing mass market broadband, and cable telephony had not developed sufficiently to be considered a substitute for traditional wireline telephony.

56. In the past 17 years, the communications marketplace has dramatically changed. The most recent data at the time that the DS0 unbundling requirements were adopted showed that wireline switched access was the leading form of telecommunications, and incumbent LECs were the dominant providers of wireline switched access. It followed that unbundling requirements were focused on providing competitive LECs with the network elements, such as local loops, to provide wireline switched access in competition with incumbent LECs. The data available in early 2003 reported 187.5 million wireline switched access lines, with incumbent LECs providing approximately 167.5 million of those lines, about 88% of the total. Cable providers reported serving only 2% of all switched access lines (via coaxial cable) in the reported data available when the Commission adopted the *Triennial Review Order*. Other forms of wireline voice lines, including interconnected VoIP, were so negligible that they were unreported. Over the last 17 years, wireline switched access lost its role as the leading technology for telecommunications. The most recent data reported 38.4 million total wireline switched access lines, with incumbent LECs providing 29.9 million of those lines, less than one-fifth of the wireline switched access lines they provided in 2003. In the interim, interconnected VoIP went from being irrelevant and thus unreported until 2008, to the most recent data showing 69.5 million interconnected VoIP lines reported, outnumbering wireline switched access lines from all providers. Wireline switched access lines now account for just 8% of all retail voice subscriptions across all technologies, and those provided by incumbent LECs are only about 39% of all wireline end-user subscriptions (both switched access and interconnected VoIP). Overall, incumbent LECs serve over fixed lines only 9% of all voice subscriptions across all technologies. At the same time wireline switched access line counts were decreasing, wireless voice subscribership was increasing. December 2002 data reported 136.2 million mobile wireless subscribers. As of December 31, 2019, that number had nearly tripled, reaching 355.7 million. And according to the Centers for Disease Control, most adults live wireless-only households, having increased from 45% to 61.3% between 2014 and 2019 and accounting for more than 80% of Americans between the ages of 25 and 34 and 73% of Americans between the ages of 35 and 44.

57. The change over 17 years has been even more dramatic for broadband. In 2003, the Commission defined advanced services as transmission speeds of more than 200 kbps both upstream and downstream, and found just over 20 million mass market advanced service lines in use. The Commission now defines fixed broadband as speeds of at least 25/3 Mbps, and it was available to approximately 96% of all Americans by the end of 2019. We exclude Barrier Communications Corporation's deployment data from our analysis because of inaccuracies and overstatements in that company's Form 477 filings. While the Commission does not yet consider satellite broadband to be a substitute for wireline broadband, the Commission found that ''[i]f we include satellite service in our estimate, the December 2018 data shows that fixed 25/3 Mbps service is deployed to nearly every American.'' Further, more than 87% of Americans had access to fixed speeds of 250/25 Mbps by the end of 2019. Deployment of last-mile fiber loops, which was not widespread in 2003, has expanded extensively. Between 2014 and 2019, residential subscription to a fiber based broadband service more than doubled, increasing from 8.3 million to 16.7 million. And mobile broadband, provided via LTE technology, which did not even exist in 2004, is now available in geographic areas covering virtually all Americans. Approximately 96% of Americans now have access to both 25/3 Mbps terrestrial broadband and 5/1 Mbps Mobile LTE broadband.

58. *Continuing Marketplace Changes.* Competition in the mass market communications space is likely to continue to grow, as barriers to entry have rapidly fallen for broadband providers using fixed wireless technology in densely populated areas. Industry analysts and incumbent wireline providers believe that 5G may allow wireless providers to capture a significant share of the residential broadband marketplace. T-Mobile committed, as a condition of its merger with Sprint, to roll out an in-home broadband service in millions of households, with a goal of serving the majority of zip codes by 2024. These 5G plans, and those of the other two

national wireless providers, are most advanced in dense urbanized areas where the deployment business case is most compelling. Other providers, including Starry, are also deploying fixed wireless technologies to serve urban areas in different frequency bands. And wireless as an intermodal alternative to wireline voice and broadband service is only going to increase further as 5G deployment progresses, further pushing DS0 loops into obsolescence. Cable providers have expanded their broadband networks beyond their current footprints to ready themselves for competition from forthcoming 5G services.

59. *Impairment Analysis.* We find sufficient evidence of facilities-based competition and competitive entry in urbanized area census blocks without reliance on UNE DS0 Loops and UNE Copper Subloops to determine that competitive LECs in those locations are no longer impaired without access to those UNEs, and that policy considerations weigh against maintaining these requirements. Because UNE Copper Subloops are used to connect DS0 loops to end-user premises, our conclusions about UNE DS0 Loops apply equally to UNE Copper Subloops. Because of the many competitive alternatives available to customers in urbanized areas, we find that elimination of these unbundling requirements will not impact the provision of 9–1–1 service. Our conclusion is based on three related findings. First, robust intermodal competition, particularly from cable providers, now exists in urbanized areas, meaning that in these areas, ''the costs cognizable under the Act of unbundling that UNE outweigh the benefits of unbundling, even if some level of impairment might be present.'' Second, reasonably efficient competitors seeking to provide broadband and voice services in urbanized areas would use fixed wireless or other technologies, and not copper-based DS0 loops. Third, in light of this actual intermodal competition and potential competition from entering providers, continuing to require incumbent LECs to offer UNE DS0 Loops reduces incentives to invest and slows the transition to next-generation networks, in contravention of statutory goals we consider under section 251(d)(2) of the Act.

60. Intermodal competition in the form of cable competition alone is enough to establish the existence of sufficient competition even in the absence of UNEs. Nearly all households in urbanized areas (98%) live in census blocks served by cable broadband with speeds of at least 25/3 Mbps, and incumbent LECs have deployed broadband meeting this speed threshold in 73% of these areas. Incumbent LEC affiliation is determined at the holding company level and for all census block which the incumbent LEC's study area overlaps the census block. We exclude a provider's deployment if the provider is not an incumbent LEC and whose last mile connection is based upon a copper technology (*i.e.,* FCC Form 477 Technology Codes 10, 11, 12, 20 and 30). In addition, 84% of households in urbanized areas live in census blocks served by at least two 25/3 Mbps providers without the use of UNEs, and 90% of households live in census blocks served by at least two 10/1 Mbps providers without the use of UNEs. For purposes of this analysis, we exclude deployment of non-incumbent LECs that report broadband based upon copper facilities on the assumption that these firms are likely using UNEs. Finally, because urbanized area census blocks are relatively small, to the extent that a facilities-based provider already serves one customer in a given census block, economies of scale are more likely to accrue to serve additional customers in that census block, as the Commission long ago noted. There are, on average, 0.057 square miles in a rural census block, 0.017 square miles in an urban cluster census block, and 0.028 square miles in an urbanized area census block.

61. Moreover, it is our predictive judgment, supported by the record, that reasonably efficient competitors seeking to enter the fixed voice and broadband marketplace in urbanized areas for residential and small business customers are likely to use a variety of technologies, including fixed wireless, rather than relying upon the existing copper-based local loop network or building a similar network. That is, the use of DS0 loops to enter the broadband and voice marketplace in urbanized areas is no longer a reasonably efficient technology. Indeed, the three national mobile wireless carriers continue to invest in 5G-based fixed wireless service, which will provide additional fixed-service choices for voice and broadband services, particularly in dense urbanized areas where 5G is being first deployed and where small cell technology is most efficiently used. And other fixed wireless providers are similarly deploying innovative solutions. The record also indicates that a range of providers are deploying fiber-to-the-home networks, including but not limited to incumbent and competitive LECs. To the extent competitive LECs claim they remain dependent upon UNE DS0 Loops in these urbanized areas to serve new customers in order to obtain the necessary scale and revenue to fund such fiber-to-the-home builds, we no longer find these claims compelling. These competitive LECs are not ''new entrants'' in these urbanized areas any longer, and network expansion like that for other types of technology providers should no longer be based on unnecessary unbundled DS0 loops. These and other technologies, rather than copper loops, are reasonably efficient methods of entry into urbanized areas today.

62. Our conclusions about actual and potential competition are supported by our ''at a minimum'' authority under section 251(d)(2). We are not only permitted to look to the impact of unbundling requirements on broadband deployment as ''rationally related to the goals of the Act,'' but are required to take this important policy goal into account. We reject the Electronic Frontier Foundation's argument that we should reconsider our decisions in the 2000s to end the unbundling of fiber-to-the-home loops. As the Commission has consistently found, unbundling fiber-based loops could reduce the incentives for both incumbent and competitive LECs to invest in next-generation networks, and there is no evidence to suggest that unbundling's effect on incentives to invest would be any different in low-income urban markets. In doing so, we find that continued unbundling of DS0 loops would inhibit, rather than promote, broadband deployment and the transition to next-generation networks and services in urbanized areas, because continued unbundling at regulated rates could artificially slow the transition away from legacy services and reduce incentives to invest in more advanced technologies, such as fixed wireless and fiber-based networks.

63. While we proposed in the *NPRM* a finding of no impairment in urban census blocks, which would include both urbanized areas (areas of 50,000 or more people) and urban clusters (areas with at least 2,500 but less than 50,000 people), based on the record and our own data, we conclude that we should limit that finding only to urbanized area census blocks. The data show that there are fewer competitor options in census blocks categorized as urban clusters and rural areas than in urbanized area census blocks. For example, as of December 31, 2019, approximately 84% of households in urbanized areas lived in census blocks with two or more providers of 25/3 Mbps broadband, compared to 59% of households in urban clusters and 42% in rural areas. Incumbent LEC affiliation is determined

at the holding company level and for all census block which the incumbent LEC's study area overlaps the census block. We exclude a provider's deployment if the provider is not an incumbent LEC and whose last mile connection is based upon a copper technology (*i.e.,* FCC Form 477 Technology Codes 10, 11, 12, 20 and 30). We therefore reject arguments that we should extend relief to urban clusters. By limiting DS0 loop unbundling relief to urbanized areas, we also obviate the concerns of commenters that consumers in less densely populated areas, particularly urban clusters, may lose their only source of competition or lose access to high-speed broadband altogether. Commission staff analysis of FCC Form 477 deployment data as of December 31, 2019 and of study area maps indicates that approximately 42,000 households have a single provider option for 25/3 Mbps that may rely on UNE DS0 Loops, based on the number of households who live in census blocks where a single provider reports 25/3 Mbps deployment for residential customers over a copper wire loop. The identification of the provider as a CLEC is based upon the provider's holding company name and incumbent LEC study area maps that indicate that the provider is not the incumbent LEC. About 35,000 of these households live in rural areas and urban clusters where UNE DS0 Loops will remain available. We believe that the approximately 7,000 households who live in urbanized areas (just 0.008% of the 88 million households in urbanized areas) with only one provider of 25/3 Mbps will not be negatively affected by our action today for two reasons. First, as discussed below, we provide a two-part transition period for UNE DS0 Loops in urbanized areas, including a 2-year period for new orders and a 4-year period for existing orders. Second, we believe that these areas may be among the ripest for entry by competitive providers, including fixed wireless providers, based on their relative density and now that UNE DS0 loops will no longer be available in these areas after the transition.

64. *Forbearance Analysis.* The facts supporting our finding of non-impairment equally support an independent finding that forbearance from our UNE DS0 Loop and UNE Copper Subloop requirements in urbanized area census blocks is appropriate. As with UNE DS1 and DS3 Loops, we find that forbearance is appropriate based on our analysis of the specific circumstances at issue. Competitive LECs wanting to continue offering the same services currently provisioned over UNE DS0 Loops in urbanized areas will have access to commercial alternatives, subject to the existence of ''suitable facilities'' after the transition. And because the marketplace for mass market last-mile loops is competitive, as discussed above, the marketplace will discipline the prices of those services.

65. *Section 10(a)(1).* We conclude that enforcement of UNE DS0 Loop obligations in urbanized area census blocks is not necessary to ensure just and reasonable rates. Intermodal competition in urbanized areas has increased dramatically since the Commission adopted the current DS0 loop unbundling obligations, and mass market customers in urbanized areas now have numerous voice and broadband options available to them. The competitive pressures posed by those intermodal competitors will serve to constrain incumbent LEC rates for commercial replacement offerings to UNE DS0 Loops. Both actual and potential competition force incumbent LECs to compete on price in order to retain, and grow, their existing customer bases. Competition overall constrains incumbent LEC rates to end users. And incumbent LECs have an incentive to make wholesale inputs available at reasonable rates so that they will continue to earn revenues from competitive LECs rather than losing those revenues to intermodal competitors. The record supports forbearing from this unbundling obligation, as enforcement of the obligation is not necessary to ensure just and reasonable rates in this competitive environment.

66. *Section 10(a)(2).* We find that the evolving marketplace and the statutory and regulatory safeguards that work to ensure just and reasonable rates also ensure that consumers will not be harmed by forbearance from enforcement of the UNE DS0 Loop obligation. Most importantly, consumers in urbanized areas now have a multitude of intermodal competitors, with others attempting to enter, vying for their voice and broadband business. The fact that these competitors use more modern technologies than copper-based local loops supports our decision in this document. As we found in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order,* ''regulations that subsidize end-user customers to remain on legacy services and technologies run counter to the Commission's goal of facilitating technology transitions to the long-term benefit of all consumers.'' We also note that there is evidence that wholesale alternatives to UNE DS0 Loops currently exist in certain areas or are starting to emerge. For example, according to CenturyLink, at least three large cable providers launched products intended to serve as alternatives to UNE Analog Loops shortly after the Commission adopted the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order.* And CenturyLink itself offers a UNE DS0 Loop wholesale alternative in areas in which it was previously granted forbearance. Moreover, incumbent LECs have committed to making wholesale alternatives commercially available ''where suitable facilities exist'' ''in any area in which unbundled DS0 loops are no longer available,'' which competitive LECs can use to provide service.

67. *Section 10(a)(3).* Finally, we find that forbearing from the UNE DS0 Loop obligation in urbanized area census blocks is in the public interest as it promotes the policy of facilitating the deployment of next-generation networks and services and encouraging the transition away from legacy facilities. As we noted in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order,* end users transitioning from TDM to new technologies and services ''will experience the benefits the Commission has recognized as flowing from that transition,'' including ''not only the benefits from the technologies themselves but also from the vibrant competition associated with next-generation [] services.'' Indeed, extensive intermodal competition has already developed in these areas. Retaining UNE DS0 Loop obligations in this competitive environment in urbanized area census blocks could actually harm the facilities-based competitive options that are currently available and developing, because the use of UNEs at cost-based rates may allow providers using legacy technologies to undercut new entrants using fixed wireless and other advanced technologies, as well as reducing competitive LECs' incentives to invest in advanced technologies. And continued reliance on legacy services by end users reduces the incentive of incumbent and competitive LECs alike to deploy advanced networks and services. We therefore find retaining this requirement in urbanized areas would have an adverse effect on the public interest. The Commission has previously expressed its preference for facilities-based competition.

68. *Geographic Area.* Certain commenters urge us to find that competitive LECs are not impaired without access to all UNE DS0 Loops or that we should forbear from this obligation on a nationwide basis. We

disagree. Two of these commenters (USTelecom and AT&T) subsequently entered into a joint compromise proposal that appears to limit their request for relief to urbanized areas subject to certain conditions. While broadband deployment and competitive entry may be increasing in urban clusters and rural areas, competitive broadband availability in these areas continues to lag behind densely populated urbanized areas, and the costs of deployment are inherently higher as density falls.

69. Alternatively, other commenters urge us to make our findings of no impairment or forbearance on a county basis rather than on a census block basis, as proposed in the *NPRM,* for purposes of administrative efficiency. Still others request that we implement our findings on a wire center basis, to provide incumbent LECs with flexibility in implementation. We disagree that a geographic basis other than census blocks is the best geographic area to rely upon. The Commission's Form 477 data is reported on a census block level, thus making that geographic boundary the most appropriate for measuring the extent of competitive facilities-based deployment by technology and the availability of competitive broadband alternatives for households. While incumbent LECs provision UNEs at the wire center level, and some wire centers serve both urbanized areas and urban cluster and rural census blocks, to the extent an incumbent LEC does not wish to take measures to distinguish between the different types of census blocks, we find that it is better to err on the side of overinclusiveness for UNE DS0 Loops, to avoid eliminating such UNE access for customers located in rural areas and urban clusters. Indeed, the Commission erred on the side of overinclusiveness when defining Tier 3 Wire Centers for the purpose of where to unbundle transport.

70. *Cable Deployment.* Certain commenters assert that reliance on cable deployment as evidence of non-impairment is inappropriate due to cable provider first-mover advantages, because they already had extensive facilities deployed for providing video service and had an established customer base. We disagree. For one, our impairment and forbearance analyses require us to consider competition from all sources. When affirming the Commission's decision not to require the unbundling of the broadband capabilities of hybrid loops, the D.C. Circuit held that ''robust intermodal competition from cable providers'' was sufficient evidence of competition, in itself, to justify the Commission's decision. The same extensive investment in the legacy cable video network that enabled cable companies to provide competitive voice and broadband service in competition with incumbent LECs and served as the underpinning of the Commission's decision to refrain from unbundling hybrid loop broadband capabilities applies equally to our decision today for UNE DS0 Loops. If the Commission was permitted to rely on cable deployment to support a decision not to unbundle the broadband capabilities of hybrid loops, we may rely on it to support our decision to eliminate unbundling for DS0 loops here. Moreover, we can consider the effects of intermodal competition in our decision to weigh other factors when considering whether to order unbundling, particularly the incentives for broadband deployment, based on our section 251(d)(2) authority.

71. *Form 477 Data.* Some commenters assert that we should not rely on Form 477 data to support competition findings because of flaws in that data. We disagree. Our UNE DS0 Loop relief in this Order is limited to urbanized areas. The census blocks in those areas are generally extremely small, meaning even in the unlikely event a provider is serving only one or a few locations in these census blocks, we can infer that the other locations in the census block are extremely likely to be served in the near future. Indeed, based on the most recent Form 477 data, cable's footprint increased by over 645,000 households, or 1.8 million people, from December 2018 to December 2019. Our assumption of such a deployment strategy, considering the high fixed costs of broadband deployment, is a ''reasonable inference[] regarding the prospects for competition in one geographic market from the state of competition in other, similar markets,'' as we are required to make per the *United States Telecom Ass'n* v. *FCC,* 359 F.3d 554 (D.C. Cir. 2004) decision (*USTA II* decision).

72. *5G and Other Nascent Technologies.* Certain commenters assert that we should not rely on potential 5G deployment to support findings of potential competition sufficient to find non-impairment. Again, as we explain above, DS0 loops are no longer a reasonably efficient technology to provide voice or broadband services in urbanized areas. We must look not only to existing competition in making an impairment finding, but to all sources of *potential* competition as well. And the impairment inquiry specifically ''presume[s] that a requesting carrier will use reasonably efficient technology.'' As we have indicated, we believe it is increasingly likely to be fixed wireless technology, whether provided by 5G or other means. We therefore ''explicitly reject arguments that support unbundling based on the costs associated with a particular architecture or approach—even an architecture or approach employed by the incumbent LEC—where entry using a more efficient available technology would permit economic entry.''

73. ''*Natural Forbearance.*'' Certain commenters assert that the Commission's copper retirement rules provide incumbent LECs an avenue for ''natural forbearance'' and thus assert that we should not provide UNE DS0 Loop relief through deregulatory means. Because section 251(c)(3)'s requirements do not apply to fiber facilities (other than dark fiber transport), *see* 47 CFR 51.319, an incumbent LEC may obtain unbundling relief by deploying fiber or other next-generation networks and then retiring its copper facilities pursuant to our network change disclosure rules. Incumbent LECs retire their copper facilities through a notice-only process, without the need to seek our authorization. The continued unbundling obligation, commenters assert, thus acts as an incentive for incumbent LECs to deploy fiber. We are unpersuaded. First, unbundling imposes significant economic costs not recognized by this argument. Second, unbundling requirements lack sufficient countervailing benefits in densely populated urbanized areas, given the degree of competition and potential entry that already exists in those areas separate from the incumbent LEC's decision whether or not to retire copper in that area. Given the existence of competition in urbanized areas that does not rely on access to UNE DS0 Loops, we find that this one-sided regulation giving certain competitive LECs an economic advantage where others have entered the market without such an advantage is unwarranted, and incumbent LECs should no longer have to bear this lopsided burden.

74. *Single Competitor Not Enough to Find Non-Impairment.* Certain commenters also oppose the proposed finding of non-impairment in the *NPRM* because, they assert, a single competitor is not sufficient to show that competitive providers are not impaired without unbundled access to the particular network element. However, we find evidence of existing and potential intermodal competition in urbanized areas. Nor is this argument consistent with the D.C. Circuit's holding in the *USTA II* decision that the presence of intermodal competition from cable providers alone was

sufficient to support eliminating unbundling obligations for hybrid loops. In any event, competitive providers will still have access to UNE DS0 Loops in census blocks in rural and urban cluster areas after the relief we grant in this order becomes effective, thus largely obviating the concerns of these commenters.

75. *Transition Period.* While the *NPRM* proposed a three-year transition period and sought comment on a six-month period for new orders, numerous stakeholders have negotiated and proposed an alternative transition timeframe that we find to be reasonable based on the record in this proceeding and which we adopt instead. We condition our relief from UNE DS0 Loop and associated UNE Copper Subloop obligations on a two-part transition, consistent with the Compromise Proposal. First, we permit competitive LECs to order new UNE DS0 Loops for an additional 24 months after the effective date of this order. This timeframe will enable competitive LECs to continue to execute short-term business plans, honor contractual obligations with new or existing customers, including small businesses, and replace UNE DS0 Loops lost through end-user customer moves or loop degradation, while they determine which alternative voice service option will best serve their customers' needs. Second, we adopt a 48-month grandfathering period for all competitive LEC customers. The 48-month transition timeframe within which all UNE DS0 Loops (including any new UNE DS0 Loops ordered during the first 24 months) must be transitioned to alternative arrangements will commence on the effective date of this order. Industry organizations and their members, accounting for the lion's share of buyers and sellers of these UNEs, agree that this 48-month period is reasonable and should provide more than enough time for competitive LECs and their customers to transition to alternative service arrangements. Competitive LECs typically have contract lengths of a minimum of three years with business or government customers. To the extent competitive LECs have entered into longer-term contracts with their customers without securing long-term contracts with their suppliers, they have done so at their own risk like any other business does, and we see no reasonable basis for accommodating that risk.

76. We reject proposals calling for either a longer transition period or a shorter transition period. We find this four-year period to be a reasonable time frame that is sufficient to enable competitive LECs in these urbanized areas to transition away from depending on UNE DS0 Loops without stranding any investments they may have made while not burdening incumbent LECs with the costs of unbundling longer than necessary. We note that Puerto Rico Telephone Company, which was not a party to the INCOMPAS–USTelecom Compromise Proposal, supports the UNE DS0 relief, transition period, and associated conditions as a ''reasonable balance.''

77. During the relevant transition period for any competitive LEC customer, any UNE DS0 Loops that a competitive LEC leases as of the effective date of this Order shall be available for lease from the incumbent LEC at regulated UNE rates. Such rates are established either through negotiated interconnection agreements or through state-commission-arbitrated rates applying certain Commission-developed pricing formulas. Our forbearance action is not intended to upset pre-existing interconnection agreements or other contractual arrangements that may currently exist nor pre-existing state-commission-arbitrated rates during the transition period (including any already-adopted state commission scheduled changes in UNE rates), which should quell concerns of those fearing near-term price increases for UNE DS0 Loops resulting from this Order. However, beginning with month 37 of the grandfathering period, incumbent LECs may raise their prices by up to 25%. Delaying any price increase for the first three years of the transition period should obviate concerns about economic pressure accompanying any such increase. However, allowing a price increase during the final year of the transition will further incentivize competitive LECs to transition their customers off of legacy networks. And incumbent LECs will be entitled to charge market rates after month 48, when the grandfathering period will expire. And incumbent LECs have committed to providing commercial alternatives for DS0s at the end of the transition period where the facilities exist to do so. Of course, the transition mechanism we adopt is simply a default process, and competitive and incumbent LECs remain free to negotiate different arrangements superseding this transition period and replacing UNE DS0 Loop arrangements with negotiated commercial arrangements at any earlier time. We find this approach will ensure an orderly transition for end-user customers of affected competitive LECs by mitigating any immediate service disruption or rate changes that could otherwise be experienced by these end users if current rates for these UNE DS0 Loops were immediately eliminated.

3. UNE Narrowband Voice-Grade Loops

78. In the *NPRM,* we proposed to eliminate all remaining narrowband voice-grade loop unbundling obligations. We find that competitors are no longer impaired without access to these elements, nationwide. Moreover, we find that continued unbundling of these network elements is no longer justified because it contravenes the Congressionally-mandated policy goal of ensuring the deployment of next-generation networks and services. We also adopt our proposal and independently find that forbearance from the remaining UNE Narrowband Voice-Grade Loop obligations nationwide is warranted.

79. *Background.* Under our current rules, incumbent LECs must provide three specific types of unbundled narrowband voice-grade loops: UNE Analog Loops, 64 kbps voice-grade channels over last-mile fiber loops when an incumbent LEC retires copper (UNE 64 kbps Voice-Grade Channel Over Fiber Loops), and the TDM capabilities of hybrid loops (UNE Hybrid Loops) (collectively, UNE Narrowband Voice-Grade Loops).

80. UNE Analog Loops are one type of copper loop that incumbent LECs must make available to competitors under the Commission's rules implementing section 251(c)(3). Notably, UNE Analog Loops are capable of providing only legacy TDM voice service, often referred to as plain old telephone service, or ''POTS.'' UNE Analog Loops, by definition, are not capable of providing or supporting digital communications, including modern IP-based services or even digital subscriber line (DSL) service. In the recent USTelecom forbearance proceeding, we granted forbearance relief from unbundling requirements for UNE Analog Loops to price cap incumbent LECs in their service areas. We granted this relief due to extensive intermodal competition present in the voice marketplace, the harmful marketplace distortions generated by outdated regulations, and because the continued existence of UNE Analog Loops reduced incentives for both incumbent and competitive LECs to invest in their own facilities and to transition to next-generation networks.

81. UNE Hybrid Loops are another type of loop that incumbent LECs must make available to competitors under the Commission's rules implementing section 251(c)(3). Hybrid loops are local loops ''composed of both fiber optic

cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant.'' Our rules currently require that incumbent LECs unbundle either (1) a TDM voice-grade capable 64 kbps channel or (2) a spare copper loop if the requesting carrier seeks to provide narrowband services, and only the TDM features, functions, and capabilities of hybrid loops if the requesting carrier seeks to provision broadband services. UNE Hybrid Loops are used to provide the ''exact same legacy TDM-based services that could be provided with UNE Analog Loops.'' The only difference is that UNE Hybrid Loops ''provide those services partially over fiber facilities, rather than over copper-only facilities.'' In the *Triennial Review Order,* the Commission declined to order unbundling of the packet-based capabilities of hybrid loops, because unbundling ''these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706.''

82. The UNE 64 kbps Voice-Grade Channel Over Fiber Loops obligation was created when the Commission eliminated unbundled access to fiber-based local loops because, among other reasons, requiring unbundling of fiber-based local loops would ''undermine important goals of the 1996 Act,'' particularly the section 706 goal to encourage the deployment of advanced telecommunications capability to all Americans. The Commission found, however, that where an incumbent LEC has retired its copper facilities, lack of access to an incumbent LEC fiber loop would impair a competitive carrier in its provision of narrowband voice services it had been providing over the unbundled copper loop. In essence, this ''very limited'' requirement was intended to prevent incumbents from exercising their ''sole control'' over the disposition of copper loops (by retiring the copper loop and replacing it with a fiber-based local loop) to disrupt competitors' provision of narrowband services. By 2015, the Commission recognized that this requirement itself could undermine incentives for broadband deployment and granted forbearance on a forward-looking basis to incumbent LECs from the requirement to make available a 64 kbps voice-grade channel over overbuilt fiber loops. This 64 kbps unbundling requirement remains in the Code of Federal Regulations. The Commission found that this unbundling requirement could impede copper loop retirements and the ongoing transition from copper to fiber and from legacy TDM-based services to next-generation networks and services. While the Commission found that this UNE had a ''decreasingly relevant purpose'' as a safeguard to protect narrowband voice competition during the copper-to-fiber transition, it nevertheless retained the 64 kbps voice-grade channel unbundling obligation for existing users.

83. UNE Narrowband Voice-Grade Loops, be they UNE Analog Loops, UNE Hybrid Loops, or UNE 64 kbps Voice-Grade Channel Over Fiber Loops, are used, if at all, almost exclusively for the provision of switched access voice-grade service, which we have found customers are migrating away from in favor of IP- and wireless-based voice services provided by multiple intermodal providers. Our conclusions in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* were based on Form 477 data, which is collected on a nationwide basis. Indeed, in 2019, incumbent LEC legacy networks provided only about 8% of retail voice subscriptions across all technologies, serve a minority of both wired residential connections and wired business connections, and face growing competition from voice service alternatives including facilities-based fixed voice providers such as cable companies providing VoIP, mobile wireless facilities-based providers and resellers, and VoIP providers offering over-the-top services via broadband.

84. *Impairment Analysis.* Consistent with our *NPRM* proposal to eliminate these obligations, we find that competitors are not impaired without access to UNE Narrowband Voice-Grade Loops due to the widespread availability of intermodal competition, the declining number of incumbent LEC voice subscriptions, the lack of demand for these UNEs, and the migration away from legacy TDM services. Section 251(d)(2) mandates that the Commission consider ''at a minimum'' whether access to proprietary network elements is necessary and a competitor would be impaired without access to such network elements. We find that continued unbundling of these network elements contravenes the congressionally mandated policy goal of ensuring the deployment of next-generation networks and services.

85. *UNE Analog Loops.* We find that competitors are not impaired without access to UNE Analog Loops nationwide. Today, there are a multitude of competitive alternatives for voice services that do not rely on an incumbent LEC's legacy network. We find there is no longer any credible basis to claim competitors are impaired without access to these UNE Analog Loops. First, voice-grade copper loops are no longer a reasonably efficient technology to enter the voice marketplace, in light of facilities-based and over-the-top alternatives to provide voice service. A reasonable entrant would use any of a number of newer technologies and services capable of providing advanced voice and broadband services, including wireless technologies. And a number of over-the-top voice capabilities are available that could also be used to enter the voice market today without constructing network facilities, instead relying on the broadband capabilities of other providers' networks.

86. Second, intermodal competition for voice services is so advanced that competitive providers, including cable providers, wireless providers, and other VoIP providers, have come to dominate the voice service marketplace. The level of competition, much of which evolved without UNEs, is such that the cost of unbundling can no longer be justified. As the Commission noted in 2004, impairment can only be found for low-capacity loops ''*if* no alternatives outside the incumbent's network are available.''

87. Finally, the declining share of incumbent LEC switched-access voice subscriptions in recent years and the prevalent deployment of facilities-based alternatives indicates that incumbent LECs no longer have a unique position in the voice service market. We further find that continued unbundling of these network elements that serve only to preserve outdated legacy voice services slows the transition to next-generation networks and services in contravention of our significant policy objectives in promoting the deployment of advanced telecommunications capabilities. Our decision to eliminate UNE Narrowband Voice-Grade Loop obligations furthers the Commission's ultimate goal of fostering the deployment of next-generation networks and services and consumers' migration to next-generation services.

88. *UNE Hybrid Loops.* Nationwide elimination of UNE Hybrid Loop obligations is also appropriate because reasonably efficient competitors are not impaired without access to these UNEs—*i.e.,* no reasonably efficient competitor would seek to enter today's voice-service market by using a loop solely capable of providing TDM service. The ''widespread deployment of facilities-based alternatives'' to the TDM-based services provided over UNE

Hybrid Loops and the fact that intermodal competition for voice services is so advanced indicates there is no basis for competitors to claim they are impaired without access to TDM-based services, particularly those provided over UNE Hybrid Loops. Further, competitive LECs no longer face significant barriers to entering the voice market without access to the TDM-based services provided over UNE Hybrid Loops owned by incumbent LECs. Competitors have come to dominate the voice service marketplace using technologies that do not include TDM-based voice. The declining amount of incumbent LEC voice subscriptions and the *de minimis* demand for the TDM-based services provided over UNE Hybrid Loops demonstrates that access to these UNEs are not necessary for a reasonably efficient competitor to enter today's voice-service marketplace. For these reasons, no reasonably efficient competitor would seek to enter today's voice service market by using a loop solely capable of providing TDM service, just as we find with respect to UNE Analog Loops. Rather, such an entrant using its own facilities would provide any of a number of newer technologies and services capable of providing both voice and broadband services, or provide over-the-top service relying on other providers' broadband networks. Moreover, eliminating access to the TDM capabilities of UNE Hybrid Loops will reduce potential delays to the TDM-to-IP transition and will promote broadband deployment that will benefit American consumers and businesses, supporting important goals of the Act.

89. *Grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops.* We also eliminate the remaining previously grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops obligation as reasonably efficient carriers are not impaired without continuing access to these grandfathered arrangements. The *de minimis* use of the grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops demonstrates that continued access to these UNEs is not necessary for a reasonably efficient competitor to enter today's voice-service marketplace. As with the remaining UNE Analog Loops and UNE Hybrid Loops, no competitive LECs or other party in the record has specifically indicated that any provider is relying upon these grandfathered UNEs to provide voice services today. And even where some competitive LECs may continue to do so, this use does not overcome the compelling evidence of competitive voice alternatives that warrant a finding of non-impairment. In sum, the impact of eliminating these grandfathered UNEs is negligible given the lack of demand for this grandfathered UNE and the migration from legacy TDM voice service to newer technologies and services. A reasonably efficient competitor would not look to UNE 64 kbps Voice-Grade Channel Over Fiber Loops as a reasonably efficient technology for entering the voice services marketplace today. Competitors are therefore not impaired without access to the remaining grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops. And eliminating these remaining channels that perpetuate outdated technology will further reduce potential delays to the TDM-to-IP transition, facilitating the goals of the Act.

90. *Forbearance—Analog Loops. Section 10(a)(1).* As a separate and independent ground for eliminating UNE Narrowband Voice-Grade Loops requirements nationwide, we conclude that the remaining UNE Analog Loop obligations are unnecessary to ensure that the charges for voice services are just and reasonable for the same reasons set forth in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order.* No party has advanced a theory under which incumbent LECs could engage in unreasonable practices and classifications regarding the remaining UNE Analog and UNE Hybrid Loops without also being able to charge unjust and unreasonable rates. As there is no record evidence to the contrary, we find that that the circumstances in non-price cap areas are indistinguishable from those in price cap areas with respect to these UNEs that can only be used to provision voice-grade service. Further, competitors have not specifically indicated that they are purchasing or relying upon these UNEs to provide voice services in non-price cap areas where other voice alternatives do not exist. Because of lack of record evidence of use of UNE Narrowband Voice-Grade Loops, we also reject the argument that we should expand the rural exemption to include these loops. In fact, very few of these UNEs still exist in non-price cap areas. Price-cap incumbent LECs account for over 99% of UNE loops provisioned to competitors. The record shows virtually uniform support for eliminating the requirements for voice-grade loops due to the changing voice-services marketplace and lack of demonstrated need for these requirements. TPx contends that ''[t]he Commission should evaluate whether the loss of analog voice loops makes competition and pricing conditions better or worse in the residential voice market before it de-lists additional DS0 UNEs based on a claimed competitive residential voice service market,'' but does not specifically challenge extending unbundling relief to the remaining UNE Analog Loops. We previously forbore from UNE Analog Loop requirements for price cap incumbent LECs in light of the ''overwhelming evidence demonstrating the increasing migration from legacy TDM voice service to IP-based and wireless voice communications capabilities provided by multiple intermodal providers.'' UNE Analog Loops in non-price cap areas are used to provide the exact same outdated TDM-based services as UNE Analog Loops in price cap areas. Moreover, UNE DS0 Loops, which can also be used to provide voice service, will still be available in rural and urban cluster census blocks, which account for approximately 85% of the population residing in census blocks overlapping non-price cap study areas. We find that it is in the incumbent LECs' interest to continue to serve wholesale customers. In fact, incumbent LECs have committed to offer commercial replacements in areas where UNE DS0 Loops will no longer be available. UNE DS0 Loops are provided over the very same facilities as UNE Analog Loops, only without the TDM equipment placed on the loops by the incumbent LEC to limit the loop to voice-grade service. We therefore find that forbearance from the remaining UNE Analog Loop requirements in non-price cap areas will not result in unjust or unreasonable voice service rates.

91. *Section 10(a)(2).* We also find that enforcement of the remaining UNE Analog Loop obligations is unnecessary for the protection of consumers for the reasons discussed above and in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order.* Specifically, we find that forbearance will not result in unjust or unreasonable rates for consumers, nor will consumers risk losing service given that competitive LECs continue to have other means by which to offer consumers voice service. While a handful of commenters express concern about increased costs leading to increased prices for consumers, the ''explosion of competition [in the voice service market] amply protects consumers far better than narrow, technology-specific Commission dictates ever could.'' Moreover, the majority of non-price cap incumbent LECs are rural LECs, most of which qualify for the rural exemption from all section 251(c) requirements, including

UNE Analog Loops. They therefore already have no obligation to offer their telecommunications services to competitive LECs at UNE prices while the rural exemption remains in place. Further, UNE DS0 Loops will remain available in urban clusters and rural areas after forbearance, and incumbent LECs have committed to provide commercial alternatives to UNE DS0 Loops after they are eliminated in urbanized areas. Those UNEs not only afford the same voice capabilities as UNE Analog Loops, they have the added advantage of being capable of carrying broadband service. While retaining UNE DS0 Loops or UNE Narrowband Voice-Grade Loops impose costs on incumbent LECs, we find DS0s are worth keeping available in urban clusters and rural areas because of the benefits DS0s have for rural broadband. The narrowband-only capability of UNE Narrowband Voice-Grade Loops does not have the same benefits for consumers. Additionally, this forbearance continues to facilitate the TDM-to-IP transition, which benefits all consumers in the long term.

92. *Section 10(a)(3).* Moreover, we find that forbearance from the remaining UNE Analog Loops requirements is consistent with the public interest for the same reasons we detailed in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*—that is, reducing reliance on outdated technology encourages competition based on next-generation networks and broadband services. Forbearance from outdated unbundling rules will promote next-generation infrastructure deployment by both incumbent LECs and competitive LECs that otherwise would have relied on UNEs. We reject arguments that we should refrain from forbearance because of a lack of commercial alternatives for voice-grade analog loops. Again, UNE DS0 Loops, which afford the same voice capabilities as UNE Analog Loops and are also capable of carrying broadband service, will remain available after forbearance in rural areas and urban clusters. Additionally, at least one major incumbent LEC is now offering commercial alternatives to UNE Analog Loops, and the other major incumbent LECs have agreed to offer commercial alternatives to UNE DS0 Loops once they are no longer available as UNEs. Finally, the Act requires us to protect competition, not competitors, and we do not believe that the continued availability of UNE Analog Loops is necessary in light of the competitive nature of today's voice marketplace. We thus grant nationwide forbearance from the remaining UNE Analog Loop requirements as ''it is no longer necessary to require . . . once-upon-a-time market-opening obligations that today amount to disparate regulatory burdens that frustrate the transition to advanced communications services offered over next-generation networks.''

93. *UNE Hybrid Loops.* We also forbear, on a nationwide basis, from our regulations requiring access to UNE Hybrid Loops. The fact that UNE Hybrid Loops are ''used to provide the exact same legacy TDM-based services'' that can be provided with UNE Analog Loops supports forbearance from this UNE requirement for the same reasons that we forbore from UNE Analog Loops in price-cap areas in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* and in non-price cap areas today. There is broad record support for eliminating the requirements for UNE Hybrid Loops nationwide, and no party claims to use or rely on this UNE, nor does any party argue that the obligation should remain in place. Moreover, as the Commission found when it forbore from the 64 kbps voice channel over fiber in 2015, the requirement to provide access to unbundled legacy elements when incumbent LECs upgrade their copper loops to modern facilities can slow the transition to next-generation networks and services. Therefore, forbearance from the remaining UNE Hybrid Loop requirements meets the requirements of section 10(a) of the Act. We conclude that, because no carriers claim to use this UNE, pursuant to section 10(a)(1), forbearance from the UNE Hybrid Loop obligation will not result in unjust or unreasonable voice service rates, and we also find that enforcing the UNE Hybrid Loop obligation is unnecessary for the protection of consumers pursuant to section 10(a)(2). Forbearance from these obligations is also consistent with the public interest pursuant to section 10(a)(3) as it will remove an unnecessary regulatory burden and promote next-generation infrastructure deployment by both incumbent LECs and competitive LECs that otherwise would have relied on UNEs. We thus grant nationwide forbearance from the UNE Hybrid Loop requirements.

94. *Grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops.* We also conclude that nationwide forbearance from the requirement that competitive LECs continue to receive unbundled access to the previously grandfathered 64 kbps voice-grade channels over fiber loops is appropriate pursuant to the requirements of section 10(a) of the Act. The Commission forbore from this requirement on a nationwide basis for all incumbent LECs in 2015 but grandfathered the obligation as to existing UNE 64 kbps Voice-Grade Channels Over Fiber Loops. The record indicates that there are only a small number of grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops that are still being used. Indeed, no commenter argues this obligation should be preserved. To the extent competitors still rely on the grandfathered 64 kbps voice-grade channel over fiber loops, the three-part forbearance standard would be met for the same reasons it is met with respect to the remaining UNE Analog Loops and UNE Hybrid Loops. We note the lack of clarity in Commission precedent as to the precise status of this grandfathering obligation and find that we need not resolve it in this Order because elimination is justified based on the fact that no commenters argue to retain the UNE obligations for these 64 kbps voice-grade channels. Specifically, even if the cost for incumbent LECs to maintain the legacy equipment and systems is low, continuing to maintain and support this obligation solely to protect narrowband legacy voice service is no longer necessary to ensure just and reasonable rates or protect consumers in light of our prior findings about the state of the voice services marketplace and the *de minimis* use of these unbundled 64 kbps channels provisioned over fiber.

95. *Transition Period.* The *NPRM* proposed a transition period of three years and sought comment on whether we should include a six-month period for new orders for all UNE Narrowband Voice-Grade Loops. Based on record evidence that UNE Narrowband Voice-Grade use is *de minimis* and that no commenter has indicated new orders are being placed, we find a three-year transition period appropriate for these UNEs and is consistent with the *UNE Transport Forbearance Order* and the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order,* each of which provided three-year transition periods, ''to fully ensure that current *and* potential competition plays its expected role'' to ensure consumers currently using these services are not harmed, and for competitive LECs ''to replace their embedded base of legacy TDM customer premises equipment and other increasingly obsolete TDM-based peripheral devices with new IP-capable equipment.'' In other contexts, the Commission similarly has adopted a uniform transition period of three years to allow existing customers to facilitate their transition to alternative facilities or arrangements in other deregulatory actions. We find that this transition

period supplies the necessary incentives for both incumbent and competitive LECs alike to deploy their own next-generation networks as expeditiously as possible, while ensuring that end users do not experience undue service disruption. Thus, competitive LECs must transition to alternative facilities or services within this three-year transition period that will begin on the effective date of this Order.

96. No commenters specifically argued for a longer or shorter transition period for UNE Narrowband Voice-Grade Loops. We disagree with commenters who made more general assertions that the transition period for these and other UNEs should be shorter than three years for existing customers. We reason that three years is appropriate in this case to alleviate any potentially negative impact on previous investments in legacy customer premises equipment and service disruption.

97. We also disagree with commenters who made general assertions there should be a longer transition period to place new orders and for existing customers to continue services. UNE Narrowband Voice-Grade Loops are no longer an ''integral part of the competitive landscape,'' and thus three years is sufficient to protect against service disruption, based on the record evidence that these UNEs are not extensively leased or relied upon nationwide. We find that a period longer than three years is unjustified and not in the public interest as it does not coincide with the Commission's policy goal of advancing next-generation networks and services.

98. As with all UNE relief, we recognize that the transition mechanism we adopt today is simply a default process, and carriers remain free to negotiate alternative arrangements superseding this transition period. Our transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of facilities or services. Therefore, we adopt a three-year transition of existing UNE Narrowband Voice-Grade Loops, commencing on the effective date of this Order.

*B. Multiunit Premises UNE Subloops and Network Interface Devices*

99. In the *NPRM,* we proposed to eliminate UNE Subloops, including Multiunit Premises UNE Subloops, in the same geographic areas where we eliminated the underlying UNE Loop, and we take action consistent with that proposal as to UNE Copper Subloops above. Based on the record in this proceeding and in the interest of regulatory parity, however, we diverge from the proposal in the *NPRM* as to Multiunit Premises UNE Subloops and find that competitors are no longer impaired without access to Multiunit Premises UNE Subloop obligations nationwide and that access to this stand-alone UNE is not necessary for competitors to deploy their own facilities. We also independently find that forbearance is warranted for Multiunit Premises UNE Subloops separate and apart from our impairment analysis. We further find that competitors are no longer impaired without access to the UNE Network Interface Devices (NID) requirement and consistent with the *NPRM,* independently find that forbearance from this obligation is also appropriate because the record indicates that stand-alone NIDs are not necessary for competitive LECs to access potential customers. Therefore, we eliminate these unbundling obligations on a nationwide basis.

100. *Multiunit Premises UNE Subloops.* Subloops are portions of a loop or ''smaller included segment[s] of an incumbent LEC's local loop plant.'' Competitive LECs generally order subloops with the intention of taking ''the competitor all the way to the customer.'' Our rules impose UNE obligations for two types of subloops—copper subloops, discussed above, and multiunit premises subloops. The Commission's rules separately address Multiunit Premises UNE Subloops due to previously-found specific ''impairments associated with facilities-based entry in multiunit buildings or campus environments.'' The rule states that incumbent LECs must offer unbundled access to these subloops necessary to access wiring at or near a multiunit customer premises, *i.e.,* all incumbent LEC loop plant between the minimum point of entry at a multiunit premise and the point of demarcation. Unlike copper subloops, the Multiunit Premises UNE Subloop includes the entirety of the loop plant regardless of the capacity level or type of loop the requesting carrier will provision to its customer, that is, including fiber or hybrid loops. The Multiunit Premises UNE Subloop also includes any inside wiring owned and controlled by the incumbent LEC.

101. *Impairment Analysis.* The record demonstrates that incumbent LECs ''no longer have a unique competitive position in multiunit premises'' and thus, the very reason for requiring incumbent LECs to provide Multiunit Premises UNE Subloops no longer exists. Section 251(d)(2) mandates that the Commission consider ''at a minimum'' whether access to proprietary network elements is necessary and a competitor would be impaired without access to such network elements. The Commission enacted these particular unbundling obligations to address issues related to facilities-based competitors accessing the customer's location where access to the premises was controlled or managed by someone other than the customer. In 2003, the Commission explained that incumbent LECs had ''first-mover advantages'' with respect to access to customers in multiunit premises because of their prior exclusive access. This no longer holds true today. In fact, the incumbent LEC ''frequently is not the 'incumbent' in the multiunit premise,'' and ''it is the owner of the property, and not the [incumbent] LEC or another provider, that typically controls access to the property.'' Competitive LECs do not assert the contrary is true. Indeed, cable companies are often the incumbent provider in the MTE. Moreover, competitive LECs ''can economically run their own high-capacity facilities to multiunit premises,'' and the Commission's rules prohibit LECs from entering into exclusive access contracts with the owners of commercial and residential multiunit premises. Therefore, we find that there is no evidence that incumbent LECs face lower barriers to entry to serve multiunit premises than competitive LECs. As such, incumbent LECs ''enjoy no particular advantage in deploying to [multiunit] premises'' and competitive LECs are no longer impaired without access to Multiunit Premises UNE Subloops.

102. INCOMPAS and NWTA assert that competitive LECs ''serving MTEs face significant barriers to entry because of the many anticompetitive practices imposed by MTE owners and managers''—not incumbent LECs—and allude to these anticompetitive practices as ''incumbent providers and MTE owners entering into sale-and leaseback agreements''—which are largely agreements between cable providers and building owners. Indeed, most of the arguments against sale-and-leaseback arrangements in the MTE Docket contend that they are used by building owners and cable providers to circumvent the Commission's cable inside wiring rules, which only apply to certain video providers and not incumbent LECs. This argument is not directed at incumbent LECs, nor does it demonstrate that incumbent LECs face lower barriers to entry than competitive

LECs, and is therefore inapplicable in the UNE context. We find that this argument is more appropriately suited for our current MTE proceeding where many incumbent LECs are also calling for action related to what they claim are anticompetitive practices of MTE owners and incumbent providers, often cable providers.

103. Granting relief from this stand-alone requirement will not disrupt any policy decisions that we may make in other proceedings examining competition in multiunit premises. Although competitive LECs have asserted that special barriers still exist to accessing multiunit premises, we find that concerns about access to multiunit premises should be and would be better addressed in the MTE proceeding, where we are considering ways to improve competitive broadband access to multiple tenant environments, and where any action we take would apply to a broader group of providers rather than only incumbent LECs. The Commission found in the *Triennial Review Remand Order,* ''it would be inappropriate to distort our unbundling analysis in an effort to solve alleged deficiencies in other aspects of our regulatory regime.'' It thus left ''building-specific impediments to be addressed in other Commission proceedings, or in other fora, as appropriate.'' Indeed, the Commission has on multiple occasions broadened its rules prohibiting providers from entering into exclusive building access agreements with MTE owners so that similar rules now apply to incumbent LECs serving residential and commercial properties, competitive LECs, and multichannel video programming distributors subject to section 628 of the Act. Any remaining barriers to accessing multiunit premises wiring are independent of accessing the Multiunit Premises UNE Subloop, and no commenters in this proceeding demonstrate that incumbent LECs maintain special advantages in multi-tenant environments today. We clarify that our findings today and our decision to eliminate the Multiunit Premises UNE Subloop requirement do ''not in any way prejudice the distinct set of questions regarding the effect on competition of restrictions imposed by a building owner.''

104. The record further supports nationwide elimination of Multiunit Premises UNE Subloops as only a *de minimis* number of multiunit premises subloops are currently being sold, especially on a stand-alone basis. As there is already a lack of demand and usage, reasonably efficient competitors would not generally be impaired by lack of access to this UNE subloop. Moreover, no commenter has presented compelling evidence regarding the necessity of this stand-alone UNE.

105. *Forbearance.* We also find that forbearance is warranted for Multiunit Premises UNE Subloops separate and apart from our non-impairment finding. As evidenced by the current record only a *de minimis* number of multiunit premises subloops are currently being sold, especially on a stand-alone basis. The record also supports forbearing from this requirement as it is economical for competitive LECs to run their own high-capacity facilities to MTEs. Moreover, incumbent LECs ''at risk of losing revenue when traffic shifts from their facilities to competitive offerings will seek to preserve such revenues, in whole or in part, by offering commercial access to their facilities.'' Sections 201 and 202 of the Act would also prohibit incumbent LECs from engaging in unreasonably discriminatory behavior. Thus, preservation of this UNE obligation is not necessary to ensure just, reasonable, and nondiscriminatory rates and terms per section 10(a)(1) of the Act.

106. The Commission's rules prohibiting LECs from entering into exclusive access contracts with the owners of residential multiunit premises serves to protect consumers in accordance with section 10(a)(2) of the Act. Multiunit Premises UNE Subloops are also unnecessary to protect consumers given their lack of use. We further find that retaining this requirement would not be in the public interest as it would contravene the Commission's and the 1996 Act's broadband deployment goals—that is, ''it would deter competitors from deploying their own facilities to reach the premises and ensuring durable competition for the business of its tenants.'' Elimination of unbundling mandates will incentivize and promote new deployment by competitive LECs and broader commercial access to the incumbent LECs' facilities to thereby achieve lasting facilities-based competition consisted. Therefore, consistent with section 10(a)(3) of the Act, forbearing from Multiunit Premises UNE Subloops would serve the public interest. Accordingly, we find that forbearance from Multiunit Premises UNE Subloops meets the statutory requirements of section 10(a) of the Act.

107. *Network Interface Devices.* The network interface device, or NID, which is always located at the customer's premises, is defined as any means of interconnecting the incumbent LEC's distribution plant to wiring at a customer premises location. Apart from its obligation to provide the NID functionality as part of an unbundled loop or subloop, an incumbent LEC must also offer nondiscriminatory access to the NID on an unbundled, stand-alone basis to requesting carriers for the purpose of connecting the competitor's own loop facilities. Forbearance from this obligation would necessarily coincide with and follow our forbearance proposals related to loops and subloops and previous forbearance grants related to loops. An incumbent LEC must permit a requesting carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's NID. The need for unbundled access to an incumbent LEC's NID arose to address scenarios, typically in multiunit locations, where access to the inside wire on the premises was controlled by a premises owner that did not want additional NIDs installed on their premises, or where a customer had no need for a duplicate NID.

108. *Impairment.* We find that reasonably efficient competitors are no longer impaired without access to the UNE NID requirement. Competitive and incumbent LECs have described substantially changed circumstances in the last two-plus decades such that this network element no longer serves any meaningful purpose. Competitive LECs have stated that ''[a]s a practical matter, [they] do not purchase network interface device elements separate from unbundled loops.'' Incumbent LECs are on record stating that there is ''virtually no demand'' for stand-alone UNE NIDs. AT&T even specifies that it sells no UNE NIDs, and ''has not sold any in some time.'' Competitive LECs have not indicated that there are still cases where the NID is the sole means of accessing this customer premise's wire. The record demonstrates that continued access to these UNEs is not necessary for a reasonably efficient competitor to enter today's marketplace. As competitors LECs ''acknowledge they are not impaired without access to stand-alone unbundled NIDs, there can be no argument that such access is necessary.''

109. *Forbearance.* As proposed in the *NPRM,* we also independently find that forbearance from the UNE NID obligation is appropriate because the record indicates that stand-alone NIDs are no longer necessary for competitive LECs to access potential customers. Stand-alone UNE NIDs no longer serve a meaningful purpose and demand for this UNE is non-existent. We find that the lack of stand-alone UNE NIDs indicates that forbearance from the obligation easily meets the statutory

requirements of section 10(a) of the Act. Because carriers are not using this UNE, enforcement of the UNE NID obligation is not necessary to ensure just and reasonable rates or practices. Nor is this obligation necessary to protect consumers, given its lack of use. Finally, because the UNE NID obligation consists of a regulatory burden that serves no beneficial purpose, forbearance from the requirement is consistent with the public interest.

110. *Transition Period.* In the *NPRM,* we proposed a uniform three-year transition period for all Multiunit Premises UNE Subloops and UNE NIDs. We adopt this three-year transition period for existing customers and no period for new orders, consistent with our proposal in the *NPRM.* We find a three year transition period appropriate for the same reasons we did so in the *2019 UNE Forbearance Orders.* Based on record evidence regarding lack of usage or reliance on these UNEs and the fact that no commenter has indicated new orders are being placed for either of these UNEs, we find a three-year transition period is appropriate, and a timeframe for new orders to continue to be unnecessary. We find that this transition period supplies the necessary incentives for both incumbent and competitive LECs alike to deploy their own next-generation networks as expeditiously as possible, while ensuring that end users do not experience undue service disruption. We disagree with generalized arguments in favor of longer or shorter transition periods because we believe a three-year transition for existing UNEs allows competitive LECs to make alternative arrangements, without unduly slowing the transition away from these UNEs. Thus, competitive LECs must transition to alternative facilities or services within this three-year grandfathering period. The transition period will begin on the effective date of this Order.

*C. UNE Dark Fiber Transport*

111. Consistent with our proposal in the *NPRM,* we find that competitive LECs are not impaired without access to UNE Dark Fiber Transport at wire centers that are within a half mile of alternative fiber, subject to the transition period we adopt. The record supports this finding. Independently, we also forbear from our regulations requiring incumbent LECs to provide UNE Dark Fiber Transport from the same wire centers. To sustain the non-impairment finding and forbearance conclusions, and to avoid stranding substantial investment in last-mile networks by competitive LECs, which provide numerous consumers with competitive advanced services over the facilities today that in many instances would not be replicable in the short and medium terms, we provide an eight-year transition period for existing UNE Dark Fiber Transport.

112. *Background.* Dark fiber transport, otherwise known as ''interoffice dark fiber,'' is fiber-optic cable deployed between incumbent LEC wire centers that has not been ''lit'' through the addition of optronic equipment that would make it capable of carrying telecommunications. The Commission's unbundling rules require incumbent LECs to unbundle their interoffice dark fiber and make it available to a requesting carrier where the requested transport involves at least one Tier 3 wire center end point. Where obligated pursuant to our unbundling rules, the incumbent LEC is required to lease its unused, unlit fiber, subject to availability, allowing the competitive LEC to deploy its own electronics to light the dark fiber and provision last-mile service to end users served from the terminating wire center as if such dark fiber were part of its own fiber network.

113. The *Triennial Review Remand Order,* in setting the current unbundling requirements more than fifteen years ago, examined both actual competition and inferences that could be drawn about potential competition. In analyzing potential competition, the Commission found that both the number of fiber-based collocators and a wire center's service area's business line count were indicative of actual and potential competition for transport. The Commission concluded at that time that unbundling was warranted for dark fiber transport originating or ending in Tier 3 wire centers because those routes ''show a generally low likelihood of supporting actual or potential competitive transport deployment.'' For purposes of UNE Dark Fiber Transport, a Tier 3 wire center is any wire center that does not qualify as either a Tier 1 wire center (which has at least four fiber-based collocators or at least 38,000 business lines, 47 CFR 51.319(d)(3)(i)), or a Tier 2 wire center (which has at least three fiber-based collocators or at least 24,000 business lines, 47 CFR 51.319(d)(3)(ii)). By contrast, the Commission found that unbundling was not required on other routes because a reasonably efficient competitor already had or could potentially deploy or obtain dark fiber transport.

114. In the *UNE Transport Forbearance Order,* we concluded that the presence of nearby competitive fiber creates a sufficiently dynamic marketplace for DS1 and DS3 transport, which protects competition and consumers and furthers the public interest. In that *Order,* the Commission forbore from UNE DS1/DS3 Transport obligations for price cap incumbent LECs at wire centers within a half mile of competitive fiber. To administer that forbearance, the Bureau released a list of approximately 11,000 Tier 2 and Tier 3 wire centers identified as having competitive fiber located within a half mile. The Commission concluded that the presence of alternative fiber within a half mile creates competitive marketplace dynamics, observing that a ''facilities-based competitor within a half mile of a location solely served by an incumbent LEC sufficiently restrains incumbent LEC pricing.''

115. In the *NPRM,* we sought comment on our proposal to find that competitive LECs are not impaired without access to unbundled dark fiber transport to wire centers that are within a half mile of alternative fiber. The proposal used the same factual underpinning as the *UNE Transport Forbearance Order,* in which the Commission forbore from UNE DS1/DS3 Transport obligations for price-cap incumbent LECs at wire centers within a half mile of competitive fiber. However, unlike the *UNE Transport Forbearance Order,* which examined whether the presence of nearby competitive fiber protected competition and consumers and furthered the public interest, the *NPRM* observed that the impairment inquiry asks only whether a ''reasonably efficient competitor within a half mile of alternative fiber'' could either obtain such transport at competitive rates or by building its own network. The Commission also rejected arguments that nearby provider-owned fiber should not be treated as a competitive alternative for UNE DS1/DS3 Transport because other fiber providers are generally uninterested in providing competitive DS1/DS3 transport service and, in particular, cable providers are ill-suited or unwilling to provide such service due to the unique characteristics of their networks. We found that the evidence competitive LECs relied on was outdated and failed to reflect continued fiber deployment, particularly BDS transport, in the past 15 years. We therefore determined that even if cable companies were unwilling to provide transport, the existence of such networks, which serve end users in the same vicinity as the competitor, is likely sufficient to temper price increases and result in reasonably competitive outcomes in the medium term. We also sought comment on whether our

observations about competitive fiber located within a half mile of wire centers in the DS1/DS3 transport market in the *UNE Transport Forbearance Order* were applicable to interoffice dark fiber and could support a reasonable inference of no impairment for competitors leasing UNE Dark Fiber Transport that are similarly situated. Lastly, we sought comment on whether to extend forbearance to UNE Dark Fiber Transport obligations for the same wire centers subject to our UNE DS1/DS3 Transport forbearance.

116. *Impairment Analysis.* Based on the record before us, we conclude that competitive LECs are no longer impaired without access to UNE Dark Fiber Transport provisioned from wire centers within a half mile of competitive fiber. The Commission has long envisioned the use of UNEs by competitors as a stepping stone to deployment of their own facilities. The impairment inquiry considers whether a hypothetical reasonably efficient competitor would be impaired when lack of access to a particular network element creates a barrier to entry that renders entry uneconomic. The record demonstrates that competitive LECs have in fact widely deployed facilities without the need for UNE Dark Fiber Transport. But while a competitive LEC may prefer UNE Dark Fiber Transport, ''that has no bearing on the fact that the existence of a nearby fiber network suggests the ability of a reasonably efficient competitor to self-provision its own fiber network in competition with the incumbent LEC, regardless of whether that network owner offers lit fiber services or dark fiber facilities.'' Indeed, ''[t]he fact that an entrant has deployed its own facilities—*regardless of the technology chosen*—may provide evidence that any barriers to entry can be overcome.'' Thus, we ask only whether a competitive LEC could ''provide the services that it seeks to offer,'' irrespective of whether it uses lit or unlit fiber, as we presume that a competitive LEC could ''take advantage of existing alternative facilities deployment where possible.''

117. Absent UNE Dark Fiber Transport, competitive LECs have been able to use alternatives such as commercial dark fiber, access to which has expanded greatly since we ordered UNE Dark Fiber Transport. Further, as we observed in the *NPRM* and the 2017 *BDS Order,* competitive LECs have been deploying their own fiber facilities at an accelerating rate over the past two decades, a result of declining costs and increases in potential revenues due to growing demand. We expect, then, that even the data contained in the *BDS Order* underreports the deployment of competitive fiber today, as it has likely improved in the intervening years since the data was collected. Additionally, some competitive LECs have even deployed their own dark fiber transport to replace the unbundled transport leased from incumbent LECs.

118. The rules we adopt in this document modernize our dark fiber unbundling requirements to reflect changes in the marketplace since 2004, when we last revised our UNE Dark Fiber Transport rules. At that time, the Commission limited the extent to which incumbent LECs were obligated to provide UNE Dark Fiber Transport by finding that, under the impairment standard, competitive LECs are not impaired without access to UNE Dark Fiber Transport where both wire centers are classified as either Tier 1 or Tier 2 wire centers. As a result, the unbundling obligations for interoffice dark fiber only applied where at least one terminating end point is a Tier 3 wire center. The Commission has described Tier 3 wire centers as those that ''show a generally low likelihood of supporting actual or potential competitive transport deployment.'' We refer to these Tier 3 wire centers as ''UNE triggering'' wire centers. In this document, however, the record reflects that alternative fiber with respect to Tier 3 wire centers has expanded tremendously, indicating that competitive LECs are no longer impaired without the use of UNE Dark Fiber Transport where there is competitive fiber with a half-mile. One commenter suggests that the Commission should also ''consider expanding its rural exemption for all elements of its NPRM, should it adopt its proposals,'' including UNE Dark Fiber Transport. However, as discussed below, neither the impairment inquiry nor the forbearance criteria distinguish as between rural and urban communities. While we may, for example, extrapolate from routes when examining impairment, and look to, *e.g.,* consumer harm under forbearance, as we explain, the record demonstrates that UNE Dark Fiber Transport is no longer necessary—even in rural communities. Additionally, the fact that dark fiber may be useful for 5G, ultimately has no bearing on either inquiry.

119. While we observed in the *NPRM* that stakeholders disagreed as to the relevance of UNE Dark Fiber Transport in the current marketplace and whether or not competitive LECs are impaired without its continued use, the majority of commenters in the record now concede that competitive LECs are no longer impaired without access to new UNE Dark Fiber Transport. Incumbent LECs urge the Commission to find no impairment and contend generally that these UNEs are no longer justified. AT&T argues that ''[t]hanks to the massive data collection in the BDS proceeding, . . . the Commission now has far more information about the actual extent of competitive transport deployment than it did in 2005'' when it found no impairment for dark fiber transport *vis-à-vis* Tier 1 and Tier 2 wire centers. AT&T observes that according to BDS data, ''competitors have continued to deploy their own facilities in and near Tier 3 wire centers,'' with ''competitive supply at thousands of Tier 3 wire centers,'' suggesting that a ''reasonably efficient competitor *can* feasibly deploy its own facility to serve such wire centers.''

120. The record demonstrates that where alternative fiber exists within a half mile of a wire center, entry is possible—*i.e.,* competing providers have been able to offer service to the area, irrespective of the technology they use. Because the impairment inquiry is technology agnostic, arguments as to the substitutability of dark fiber are irrelevant. As we explained in the *NPRM,* ''[w]hile the Commission has previously differentiated lit from dark fiber, that has no bearing on the fact that the existence of a nearby fiber network suggests the ability of a reasonably efficient competitor to self-provision its own fiber network in competition with the incumbent LEC, regardless of whether that network owner offers lit fiber services or dark fiber facilities.''

121. We disagree with commenters that argue that new UNE Dark Fiber Transport remains essential to entry even where alternative fiber exists. Competitive LECs have claimed that unbundled dark fiber is essential to provisioning service, reaching new customers, and that alternative fiber is sometimes unavailable. Several competitive LECs have in fact used unbundled access to interoffice dark fiber and other UNEs to obtain a sufficient customer base within an incumbent LEC's local market, thus generating enough revenue to eventually build a competing fiber network. The use of UNE Dark Fiber Transport has then allowed many competitors to gradually deploy their own last-mile fiber networks to offer service to consumers, competing directly with incumbent LECs for market share. These arguments fail to engage with the impairment standard, however. While UNE Dark Fiber Transport may have helped new entrants to *enter* the market at the time when we initially ordered

unbundling, that does not bear on the argument of whether unbundling of dark fiber continues to be necessary today. Further, these commenters fail to demonstrate that where alternative fiber *is* available—lit or unlit—*new* entrants remain impaired. The existence of alternative fiber—regardless of the technology used—indicates that a reasonably efficient competitor can enter the market. One commenter argues that in considering the issue of alternative fiber, the Commission should differentiate between ''commercially owned dark fiber and dark fiber funded and controlled by government entities, who do not typically make fiber commercially available,'' and reiterates the argument that CLECs sometimes do not make their own dark fiber commercially available. However, even if some alternative fiber is government subsidized or controlled—no alternative data is advanced to suggest how much of it is—as explained above, whether or not such fiber is commercially available has no bearing on the analysis. Additionally, with respect to the issue of public safety, no argument is made that eliminating UNE Dark Fiber Transport will create issues for, *e.g.,* accessing 9–1–1, and we do not find that any such public-safety issue arises. Whether a new entrant uses commercial dark fiber or deploys their own network has no bearing on the fact that entry is economically feasible.

122. One commenter argues that the impairment inquiry cannot simply look at whether there is alternative fiber within a half mile of a wire center; rather, it contends that a more granular analysis of whether alternative fiber reaches the same destination is necessary to determine if entry into a particular market is economically feasible, because switching to alternative fiber is otherwise not an option for existing providers. However, the impairment inquiry only asks if a reasonably efficient competitor could enter the market, as evidenced here by the existence of alternative fiber. Whether these competitors then make their fiber commercially available for other providers is not at issue. One commenter has contended that the ''presence of competitive fiber within a half-mile of a wire center provides no insight as to the economic viability of such fiber deployments.'' However, the Commission may use proxies and draw inferences therefrom rather than analyzing every route individually. In so doing, however, Uniti Fiber claims that the Commission must evaluate routes that are ''similarly situated with regard to 'barriers to entry,' '' and that ''inferring no impairment in *all* areas where competitive fiber *may* be located within a half mile of the wire center'' fails to satisfy the ''nuanced approach to impairment demanded'' by the courts. However, we need not analyze on a specific-route basis ''when and by whom such competitive fiber was deployed, whether the fiber is actually used to provide service in that market, or of the remaining operational and economic barriers to transport deployment'' as Uniti Fiber urges. Such a level of granularity would require a case-by-case assessment of impairment, an approach criticized by courts that have instead approved of examining ''facilities deployment along similar''—not identical—''routes . . . .'' And we can and must also draw reasonable inferences about deployment by examining similar markets. Further, this alternative fiber suggests the existence of sufficient demand to justify entry absent dark fiber transport UNEs, and competitive LEC commenters ignore potential revenue opportunities despite highlighting hypothetical costs and barriers. Although commenters argue that *existing* networks would be harmed by eliminating UNE Dark Fiber Transport, largely due to reliance interests, we take into account such concerns in adopting a transition period. And while competitive LECs point to various success stories of the kind envisioned by the Commission when it unbundled dark fiber for Tier 3 wire centers, ultimately we must ask only whether providers are now impaired without access to it on an unbundled basis.

123. Further, incumbent LECs claim they see little demand for unbundled dark fiber from competitive LECs and argue that UNE Dark Fiber Transport constitutes a small proportion of available dark fiber transport overall. Verizon reiterates that it both uses and sells a *de minimis* amount of UNE Dark Fiber Transport. Incumbent LECs argue, conversely, that the marketplace for commercial dark fiber transport is thriving, with AT&T explaining that it purchases a large amount of commercial dark fiber transport outside its incumbent franchise areas. According to USTelecom, the record evidence presented by competitive LECs shows their progress in replacing UNE Dark Fiber Transport with their own interoffice transport, further indicating that competitive LECs ''have largely, if not entirely, moved on from reliance on these UNEs.'' Additionally, use of UNE Dark Fiber Transport for provisioning service to rural areas appears minimal. This not only reinforces our finding of no impairment but also independently, when coupled with the Commission's findings regarding the competitiveness of the market without reliance on UNEs, persuades us that unbundling should be eliminated pursuant to our ''at a minimum'' authority even assuming *arguendo* some level of impairment in light of the costs of unbundling.

124. *Forbearance Analysis.* In addition to supporting our finding of non-impairment, the record independently compels us to forbear from our UNE Dark Fiber Transport requirements in the same wire centers. Forbearance is appropriate based on our analysis of the specific circumstances at issue. We find that the criteria for forbearance are met and therefore do so with respect to our regulations requiring incumbent LECs provide UNE Dark Fiber Transport from these wire centers, subject to the transition period and conditions we adopt.

125. *Section 10(a)(1).* We conclude that UNE Dark Fiber Transport obligations from Tier 3 wire centers with alternative fiber within a half mile are not necessary to ensure just and reasonable rates. We limit our forbearance only to those wire centers where alternative fiber is present within a half mile of the wire center, which creates market pressure to keep rates down. And given the incentives for providers, we expect those currently using UNE Dark Fiber Transport to either deploy alternative fiber themselves or to use commercially available dark fiber or other transport alternatives, which should further temper rates. We therefore conclude that unbundling obligations are no longer necessary from these wire centers to ensure just and reasonable rates.

126. *Section 10(a)(2).* We find that the evolving marketplace and the statutory and regulatory safeguards that work to ensure just and reasonable rates also ensure that consumers will not be harmed by forbearance from requiring UNE Dark Fiber Transport from wire centers within a half mile of alternative fiber. With the availability of alternative fiber offerings, incumbent LECs face pressure to constrain rates and to act to retain existing customers. Although not all alternative fiber is dark fiber, such a distinction is ultimately irrelevant to consumers: they are concerned about the end product, not the specific technology used for middle-mile transport. And while competitive LECs transitioning off of UNE Dark Fiber Transport may look to commercial dark fiber as an alternative, where no such alternative exists, we nevertheless anticipate that the timeframe provided

for in our transition coupled with the incentives for competitive LECs to deploy their own network facilities as the record indicates they have been doing should ensure that consumers continue receiving service.

127. *Section 10(a)(3).* Finally, we find that forbearing from UNE Dark Fiber Transport from these wire centers is in the public interest as it promotes the policy of ensuring the deployment of next-generation networks and services. Competition is the preferred method by which the Commission safeguards the public interest. We have found that ''disparate treatment of similarly situated competitors creates marketplace distortions that may harm consumers,'' and forbearance eliminates such distortions. Not only must the Commission consider whether forbearance will promote competition, but ''[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest'' under section 10(a)(3). Further, we expect that forbearance will promote deployment of a provider's own fiber, thus facilitating deployment of additional next-generation networks.

128. *Transition Period.* For competitive LECs currently offering services reliant on UNE Dark Fiber Transport, substantial costs, including sunk costs, have been incurred to use such facilities, including, for example, the deployment of fiber-based last-mile networks and enterprise connections, as well as the addition of expensive optronic equipment. These sunk investments in many cases would be rendered useless if a competitive LEC were forced off of UNE Dark Fiber Transport too quickly, and the record indicates that competitive LECs would be unable to continue serving some markets. We therefore grandfather existing UNE Dark Fiber Transport for eight years so as to avoid risking abandonment of services and stranding significant investments reliant on existing dark fiber. This timeframe strikes the appropriate balance between the competing interests of the various stakeholders as well as enjoys support by the majority of those stakeholders as reflected in the record today. We have found such compromises reasonable and in the public interest.

129. Such a transition period for existing UNE Dark Fiber Transport avoids stranding significant investment by competitive LECs and negatively impacting their customers, including those in remote locations. Competitive LECs claim that a loss of UNE Dark Fiber Transport would result in abandoned service in such areas. Specifically, investment into fiber to the home and fiber rings may be abandoned, and some recent awards of government support grants for broadband deployment (*e.g.,* CAF II (83 FR 15982, April 13, 2018)) rely on UNE Dark Fiber Transport for construction. The Connect America Fund Phase II program is a part of the Universal Service High-Cost program designed to expand broadband and voice services to places where they are unavailable, and the Commission provides funding to subsidize new network infrastructure or upgrades.

130. Incumbent LECs, however, argue that UNE Dark Fiber Transport constitutes a small portion of their dark fiber transport overall. Because this unbundled element comprises such a minute portion of incumbent LECs' business, this suggests that a lengthier period than we adopt for other UNEs today would have a relatively smaller effect on incumbent LECs. And as we have explained, the ''at a minimum'' language in section 251(d)(2) allows the Commission to consider other factors ''rationally related to the goals of the Act,'' including deployment of broadband, access to which may be impaired. Given the relatively smaller cost to incumbent LECs, we thus find that permitting competitive LECs to continue using UNE Dark Fiber Transport will avoid potential waste and safeguard existing customers.

131. One commenter also argued that competitive LECs should only be allowed to maintain UNE Dark Fiber Transport subject to capacity limits. The commenter claimed that the Commission should ''make clear that purchasers are limited to using [UNEs] for transport capacities of no more than the equivalent of 12 DS3s,'' claiming that in the *Triennial Review Remand Order,* ''the Commission found that requesting carriers are *not* impaired without access to transport facilities above 12 DS3s on a given transport route.'' As such, they believe it would be inconsistent to allow competitive LECs to use dark fiber to ''carry almost any capacity depending on the electronics the CLEC attaches to it,'' which they argue is a ''severe anomaly in the Commission's unbundling rules.''

132. However, the rationale for limiting transport with respect to DS3s is inapplicable as applied to dark fiber. In the *Triennial Review Remand Order,* we set the 12–DS3 capacity limit to ''establish a safeguard to limit access to a carrier that has attained a significant scale on such a route indicating that more than sufficient potential revenues exist to justify deployment . . . .'' As INCOMPAS and NWTA explain, in so limiting transport capacities, we undertook an analysis of competitors' revenue potential—something commenters seeking capacity limitations fail to do here. And unlike DS3s, dark fiber requires significant investment by competitive LECs to enable it to carry traffic, which also limits the amount of bandwidth that can be realistically transported. INCOMPAS/NWTA also claim that per-Mbps revenue has declined over time, and that the record does not provide an economic rationale for limiting the extent to which competitive LECs can upgrade the electronics attached to dark fiber for additional capacity.

133. Many incumbent LECs argued for a short transition period for existing UNE Dark Fiber Transport of only a few years. Prior to agreeing to an eight-year transition period, various incumbent LECs or their representatives argued for transition periods as short as 18 months but no longer than three to five years. However, we agree with competitive LECs that argue that these timelines are too short under the circumstances. For example, proponents of a longer transition timeframe argue than an abbreviated transition periods ''downplay[] the costs of, and other barriers to, overbuilding existing, unused interoffice dark fiber transport routes,'' which even over ''the short period of a few years'' can ''easily run[] into the tens, if not hundreds, of millions of dollars.'' In addition, we recognize that carriers may face other deployment issues, including state and local restrictions such as on rights-of-way, ''attaching facilities to bridges or prohibitions on boring river levees,'' as well as other ''local terrain challenges,'' at least in some areas dark fiber might not be easily replaceable in some areas in the short term. Considering these possibilities at the same time competitive LECs are transitioning to alternative solutions for unbundled loops that they may be relying on, the result could be that higher capacity advanced services may become unavailable in some areas where competitive LECs providing these services currently rely on UNE Dark Fiber Transport. Given the costs and time needed for deploying new replacement transport facilities at the same time these same competitive LECs are deploying alternative loop facilities, customers of these services could be forced to go without for potentially significant periods of time. Our longer transition period addresses this potential unintended consequence.

134. We do not believe that our eight-year transition period will significantly reduce incentives for continued deployment. Competitive LECs reliant on UNE Dark Fiber Transport have shown their propensity to deploy their own fiber as soon as they can to transition to their own network facilities and eliminate dependence on the incumbent LEC completely. We believe this transition timeframe will provide sufficient time for them to do so without unduly disrupting their customers and better advance broadband deployment than if these same competitors prematurely lost access to their existing UNE Dark Fiber Transport and instead withdrew from certain geographic markets entirely.

135. On the other hand, we do not believe indefinite grandfathering would be appropriate. Although some commenters convincingly argue that a longer period of time than the three years proposed in the *NPRM* is necessary to transition off of UNE Dark Fiber Transport, they do not advance arguments that would suggest longer than eight years is needed. WorldNet, for example, contends that an exception should be made for Puerto Rico to grandfather UNE Dark Fiber Transport there indefinitely. However, their arguments fail to explain why eight years or another significant period of time would be insufficient to obtain alternative transport. Nor do they engage with either the impairment or forbearance inquiries: while they assert that the situation in Puerto Rico is unique, they do not explain why the presence of alternative fiber does not indicate that a reasonably efficient competitor should be able deploy or obtain alternative transport, or elaborate on any of the forbearance criteria. And although INCOMPAS and the NWTA have previously argued that ''no transition period would be able to offset the harms to consumers and fiber deployment,'' claiming some UNE Dark Fiber Transport ''is irreplaceable,'' INCOMPAS itself contends that recognizing the benefits of UNE Dark Fiber Transport and the challenges of transitioning therefrom is not itself an argument for ''permanent grandfathering.'' Meanwhile, competitive LECs have variously offered arguments for why incumbent LECs' proposals are insufficient, or in favor of longer timeframes for UNEs generally, *e.g.,* of seven years minimum. Instead, we agree with the Joint Parties' explanation of how their proposal ''chart[s] a middle course that accommodates the various parties' needs.'' Indeed, Puerto Rico Telephone Company, which was not a party to the Compromise Proposal, agrees that it is supported by the record. As the advocates of the compromise proposal state, this transition period recognizes ''the fact that competitive LECs will simultaneously be impacted by transitions away from unbundled access to multiple elements integral to the operation of their networks, including DS0, DS1 and DS3 loops, in addition to dark fiber transport.'' We therefore provide a transition period of eight years for UNE Dark Fiber Transport ordered prior to the effective date of this Order.

*D. Operations Support Systems*

136. In the *NPRM,* we proposed to forbear from the UNE Operations Support Systems (OSS) obligations except as used to manage UNEs. The *NPRM* did not propose to eliminate unbundled access for 911/E911 databases. Thus, UNE OSS obligations remain for accessing 911/E911 databases for any requesting carrier regardless of any Commission action herein providing UNE OSS relief. The record generally supports this approach, with the exception of local interconnection and local number portability where incumbent LECs maintain such databases. We find that competitors are not impaired without access to UNE OSS, except where carriers are continuing to manage UNEs and for purposes of local interconnection and local number portability. Independently, we forbear from applying UNE OSS requirements, except when unbundled OSS is used to manage other UNEs, local interconnection, and local number portability.

137. Under our current rules, incumbent LECs must offer nondiscriminatory access to their operations support systems, or OSS, for qualifying services on an unbundled basis. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. The Commission previously found that the UNE OSS ''requirement includes an ongoing obligation on the incumbent LECs to make modifications to existing OSS as necessary to offer competitive carriers nondiscriminatory access and to ensure that the incumbent LEC complies with all of its network element, resale and interconnection obligations in a nondiscriminatory manner.'' OSS is used to provision other UNEs, and it is also a separate stand-alone UNE that is used for interconnection and other purposes, including number porting. The Commission required incumbent LECs to provide OSS on an unbundled basis in the *Triennial Review Order* because it found that ''these functions are essential for carriers to serve mass market and enterprise customers'' and because competitive LECs providing these services are ''impaired on a national basis without access to OSS.''

138. *Impairment Analysis.* We find that competitors are not impaired without access to UNE OSS, except where carriers are continuing to obtain and manage UNEs and for purposes of local interconnection and local number portability. We note that our impairment and forbearance findings apply to UNE OSS maintained *directly or indirectly* by an incumbent LEC—*i.e.,* it makes no difference ''whether the incumbent LEC maintains the OSS database itself or outsources the maintenance but retains control over the database.'' We find, based on the record, that UNE OSS is of little value when decoupled from UNE ordering and provisioning, and that there is limited usage of this stand-alone UNE in today's marketplace. NASUCA's reply asserts the same arguments raised by NCTA and INCOMPAS, most of which are covered in the Compromise Proposal and adequately address their concerns. NASUCA also asserts that OSS is used by competitive LECs to make ''changes to directory listings'' and eliminating the OSS UNE would ''impair the ability of competitors to offer service and in doing so would harm consumers who would suffer from incomplete and delayed directory information.'' To the extent NASUCA's directory listing assertion is a stand-alone argument, it is not developed enough to respond to its alleged effects on consumer harm. Nor do the competitive providers which would use directory listings claim that losing unbundled access to such listings would harm them or their end-user consumers. And assuming *arguendo* that directory listings are important to competitive providers, which we do not concede, we find, consistent with our discussion below, that it is in the interest of incumbent LECs to provide assistance with directory listings as part of their wholesale services. We agree with commenters that there is generally ''no need to offer regulated unbundled access to OSS in any circumstance where the Commission has eliminated access to the corresponding unbundled network facilities,'' except with respect to ordering local interconnection or number portability. As such, we find that the market conditions that warrant unbundling relief on the basis of non-impairment or forbearance above for UNE Loops of multiple types as well as

UNE Dark Fiber Transport and other network elements also warrant unbundling relief here. We therefore conclude that this UNE is generally not necessary for a reasonably efficient competitor to enter today's communications service marketplace, except for local interconnection and number portability. Moreover, we find that it is in the incumbent LEC's interest to offer necessary services, like OSS, when they provide commercial alternatives to UNEs or other wholesale products. As Sonic, a major purchaser of UNE Loops and Transport, explains, incumbent LECs ''have to maintain ordering systems and will have to manage the sharing of facilities if they offer wholesale services.''

139. We decline to find lack of impairment with regard to UNE OSS used for interconnection and number portability, however, as the record indicates that UNE OSS still plays an important role with respect to these critical local competition tools. Some competitive LECs and cable providers raised network interconnection and number portability implications if this real-time electronic interface is not maintained. Consistent with these comments and the comments of the majority of the LEC stakeholders commenting on this issue recognizing the importance of preserving continued UNE OSS access for these purposes, we maintain the status quo of UNE OSS for purposes of local interconnection and local number portability.

140. *Forbearance.* Consistent with the *NPRM* and the record, we independently forbear from the stand-alone UNE OSS obligation, except for carriers continuing to obtain and manage UNEs and for purposes of local interconnection and local number portability where the incumbent LEC maintains such databases. Based on the record as discussed above and the fact that no commenter opposed forbearance, except with regard to number portability and interconnection, we find that forbearance from the stand-alone UNE OSS obligation, except with respect to ordering local interconnection or number portability, meets the requirements of section 10(a) of the Act. The very limited use of this network element in today's marketplace except for the purposes for which we continue to make it available and the fact we retain it where it is used to manage UNEs is sufficient evidence that this stand-alone UNE OSS obligation is not necessary to ensure either just and reasonable rates or the protection of consumers pursuant to sections 10(a)(1) and 10(a)(2). Moreover, the elimination of regulatory burdens that serve no purpose is consistent with the public interest pursuant to section 10(a)(3). For the same reasons discussed above, we decline to forbear with regard to its continued availability on an unbundled basis for local interconnection and number portability.

141. We note that elimination of OSS unbundling obligations, as specified above, will not adversely impact public safety. Unbundled access to 911 and E–911 databases will remain available and the *NPRM* did not even propose to consider limiting access to this UNE, as will unbundled OSS requirements where UNEs are available and for purposes of local interconnection and local number portability. The *NPRM* did not propose to modify the E911/911 UNE. We find that the California Public Utility Commission's assertion that competitive LECs ''may struggle to resolve maintenance and repair issues that ultimately could adversely affect an end-user's ability to reach emergency services'' is misplaced as that concern relates to the maintenance of copper networks rather than OSS or unbundling generally and thus is not relevant to this proceeding. No commenter, including the competitive providers that use OSS or the California Public Utility Commission, specifically asserts that OSS is needed to resolve maintenance and repair issues, generally. Moreover, UNE OSS remains available to manage existing UNEs which includes aspects of maintenance and repair functions for such UNEs. As discussed above, we find that it is in the incumbent LEC's interest to offer associated services, like OSS, when they provide wholesale products.

142. *Transition Period.* The transition period for UNE OSS used to order and manage UNEs phased out by this Order naturally coincides with the transition periods adopted for each such UNE described above. Incumbent LECs indicate they will also provide commercial access to their OSS systems to requesting carriers in any area in which unbundled OSS functionality is no longer available for particular network elements because of unbundling relief, ensuring a seamless transition away from UNE OSS, availability that coincides with transition timeframes for unbundled network elements.

*E. Avoided-Cost Resale*

143. The *NPRM* proposed to extend the forbearance relief granted to price cap incumbent LECs for Avoided-Cost Resale requirements to non-price cap carrier incumbent LECs. We adopt this proposal and grant relief from all remaining Avoided-Cost Resale requirements. Section 251(c)(4) of the 1996 Act requires that incumbent LECs make available to requesting carriers at wholesale rates any telecommunications service they offer to their own non-carrier customers on a retail basis. The record supports forbearing from this obligation for non-price cap incumbent LECs for many of the same reasons that justified forbearance from Avoided-Cost Resale obligations for price cap incumbent LECs.

144. In August 2019, we granted price cap incumbent LECs forbearance from the Avoided-Cost Resale requirement based on ''the breadth of the voice service marketplace and the number of wholesale input alternatives to competitive LECs seeking to continue serving customers currently served by Avoided-Cost Resale'' and given that ''Avoided-Cost Resale requirements . . . serve only to prolong dependence on legacy TDM voice services rather than pave the way for meaningful facilities-based competition over next-generation networks providing advanced communications capability.'' We followed that action by seeking comment in the *NPRM* on whether there are any reasons why we should not extend that forbearance to non-price cap incumbent LECs. The record in response to the *NPRM* does not provide any compelling reason to refrain from extending Avoided-Cost Resale forbearance herein to all incumbent LECs. Competitive LEC resellers' customer base is almost exclusively made up of business and government customers. As a result, forbearance from the Avoided-Cost Resale requirement will not impact mass market customers.

145. As we found in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order,* competitive LECs almost exclusively use Avoided-Cost Resale to provision legacy TDM voice service to business and government customers. In many cases, these resold legacy voice lines are used for redundancy, and not competitive entry or as a primary voice line for customers of these services. Moreover, TDM service will remain available for purchase by competitive LECs, just not at wholesale rates. As noted elsewhere in this Order, no actions we take today eliminate the availability of legacy TDM-based service. According to Granite, the leading provider of Avoided-Cost Resale, the vast majority of TDM lines resold by competitive LECs are purchased via section 251(b)(1) resale and commercial agreements rather than via Avoided-Cost Resale, and these options will remain available after forbearance from the Avoided-Cost Resale requirements. Commenters

responding to our *NPRM* do not provide any evidence that competitive circumstances are any different in non-price cap LEC service areas.

146. The obligations and responsibilities imposed on incumbent LECs by the 1996 Act were ''designed to open monopoly telecommunications markets to competitive entry.'' This carefully crafted design applies equally to UNEs and Avoided-Cost Resale. Granite, the primary commenter on this issue, asserts that the Commission conflated UNEs and Avoided-Cost Resale in granting forbearance from the latter in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order.* While one CLEC other than Granite did comment on Avoided-Cost Resale, it was in the larger context of its use of a ''combination of UNEs, avoided-cost resold services, and [its] own fiber network'' asserting that it uses Avoided-Cost Resale where the incumbent LEC is the only source of wired voice service. When implementing section 251 of the 1996 Act, however, the Commission viewed Avoided-Cost Resale as an ''important entry strategy for many new entrants, especially in the short term when they are building out their own facilities'' and that ''in some areas and for some new entrants . . . it will remain an important entry strategy over the longer term.'' The Commission further noted that ''[R]esale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks.'' Therefore, even at the time that Avoided Cost Resale was enacted, the Commission envisioned that new entrants would utilize the regulation only until they could deploy their own facilities. Indeed, for competitive LECs that engage in their own facilities-based deployments, Avoided-Cost Resale data suggests it is no longer, if it ever was, a particularly important entry strategy. The majority of competitive LEC commenters did not even address Avoided-Cost Resale in their comments filed in this proceeding. While WorldNet mentions resale in its comments in this proceeding, always as ''UNEs and resale,'' it never discusses why Avoided-Cost Resale is necessary. And the declaration submitted in support of WorldNet's comments discusses why UNEs are necessary, but it makes no mention at all of resale. As we noted in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order,* Avoided-Cost Resale was never intended to be the permanent business strategy it seems to have become for certain providers. Granite can hardly be considered the type of ''small business'' that the Commission was referring to in 1996. Nor are the commenters opposing forbearance from this requirement ''new entrants''—Granite, for example, has been in business for nearly two decades and can hardly credibly claim Avoided-Cost Resale obligations in non-price cap service areas, or price-cap service areas for that matter, are necessary to sustain its existence in today's exceedingly competitive voice services marketplace. And even if it were, the Act does not protect specific competitors or business models where overwhelming evidence of pervasive competitive alternatives exist for consumers, including those that may currently take service from companies like Granite. Indeed, even ''if all CLECs were driven from the . . . market,'' the existence of ''robust intermodal competition'' from other providers warrants upholding the Commission's decision.

147. *Rural exemption.* The majority of non-price cap incumbent LECs are rural LECs, most of which qualify for the rural exemption from all section 251(c) requirements, including Avoided-Cost Resale. They therefore have no obligation to offer their telecommunications services to competitive LECs at wholesale rates while the rural exemption remains in place. Indeed, competitive LECs such as Granite have admitted that they are unable to avail themselves of Avoided-Cost Resale in many rural areas because of the rural exemption. As a result, maintaining Avoided-Cost Resale in non-price cap areas provides little to no benefit to competitive LECs whose business model relies primarily on resold services. In such areas, resale under section 251(b)(1) is the only regulatory resale-related mechanism available to them. Section 251(b)(1) obligations are not implicated by our actions here.

148. *Section 10(a)(1).* We conclude that enforcement of Avoided-Cost Resale obligations is not necessary to ensure just and reasonable rates for voice-grade services. To the extent competition protects against rates, charges, practices, and classifications that are not just and reasonable, it logically follows that it also protects against charges, practices, and classifications that are unjust and unreasonable. Thus, to whatever extent the enforcement of section 251(c)(4) is not necessary to ensure just and reasonable rates, it necessarily follows that such enforcement prevents the opposite from occurring, that is, unjust and unreasonable rates. Competitive LECs such as Granite already purchase the majority of their resold services through either commercially negotiated agreements or section 251(b)(1) resale. While TPx has not made a similar statement, it also has not provided specifics regarding how many of its 12,000 resold lines are purchased via Avoided-Cost Resale and how many via other avenues. Moreover, TPx's comments themselves, versus the attached declaration, make no mention of Avoided-Cost Resale. Indeed, Granite has previously acknowledged that it purchases the majority of its resold services this way, arguing that it relies on the existence of Avoided-Cost Resale as leverage for negotiating better rates. Avoided Cost Resale was enacted to help jumpstart competition in the market; it was not intended to serve as a leveraging tool for individual competitors when negotiating agreements. We thus are unpersuaded by Granite's assertion that sections 251(b)(1), 201, 202, and 208 will not serve as sufficient regulatory backstops to ensure unreasonable and unreasonably discriminatory rates. As we stated in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order,* ''even if the rates paid by competitive LECs to resell voice service were to rise based on our grant of forbearance from Avoided-Cost Resale, there is no reason to believe that end-user rates will be unjust or unreasonable.'' Moreover, UNE DS0 Loops will remain available in rural and urban cluster census blocks, as will UNE DS1 and DS3 Loops in non-competitive counties, to the extent the incumbent LEC is not entitled to the rural LEC exemption. Competitive LECs thus will remain able to provision service to customers in those areas via means other than Avoided-Cost Resale to the same extent they are able to today. Granite asserts that the Commission should retain Avoided-Cost Resale in those areas in which it retains UNE DS0 Loops because they are provided over the same facilities. However, while many competitive LECs use UNE DS0 Loops as a stepping-stone to deployment of their own networks, as well as to provide high-speed broadband, those competitive LECs relying on Avoided-Cost Resale do so almost exclusively to provision only voice-grade services. Thus, while retaining UNE DS0 Loops furthers the congressionally mandated goal of ensuring the provision of advanced services to all Americans, Avoided-Cost Resale does not. Alternative voice services are also available from intermodal competitors, and commercial replacements will be available where UNE Loops are being

phased out. The availability of these other voice services serves to constrain incumbent LEC rates for services previously purchased via Avoided-Cost Resale.

149. *Section 10(a)(2).* We find that the evolving marketplace and the statutory and regulatory safeguards that work to ensure just and reasonable rates also ensure that consumers will not be harmed by forbearance from enforcement of the Avoided-Cost Resale obligation. Competitive LEC resellers' customer base is almost exclusively made up of business and government customers. As a result, forbearance from the Avoided-Cost Resale requirement will not impact mass market customers. Again, competitive LECs have made it clear that they purchase very few of the services they resell via Avoided-Cost Resale, and they will still have access to TDM-based services via commercial agreements and section 251(b)(1). While this may result in higher prices, this should serve to encourage end-user customers to migrate to next-generation services, thus helping to advance Congress's goal as stated in section 706. They also will still be able to purchase a variety of wholesale inputs, including UNE DS0 Loops in rural and urban cluster census blocks and via UNE DS1 and DS3 Loops in non-competitive counties to the extent they are available today. Even if these competitive LECs choose not to stay in the market via UNEs rather than Avoided-Cost Resale, other competitors may choose to enter these markets via UNEs. And customers will also have access to various intermodal alternative services, to which they have increasingly been migrating.

150. *Section 10(a)(3).* Finally, we find that forbearing from Avoided-Cost Resale obligations for non-price cap LECs is in the public interest as it promotes the important Commission policy of furthering the deployment of next-generation networks and services and encouraging the rapid transition to IP-based voice services and the benefits that accrue to the public at large from the widespread use of such services. Increased adoption rates of next-generation services provide incentives for incumbent and competitive LECs alike to expend precious resources on deployment of networks capable of supporting those services. To the extent end users are allowed to rely on the availability of legacy services, many will continue to do so and eschew the move to next-generation networks and services.

151. We reject Granite's argument that we cannot consider the public interest benefits of facilities-based competition and expediting the transition to next-generation networks in a forbearance analysis. Indeed, the D.C. Circuit has specifically approved of the Commission considering section 706 goals in a forbearance analysis. Moreover, section 10's public interest determination gives the Commission broad discretion as to what public interest factors it may consider in determining whether section 10(a)(3)'s prong has been met. Commenters raise no new arguments opposing forbearance from the Avoided-Cost Resale requirements to non-price cap LECs than they did in opposing forbearance from those requirements for price cap LECs, except to point to fewer alternatives being available in rural locales. We address their arguments in detail below. However, as we noted above, rural incumbent LECs are largely exempt from the Avoided-Cost Resale requirements.

152. Moreover, we are unpersuaded that extending forbearance from Avoided-Cost Resale requirements to non-price cap incumbent LECs will provide incentives for incumbent LECs to harm competition and consumers. This argument stems almost wholly from the claimed potential for increased rates that might make particular competitors such as Granite unable to continue providing service to their end-user customers via commercial service offerings that Granite has negotiated with certain incumbent LECs. As we have repeatedly reminded Granite and others, however, the 1996 Act's market-opening provisions were put in place to protect competition, not specific competitors or particular business plans. And nothing in this Order eliminates the availability of TDM-based services. Eliminating the subsidy for legacy services that make them available at a lower price, though, may lead to greater adoption of next-generation services and further Congress's goal and the Commission's mission of encouraging the deployment of advanced communications capabilities.

153. *Line power.* We disagree with commenters who assert that Avoided-Cost Resale should remain available because of the purported benefits of line-powered service. Some commenters claim that ''traditional'' TDM service is line-powered and thus is more reliable than next-generation services that require backup power to function during power outages. We did not find this argument persuasive in the context of price cap areas, and we do not find it persuasive now as to non-price cap areas. To do otherwise would be inconsistent with incumbent LECs' ability to retire their line-powered copper networks and move their customers to fiber facilities without need for Commission authorization, a process the Commission has worked to expedite and facilitate over the past three years. Line-powered TDM service is available only to the extent that a carrier has not retired its copper loops, a business decision that is made by the carrier and not the Commission. No actions taken in this Order remove the availability of either copper-based facilities or legacy TDM-based services. As we have previously stated: ''Nothing about the rules at issue in this order require carriers to maintain line-powered copper loops—whether those loops may be retired is a subject of our copper retirement rules.'' However, incumbent LECs retiring their copper facilities must continue providing the same TDM-based service to their customers as before the retirement, just without line power, unless they also seek Commission authorization to discontinue that service. And in such a situation, the incumbent LEC must then comply with our technology transition discontinuance rules. As customer demand for TDM over copper continues to dwindle, incumbents are more likely to retire their copper and focus their resources on deploying next generation networks, at which point line power will not be as readily available. And the Commission has previously taken action to ensure that end users are aware of the need to take action to ensure that their non-copper-based phone service continues to function in the event of a power outage. It is also inconsistent with our goal of speeding the transition to next generation networks and services and our policy to discourage ''reliance on outmoded legacy services.'' To the extent certain commenters suggest that copper-based TDM service is its own product market, we reject these claims as unsupported by sufficient evidence. Moreover, we have already declined to find TDM-based services in general to be their own product market. Moreover, the Commission has previously noted in other forbearance contexts that ''[p]erfect substitutability is not required.'' And nothing compels us to apply the type of market power analysis used in the *Qwest Phoenix Order* (25 FCC Rcd 8622, June 22, 2010) to our forbearance here for Avoided-Cost Resale. We now decline to find the even more narrow categorization of copper-based TDM service to be its own product market. To find otherwise would be inconsistent with the Commission's prior findings that copper retirements come within the purview of

the section 251(c)(5) of the Act, requiring only that incumbent LECs provide adequate notice of network changes, and do not constitute a discontinuance of service under section 214(a) of the Act. Moreover, nothing of the sort is required by the Act, and indeed, finding that copper-based TDM service must be maintained would slow the transition to advanced services, in contravention of section 706 of the 1996 Act. Forbearing from this outdated regulation will incentivize carriers to redirect resources to next-generation networks, thus benefiting the public by allowing for more advanced telecommunications capabilities. As the Commission previously stated, ''[w]e will not impede the progress toward deployment of next-generation facilities for the many because of the reticence of an ever-shrinking few.''

154. Regardless, when an incumbent LEC retires its copper, which it can do on 90-days' notice and without a need to first obtain Commission authorization, customers will still receive the same TDM-based service, albeit without the legacy feature of line power. At such point, when TDM service is provided over fiber, it requires the use of backup power to operate during power outages. In addition, where copper loops still exist and incumbent LECs provide voice telecommunications services over those loops, copper-based TDM service will remain available for resale under section 251(b)(1) regardless of our forbearance herein. Competitive LECs in non-price cap areas will also be able to purchase these services pursuant to commercially negotiated agreements, which is how they currently purchase the majority of their resold services.

155. Opponents of forbearance also point to the occurrence of natural disasters to support the continued necessity of Avoided-Cost Resale, thereby limiting their argument to TDM-based services provided over copper rather than fiber facilities. However, those same natural disasters can and do lead to expedited copper retirements, meaning that the TDM-based services available for resale are no longer line powered. Indeed, copper tends to perform more poorly in many such situations whereas fiber is more resilient and faces lower outage risks from weather events and aging. The Commission specifically adopted rules in 2017 expressly to accommodate such circumstances, as well as expedited copper retirements resulting from other circumstances outside the incumbent LEC's control. Assertions by the California PUC and Michigan PSC that we must consider public safety concerns are subject to this same response given that no actions taken in this Order remove the availability of legacy TDM-based services.

156. *One stop shop.* Opponents of extending to non-price cap areas forbearance from Avoided-Cost Resale requirements point once again to their multi-location business customers. Because competitive LEC commenters opposing this relief have made no new arguments specific to non-price cap areas, we are not persuaded that the needs of these customers justify retaining this requirement for non-price cap incumbent LECs. First, rural LECs, which include many non-price cap incumbent LECs, are already exempt from the Avoided-Cost Resale requirements. Additionally, to the extent particular non-price cap incumbent LECs are not exempt from section 251(c)'s requirements, competitive LECs will still be able to purchase these services via section 251(b)(1) resale or commercial agreements. Finally, to the extent broadband is available to these locations, multi-location businesses can link their various locations in other ways, such as through a virtual private network via IP-based services.

157. *VoIP unavailable.* The unavailability of broadband in certain areas and, thus, the unavailability of VoIP in those areas, does not render inappropriate extending forbearance from Avoided-Cost Resale requirements to non-price cap incumbent LECs, contrary to the assertions of certain commenters. First, approximately two-thirds of the Americans residing in rural areas and urban clusters (combined) have access to broadband service from cable providers, and at least three wireless providers are available almost universally. For those areas that lack access to broadband, many incumbent LECs in non-price cap areas qualify for the rural exemption under section 251(f), as noted above. Moreover, TDM service will remain available for resale under section 251(b)(1) in those areas absent the incumbent LEC seeking to discontinue those services. In order to discontinue service, the carrier would have to seek Commission authorization. 47 U.S.C. 214(a). And one of the factors the Commission considers when reviewing discontinuance applications is the adequacy of the available replacement service(s). Indeed, the Commission specifically adopted rules applicable to the discontinuance of legacy TDM-based voice service that encompass just such situations. Finally, the Commission continues its efforts to accelerate broadband deployment to unserved and underserved areas and close the digital divide. As a result, forbearing from the Avoided-Cost Resale requirements in non-price cap areas will have minimal effect.

158. *Deployment incentive.* As discussed in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order,* forbearing from Avoided-Cost Resale requirements will encourage the transition to next-generation services by leveling the playing field between next-generation services and legacy TDM-based services. We reject Granite's argument that forbearing from the Avoided-Cost Resale requirement acts as a disincentive for incumbent LECs to deploy additional next-generation facilities by making incumbent LECs' TDM-based services delivered over copper more profitable. There is no such evidence in the record, and indeed Granite's argument is at odds with incumbent LECs' retirement of copper loops and replacement with next-generation alternatives. Moreover, the majority of customers in non-price cap areas have access to service by both cable and wireless providers, which incentivizes incumbent LECs to replace their aging copper facilities with next-generation networks in order to remain competitive. We also reject Granite's argument that nationwide forbearance from the Avoided-Cost Resale requirement is inconsistent with our more granular treatment of UNE DS1 and DS0 Loops. Both UNE DS1 and DS0 Loops can be used to provide broadband services, and in balancing the costs of regulation with the potential benefits that these loops can provide for broadband deployment and access where competition is less developed and entry is less likely, we determine above that these UNE Loops should remain available in limited areas. But Avoided-Cost Resale does not provide similar benefits for broadband deployment, and therefore we do not believe that it would benefit the public interest to retain Avoided-Cost Resale in any specific areas.

159. *Resale as backstop.* Commenters opposing forbearance from Avoided-Cost Resale requirements assert that the Commission has always retained those requirements when granting forbearance from unbundling obligations, such as in the *Qwest Omaha Order.* But *Qwest Omaha* was decided 15 years ago, at a time when the market was dramatically different and TDM service played a much larger role than it does today. In addition, the Commission's decision there was based on the specific facts of that case. The Commission found in *Qwest Omaha* that section 251(b)(1) resale was not an adequate substitute for avoided-cost resale because it lacked a

wholesale pricing requirement. However, that *Order* was adopted 15 years ago when the communications marketplace was very different from today's marketplace. In particular, the voice marketplace is replete with facilities-based competition, and incumbent LECs no longer have a dominant role in voice as whole or wireline voice in particular. Moreover, the Commission did not then have before it a record showing that the majority of resold services are purchased by means other than Avoided-Cost Resale.

160. In any event, UNE DS0 Loops will remain available in rural and urban cluster census blocks, and UNE DS1 and DS3 Loops will continue to be available in non-competitive counties, to the extent the incumbent LEC is not entitled to the rural LEC exemption. Moreover, we find today and similarly found in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order* that the continued requirement to provide Avoided-Cost Resale slows the transition to next generation services and undermines our goal of sustainable facilities-based competition. Thus, unlike in *Qwest Omaha,* we no longer need to retain Avoided-Cost Resale to ensure voice competition because technology has changed and we know there is competition in the voice market. The circumstances at issue here thus are distinguishable from those at issue in prior UNE forbearance orders that retained Avoided-Cost Resale as a regulatory backstop and alternative to facilities-based competition.

161. *Alternative Proposals.* Granite makes two proposals with respect to retaining the Avoided-Cost Resale requirement. First, it proposes preserving the requirement solely for business and government customers. We have already disposed of this argument in the *UNE Analog Loops and Avoided-Cost Resale Forbearance Order*. Second, it proposes preserving the requirement where UNE DS0 Loops will remain available—*i.e.,* in rural and urban cluster census blocks. Granite argues that ''where market conditions warrant retaining UNE DS0 loops, they equally warrant retaining Avoided-Cost Resale.'' However, competitive LECs use Avoided-Cost Resale to provision legacy TDM voice service, while UNE DS0 loops are used to provide both broadband and voice service. The Commission's policy of transitioning to next-generation services therefore warrants forbearance from Avoided-Cost Resale requirements even where market conditions support retaining UNE DS0 loops. We decline to adopt either proposal as both undermine the policy of encouraging consumers to transition to next-generation services and are unnecessary to protect consumers or the public interest.

162. *Pending appeal.* INCOMPAS asserts that it is inappropriate for the Commission to extend forbearance from Avoided-Cost Resale requirements to non-price cap incumbent LECs while the appeal of the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* is pending. We disagree. That *Order* remains effective at this time, and this is a different proceeding with a new record upon which to consider extending Avoided-Cost Resale forbearance. Nothing in this record persuades us that a different conclusion is warranted.

163. *Transition Period.* In the *NPRM,* we proposed a three-year transition period for this forbearance relief, and we sought comment on whether to include a six-month period for new orders. We adopt this proposal and do not include any period for new orders, conditioning our forbearance from non-price cap LEC Avoided-Cost Resale obligations on an appropriate transition period. Competitive LECs using Avoided-Cost Resale to fill in gaps where UNE Loops are unavailable and where they have not yet deployed their own fiber facilities will need to consider whether they can devote resources to deploying their own network facilities during the transition period or make alternative commercial arrangements. And competitive LECs operating on a purely resale basis will need time to negotiate new pricing arrangements under section 251(b)(1) resale, negotiate entirely new commercial wholesale arrangements, or work with their customers to migrate them to IP-based voice services. However, unlike with UNEs, competitive LECs using Avoided-Cost Resale do not have to place new orders to address individual last-mile loops that have deteriorated or to deal with the residential churn that requires competitive LECs using UNE DS0 Loops to place new orders when a residential customer at a particular location moves and a new potential residential customer moves into that location.

164. Accordingly, we condition our grant of forbearance from non-price cap LEC Avoided-Cost Resale obligations on a three-year grandfathering period. This transition period will begin on the effective date of this Order. During the relevant transition period, any Avoided-Cost Resale services that a competitive LEC purchases as of the effective date of this order shall be available for purchase from the incumbent LEC at regulated rates. Wholesale discounts are established either through negotiated interconnection agreements or through state-commission-Avoided-Cost Resale rate studies applying certain Commission-developed pricing formulas. Our forbearance action is not intended to upset pre-existing interconnection agreements or other contractual arrangements that may currently exist nor pre-existing state commission wholesale discount rates during the transition period (including any already-adopted state commission scheduled changes in the discount rates), which should quell concerns regarding near-term price increases following forbearance from Avoided-Cost Resale obligations. As with the transition for price cap LEC Avoided-Cost Resale, we find this transition period will minimize the impact of any immediate rate increase for end-user customers of affected competitive LECs that could otherwise occur if current pricing for these services were immediately eliminated. Further, the process that we describe is a default process from which competitive LECs and non-price cap incumbent LECs remain free to deviate pursuant to mutual agreement. The transition timeframe we adopt will work to ensure that end-user customers do not experience any undue service disruption as a result. We find no reason to adopt any longer transition period and thus we reject INCOMPAS's proposed seven-year transition period. INCOMPAS relies on the seven-year transition period provided for in the *T-Mobile/Sprint Order* (34 FCC Rcd 10578, Nov. 5, 2019) ''for DISH to become a facilities-based provider.'' However, the most vocal opponent to eliminating the Avoided-Cost Resale requirement is Granite, which is not a facilities-based provider and has not professed any desire or intention to become one, and there is little record evidence suggesting Avoided-Cost Resale is used as a bridge to facilities-based competition. And neither INCOMPAS nor Granite provide any evidence that consumers will be harmed without a longer period.

*F. Cost Benefit Analysis*

165. We take a dynamic and forward-looking approach to evaluate the benefits and costs of regulation. The Commission has discussed at length the failings of *ex ante* regulation and found that *ex ante* regulation is necessary only where competition cannot be relied upon to reasonably discipline the market. Our consideration of the relative benefits and costs of the obligations for UNE DS0 associated subloops, UNE DS1 and DS3 associated subloops follows the same reasoning as our consideration the underlying Loop obligations for these

services discussed in this section. To the extent that we find that the benefits of continuing UNE obligations exceed the costs of obligation, this analysis applies equally to the UNE OSS obligation necessary to provision UNEs and to support number portability. Further, the costs of the obligation to provision Multiunit Premises UNE Subloops, UNE Hybrid Loops, Grandfathered UNE 64 kbps Voice-Grade Channel Over Fiber Loops, UNE NIDs and UNE Narrowband Voice-Grade Loops exceed the benefits of continuing these obligations because there is no indication that these UNEs are used by competitors to any significant degree. Further in the case of Multiunit Premises UNE Subloops, the record indicates that the it is the owner of the property, not the incumbent LEC, that controls access to the property. Thus, competitive LECs concerns with access to the MTEs are beyond the scope of our actions here, and instead belong to the current MTE Docket. The obligation to offer UNEs and Avoided-Cost Resale have been in place for over 23 years, and the Commission has long recognized that unbundling ''is an especially intrusive form of economic regulation.'' The Commission has found that these obligations can yield negative effects, including diminishing incentives to invest, inhibiting facilities-based competitive entry and forestalling the benefits of competition. Thus, we seek to eliminate UNEs and Avoided-Cost Resale where development of competition means the costs of continuing these obligations outweigh their benefits and where the statutory criteria for declining to impose such requirements are otherwise satisfied.

166. *UNE DS1 and DS3 Loops.* We find that over the medium and long term the costs of maintaining the obligation to supply UNE DS1 and DS3 Loops in those counties and study areas deemed competitive in the *BDS Order* and *RoR BDS Order* exceed any benefits such supply provides. First, the Commission has found UNE DS1 and DS3 Loops to be ''particularly close substitutes'' for DS1 and DS3 business data services, and deregulated pricing for DS1 and DS3 business data services in the counties and study areas deemed competitive in the *BDS Order* and *RoR BDS Order*. The Commission has found that *ex ante* price regulation for DS1 and DS3 business data services to be unnecessary in these counties and study areas and that the costs of *ex ante* regulations exceed the benefits of *ex ante* regulation for DS1 and DS3 business data services. Because UNE DS1 and DS3 Loops are close substitutes for DS1 and DS3 business data services, the Commission's conclusions as to the net costs of continued regulation of DS1 and DS3 business data service should apply equally to UNE DS1 and DS3 Loops. Thus, the obligation to offer UNE DS1 and DS3 Loops is no longer needed where the Commission has found that market sufficiently competitive and/or found no need for continued regulation of DS1 and DS3 business data services. Second, the demand for UNE DS1 and DS3 Loops and DS1 and DS3 business data services have declined over time as competitive LECs have built out their own networks and migrated away from TDM-based services; thus suggesting that competitive LECs' need for these inputs has declined as these competitors have built their own facilities. Consequently, requiring the supply of UNE DS1 and DS3 Loops where relief has been granted for DS1 and DS3 business data services is likely to have a net expected cost in medium and long term. Finally, as there are no material operational or performance distinctions between UNE DS1 and DS3 Loops and DS1 and DS3 business data services and these services are used interchangeably, there is no benefit to have one regulatory paradigm for UNE DS1 and DS3 Loops and another for DS1 and DS3 business data services, particularly given the impact that a differential regulatory paradigm could have on firms' incentives to invest in their own networks and next-generation services.

167. In the short term, however, we do not want to disrupt the services currently received by customers of competitive LECs that purchase UNE DS1 and DS3 Loops in these areas, particularly given the impact on businesses and consumers from the recession and COVID–19 pandemic which has increased the need for reliable broadband services for businesses and consumers. Consequently, we find that the 42-month transition period for UNE DS1 Loops and the 36-month transition period for UNE DS3 Loops provides sufficient time for the competitive LECs to transition to alternative arrangements and/or to replace these productive inputs with their own facilities. As discussed in the DS1/DS3 section, there is record evidence that the use of UNE DS3 Loops is *de minimis,* justifying a shorter transition period.

168. *UNE DS0 Loops.* We find that the costs of maintaining the obligation to supply UNE DS0 Loops in urbanized areas exceed any benefits such supply provides. UNE obligations are heavy-handed and so carry substantive regulatory costs. They likely distort pricing and investment decisions, as well as choices of product offerings. In urbanized areas, we find that the benefits of the UNE DS0 obligation are negligible because the facilities-based competition such regulations are intended to foster is established to an extent that makes these rules redundant. Currently, 71% of mass market consumers in these areas can obtain broadband services meeting a 25/3 Mbps speed threshold from at least the incumbent LEC and a cable provider. This contrasts with 21% of consumers in rural areas and 27% of consumers in urban clusters. The corresponding figures for broadband services meeting a 10/1 Mbps speed threshold are 82% for urbanized areas, 36% for rural areas, and 59% for urban clusters. And competition and entry by fixed wireless providers continues to increase. Thus, competition between two facilities-based providers with near ubiquitous networks, and expected entry by fixed wireless providers, without the distortions of UNE regulation, will bring greater benefits over the medium term, than ongoing UNE requirements, which distort incumbent and competitive LECs' incentives to compete.

169. In contrast, the record presents insufficient evidence of competitive changes to end UNE DS0 Loop obligations in urban clusters and rural areas. We find that: (1) Mass market customers in these areas often either do not have access to a high speed broadband service or can only obtain such service from a single provider, which sometimes is a competitive LEC that relies on UNE DS0 loops; and (2) certain competitors rely on UNE DS0 loops to connect their customers to their own fiber networks and are swapping out these loops for their own last mile facilities as they build out their fiber network to their end-users' premises. Based on December 2019 Form 477 data, the proportion of households with either no or one provider option for 25/3 Mbps services was 57% in rural areas and 40% in urban clusters compared to 16% in urbanized areas. As noted above, of the approximately 42,000 thousand households who have a single option for 25/3 Mbps service that may rely upon UNE Loops, about 35,000 live in rural areas and urban clusters where UNE DS0 Loops will remain available. Thus, consistent with our initial imposition of UNE DS0 Loop requirements, access to UNE DS0 Loops in urban clusters and rural areas continues to support the development of competition and the deployment of advanced services in these areas.

170. In urbanized areas, we find the two-part transition for UNE DS0s Loops appropriately balances the short-term

needs of the competitive LECs to maintain competitive supply while they extend their networks. Competitors claim that the immediate loss of UNE DS0 Loops would strand their investments and cause the cessation of services to their customers, particularly given the recession that has been caused by the COVID–19 pandemic. We find these claims credible as facility-based replacement of existing UNEs requires substantive time and effort.

171. *UNE Dark Fiber Transport.* Consistent with the *UNE Transport Forbearance Order,* we find that the costs of maintaining the obligation to supply new UNE Dark Fiber Transport exceed any benefits such supply provides to wire centers that are within a half mile of alternative fiber. Such an obligation distorts the incumbent and competitive LECs' incentives to invest in transport networks, *e.g.,* because it is unlikely UNE prices correctly reflect efficient costs in all circumstances. Similarly, competitive LECs may inefficiently prefer to purchase UNEs without any long-term obligations, rather than bearing the multi-decade risk deployment entails.

172. We find that there are net benefits to competitors to retain use of their existing UNE Dark Fiber Transport for a significant period of time, however, because of the risk of stranding competitors' investments that rely upon this transport. This concern is sharpened by the recession caused by the COVID–19 pandemic, which has increased the need for broadband services, and has made it harder to finance deployment. Some competitive LECs rely on embedded UNE Dark Fiber Transport to support the investments they have made in networks, notably including last-mile facilities, which represent substantial investments that are sunk for many years. Competitively replacing the UNE Dark Fiber Transport they currently rely on would in some instances require significant investments (on the part of the providers or third parties) and would take substantial time. The result, in some instances, would be the cessation of services to existing customers and of planned new last-mile deployments. And the cost of continuing to provision existing UNE Dark Fiber Transport is comparatively low. Accordingly, we are persuaded there are significant net benefits to permit competitors' continued use of embedded UNE Dark Fiber Transport at existing terms and conditions for eight years.

173. *Avoided-Cost Resale and UNE Analog Loops.* We find there are net costs of continuing the obligations to offer Avoided-Cost Resale and UNE Analog Loops. The Commission has found that the availability of these UNEs at subsidized prices distorts competitors' incentives to build their own last mile facilities and the deployment of next-generation facilities, hindering the Commission's policy goals and reducing overall efficiency. The migration away from legacy TDM services is occurring in price-cap and non-price cap areas. The Commission forbore from imposing these obligations for price-cap LECs, and identical reasoning applies to non-price LECs. Allowing competitive LECs access to these services during the three-year transition period will allow an orderly transition to the more efficient end state. In addition, providers with customers that prefer legacy services and that rely upon Avoided-Cost Resale to provision those services, may continue to offer legacy services via section 251(b)(1) resale and commercial agreements.

*G. Other Considerations*

174. *SBA Response.* We disagree with the Chief Counsel of the Small Business Administration that removing these UNE and resale obligations for which we grant relief today will prevent small competitive LECs from providing competitive services to consumers and from deploying their own networks, and that the benefits to adopting these changes will have unclear economic benefits. We eliminate UNEs and resale only where they are no longer necessary for competition and entry as the Act requires, and preserve them where they still serve a useful purpose. Moreover, the fact that INCOMPAS and USTelecom and almost all of their members who participated in this proceeding have reached a compromise as to several of the UNEs that SBA raises concerns about, provides us with additional assurance that eliminating certain UNEs subject to transition conditions will not unduly affect small businesses. We expect that the benefits from eliminating these UNEs and resale, including increased competition and deployment of next-generation facilities, will also extend to small businesses. Additionally, any small businesses relying on current UNE Dark Fiber Transport will retain all of their current rights for eight years. To the extent small businesses are burdened, we expect that this generous transition period will provide them sufficient time to act to avoid disruptions to their current business operations.

175. *Puerto Rico.* Based on the record in this proceeding, we do not find that a longer grandfathering period is necessary for Puerto Rico for any UNE or resale obligations for which we grant relief. Although we provided a five-year, rather than three-year, grandfathering period for Puerto Rico due to the state of the economy and ongoing hurricane restoration efforts in the *2019 UNE Forbearance Orders,* a unique transition period is not warranted here for Puerto Rico, and competitive LECs providing service there have been on notice for almost a year now that such UNEs may no longer be available. While we sought comment on a longer transition period for Puerto Rico in the *NPRM,* we did not propose a different transition timeframe. We find that we have provided a sufficient transition period for the UNE and resale obligations for which we grant relief, which should also provide more than enough time for competitive LECs in Puerto Rico to seamlessly transition their existing customers to alternative facilities or services. A longer transition would unnecessarily continue to impose outdated burdens solely placed on the incumbent LEC, undermining incentives for sustainable facilities-based competition, which is important to encourage as Puerto Rico continues to rebuild. Moreover, we clarify that the transition periods we adopt herein do not supersede or modify any previously-adopted transition periods applicable to Puerto Rico.

176. We also reject WorldNet's argument that the Commission should exempt Puerto Rico from any elimination or reduction of UNE or resale obligations in this proceeding due to its unique economic circumstances. As WorldNet acknowledges, we recently decided not to exempt Puerto Rico with regard to the UNE and Avoided-Cost Resale obligations at issue in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order.* For similar reasons, namely, that reducing unbundling obligations will increase incentives for facilities-based deployment, our decision in this document applies to Puerto Rico. Importantly, customers in Puerto Rico will have a number of alternative options that will protect them from unreasonable rates and charges, aided in part by the Commission's ongoing work to implement the Uniendo a Puerto Rico Fund and ensure that the residents of the island have access to next-generation technologies that are resilient to hurricanes and other natural disasters. Even after our actions today, WorldNet will still be able to make voice services available to its customers via alternative arrangements such as commercial agreements with the incumbent LEC or other providers and section 251(b)(1) resale, or through

deployment of its own facilities-based voice services. Thus, we do not find it necessary to exempt Puerto Rico from the UNE and resale obligations that are eliminated or reduced today. Moreover, the transition timeframes that we have adopted should provide more than sufficient time for WorldNet to transition any of its existing customers to alternative facilities or services.

177. *Public Safety.* With respect to concerns that the Commission ''should carefully consider the impacts that its proposal . . . would have on public safety,'' we note that such issues have been considered with respect to each UNE element where the issue has been raised in the record as well as in the discussion of Avoided-Cost Resale. As discussed above, to the extent commenters raise issues about losing line power and TDM service over copper, this Order will not impact the availability of such features, nor does it affect the availability of 9–1–1 functionality. And consistent with the *NPRM,* we retain the access to E911/911 database UNE without modification. We therefore find that our actions today will not affect issues related to public safety in any way.

178. *Form 477 Data.* With respect to concerns that there are limitations related to our reliance on Form 477 data, such data is the best, most granular data currently available. Importantly, however, in this Order, we rely on Form 477 data primarily for nationwide findings in the UNE Narrowband Voice-Grade Loops and Avoided-Cost Resale sections, and on findings that apply to urbanized areas as compared to urban clusters and rural areas. Moreover, the nationwide findings we primarily rely on in the UNE Narrowband Voice-Grade Loops and Avoided-Cost Resale sections are voice subscription counts rather than deployment data. While some parties in this proceeding have questioned the reliability of deployment data, none have questioned the validity of voice subscription counts. While some commenters criticize Form 477 deployment data as overstating deployment because a provider need only serve one location in a census block for the block to be considered served, we note that in urbanized areas, where census blocks are extremely small, a provider that serves one location is very likely to be able to serve the other locations in the census block in the near future. To the extent commenters raise concerns about the precision of Form 477 data in specific areas, nothing in our Order relies on such specificity. The findings in the UNE DS1/DS3 and UNE Dark Fiber Transport sections are based on analyses that relied upon the comprehensive BDS Data Collection and the Commission's prior orders that relied upon those analyses. While the Commission is currently developing a new data collection to replace Form 477, it is primarily doing so to improve precision in specific areas, which, while undoubtedly important for Universal Service purposes, is not required for our more general findings to refine unbundling requirements. For purposes of this proceeding, as discussed above, we have accurately captured the ''current competitive landscape'' nationwide and find that our actions today will ''effectively foster competition and benefit consumers.''

## IV. Procedural Matters

179. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in this proceeding. The Commission sought written comment on the proposals in the *NPRM,* including comment on the IRFA. The present Final Regulatory Flexibility Analysis (FRFA) addresses comments received on the IRFA and conforms to the RFA.

### *A. Need for, and Objectives of, the Rules*

180. In the *NPRM,* the Commission proposed to revise its unbundling and resale requirements to account for changes in communications service markets where competition has flourished, and sought comprehensive comments on these proposals. Thus, this Order provides a new regulatory framework that does away with obsolete regulatory obligations and promotes the deployment of competitive facilities and next-generation networks, spreading the benefits of innovation and facilities-based competition to market entrants and end-users alike, including small businesses in each category.

181. Specifically, in the *NPRM* the Commission sought comment on proposals to eliminate: (1) UNE DS1 and DS3 loop obligations in counties and study areas deemed competitive in the *BDS Order* and *RoR BDS Order;* (2) UNE DS0 loops in urban census blocks; (3) UNE analog loop obligations where they still apply; (4) 64 kbps voice-grade channel over fiber loops obligations where they still apply; (5) unbundling requirements for the narrowband frequencies of hybrid loops; (6) UNE subloops in the particular instances or geographic areas where we propose to eliminate the unbundling obligation for the underlying loop to the customer's premises; (7) unbundled dark fiber transport to wire centers that are within a half mile of alternative fiber; (8) stand-alone UNE network interface device (NID) obligations; (9) operations support systems (OSS) unbundling obligations; and (10) Avoided-Cost Resale obligations in non-price cap areas. The unbundling requirement imposed by the 1996 Act were designed to promote competition, not specific competitors; as such, in evaluating the continued need for particular UNEs or Avoided-Cost Resale, we look to the existence of competition rather than the impact our actions will have on individual competitors.

182. Drawing on the record in this proceeding along with data from a variety of sources, including findings in the *BDS Order, RoR BDS Order,* and Form 477 data, the Commission makes findings regarding actual and potential competition in different geographic areas. In those localities where competition is robust, the Commission finds that continuing to require incumbent LECs to provide access to the UNEs described above is counterproductive. Ending these requirements will minimize burdensome regulations and allow market forces to drive innovation and competitive pricing.

#### 1. UNE DS1 and DS3 Loops

183. Based on the record in this proceeding, as well as the conclusions drawn in the *BDS Order,* the Commission finds competitive LECs are no longer impaired without access to unbundled DS1 and DS3 loops in those counties that are already competitive or where there is the potential for competition (collectively, ''Competitive Counties''). Therefore, these UNE requirements are no longer necessary nor appropriate in these locations. Even if there were continuing impairment, requiring provision of these UNEs would contravene the Commission's mandate to ensure the deployment of next-generation infrastructure. In the alternative, the Commission finds that forbearance from enforcing requirements for UNE DS1 and DS3 loops in Competitive Counties is appropriate. In these competitive localities, market forces will ensure fair pricing. None of these findings apply to non-competitive counties.

#### 2. UNE DS0 Loops

184. Based on the record in this proceeding, as well as Form 477 data, the Commission finds that cable companies provide significant competition, and therefore competitive LECs are no longer impaired without access to unbundled DS0 loops in urbanized census blocks, and

independently forbears from the obligation. As such, UNE obligations are no longer appropriate in these areas. This finding does not apply to urban cluster census blocks nor rural census blocks.

3. UNE Narrowband Voice-Grade Loops, Multiunit Premises Subloops, and NIDs

185. The Commission finds that competitors do not face significant barriers to entry into the voice-service market, and therefore forbear from any remaining UNE Narrowband Voice-Grade Loop obligations nationwide. The Commission also finds that impairment no longer exists without access to UNE Multiunit Premises Subloops and NIDs. Further, the Commission finds that competitive LECs are not impaired by lack of access to these UNEs, and that continued provision thereof contravenes the Commission's mandate to ensure deployment of next-generation networks.

4. UNE Dark Fiber

186. The Commission finds that competitive LECs are not impaired without UNE dark fiber that is within a half mile from alternative fiber. Further, the Commission independently forbears from any UNE Dark Fiber Transport within a half mile from alternative fiber. However, access will be grandfathered for eight years for those who are already relying on it.

5. Operations Support Systems

187. The Commission finds that competitive LECs are not impaired without access to OSS, except for the purposes of number portability and interconnection.

6. Avoided-Cost Resale

188. For the same reasons the Commission granted price-cap incumbent LECs forbearance from the Avoided-Cost Resale requirement in 2019, the Commission now extends that forbearance to non-price-cap incumbent LECs. The Commission finds that enforcement of these obligations is unnecessary to moderate end-user pricing nor to protect competitive LECs' ability to provide service due to the abundance of alternatives available across markets.

*B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA*

189. In this section, we respond to comments filed in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are summarized in part E, below.

190. We reject arguments that ending UNE access for competitive providers would damage their ability to compete in the affected markets because UNE loop obligations are being rolled back only in counties and study areas already deemed competitive, and access to dark fiber will be grandfathered for eight years for all providers currently utilizing it. Furthermore, the Commission's objective in finding non-impairment is to foster competition, not to promote any specific competitor. In making the impairment inquiry, we make the reasonable inference that if competitive providers have successfully entered one market using their own facilities, other providers can enter similar markets on a similar basis.

191. We also reject the claim that removing access to UNEs will inhibit development of next-generation infrastructure. Indeed, we find that continuing provision of UNEs in areas with robust competition in place will result in stagnation of innovation and delay the deployment of new technologies such as 5G networks.

192. With respect to whether small business customers will lose their choice in providers with the adoption of this Order, or may lose access all together if the only provider in their region is unable to provide service by way of UNEs, we note that because UNE loop obligations will only be removed in markets where competition is sufficiently robust. Additionally, we provide 8 years for competitive LECs to transition from UNE Dark Fiber Transport. While price increases are possible as a result of the transition to commercial pricing for some network elements, these increases do not constitute impairment.

193. With respect to the suggestion that a significant number of small entities may be unaware of this proceeding and that the Commission should engage in educational outreach to inform them of it, we disagree with this assertion because the *NPRM* explained the proposed regulatory changes in detail and solicited comments from all parties. A summary of the *NPRM* was published in the **Federal Register**, and we believe that such publication constitutes appropriate notice to small businesses subject to the regulations.

*C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration*

194. First, we disagree with the Chief Counsel's assertion that the Commission failed to consider in its IRFA the impact of the new regulations on small entities that will be directly impacted by the changes. To the contrary, the Commission specifically requested comments regarding economic impacts on small entities that may result from the changed regulations. Many such comments were submitted in response, allowing the Commission to consider the concerns of small competitive LECs and other entities throughout this Order. Though the Chief Counsel advises the Commission to issue a further notice of proposed rulemaking with a supplemental IRFA, we believe this is unnecessary because the *NPRM* described in detail the proposed changes to the regulatory framework, posed specific questions on how best to implement the changes, and sought comprehensive comments from all parties. As described in paragraph 193 of this RFA, a summary of the NPRM was published in the **Federal Register**, thus providing notice to all affected entities, including small entities.

195. We disagree with the Chief Counsel's argument that removing these UNE obligations will prevent small competitive LECs from providing competitive services to consumers and from deploying their own networks. Indeed, the Commission is implementing these changes in order to promote facilities-based competition that will benefit large and small providers as well as end-users. Access to UNEs was always intended as a stepping stone for competitors to gain market entry and build their own networks, to be retired once competition was established. In evaluating the need for a given UNE the Commission considers the existence of competition, including intermodal competition, not the impact on any particular competitor. The Commission's impairment determinations consider the existence of intermodal competition because ''[t]he fact that an entrant has deployed its own facilities—regardless of the technology chosen—may provide evidence that any barriers to entry can be overcome.'' Further, examining these same facts, the Commission finds that the forbearance criteria are met, as competition will ensure that rates remain just and reasonable and protect consumers, while also promoting the public interest by spurring deployment of next-generation facilities. Additionally, those entities relying on dark fiber will have a significant period—eight years—to transition from UNE Dark Fiber Transport.

196. Unbundling requirements for DS1 and DS3 loops will be removed only in those counties already determined to be competitive in the *BDS*

*Order* and *RoR BDS Order*. Furthermore, access to equivalent network elements is still available for purchase via commercial agreements, which supports a finding a non-impairment. Indeed, competitive providers already rely on these commercially available elements to compete. Obligations to provide UNE DS0 loops will cease only in urbanized census blocks where there is ample evidence of intermodal competition; urban cluster and rural census blocks, where the record does not provide evidence of robust competition, will retain the legacy UNE requirements.

197. We disagree with the implication in the Chief Counsel's comments that the new regulations offer no economic benefit. In implementing these regulatory changes, the Commission is pursuing its congressionally mandated goal of ensuring deployment of next-generation networks and services. Pursuant to the provisions of the 1996 Act, the Commission revises its unbundling and resale requirements to account for changes in communications service markets where competition among incumbent and competitive LECs has flourished and UNEs are no longer necessary to facilitate market entry. Congress authorized the Commission to forbear from any regulatory obligations once the agency determined that they are obsolete, and encouraged the Commission to use forbearance and other means to encourage deployment of advanced telecommunications capability and remove barriers to infrastructure deployment. Promoting investment in innovation and advanced technologies can only provide greater economic benefits for all parties involved.

*D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*

198. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

199. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' SBA Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

200. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

201. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

202. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs),* ''*Shared-Tenant Service Providers,*'' *and* ''*Other Local Service Providers.*'' Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers and under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

203. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed

Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

204. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for OSPs. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus under this size standard, the Commission estimates that the majority of firms in this industry are small entities. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees. Consequently, the Commission estimates that the majority of operator service providers are small entities.

205. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICs code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data from 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities.

206. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to ''Other Toll Carriers.'' This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. The applicable SBA size standard consists of all such companies having 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities.

207. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year. Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

208. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards. In the Commission's auction for geographic area licenses in the WCS there were seven winning bidders that qualified as ''very small business'' entities, and one winning bidder that qualified as a ''small business'' entity.

209. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities. *Satellite Telecommunications.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we estimate that the majority of satellite

telecommunications providers are small entities.

210. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, more than half of these entities can be considered small.

211. *Internet Service Providers (Broadband).* While ISPs are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present FRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. Broadband internet service providers include wired (*e.g.,* cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

212. *Internet Service Providers (Non-Broadband).* internet access service providers such as Dial-up internet service providers, VoIP service providers using client-supplied telecommunications connections and internet service providers using client-supplied telecommunications connections (*e.g.,* dial-up ISPs) fall in the category of All Other Telecommunications. The SBA has developed a small business size standard for All Other Telecommunications which consists of all such firms with gross annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Consequently, under this size standard a majority of firms in this industry can be considered small.

213. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications'', which consists of all such firms with annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999. Thus, the Commission estimates that the majority of ''All Other Telecommunications'' firms potentially affected by our action can be considered small.

### *E. Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*

214. The objective of the new regulatory framework is to encourage the deployment of next-generation networks and to unburden incumbent LECs where there is substantial evidence of facilities-based competition and market entry. Beyond the benefits that providers will enjoy from a decreased regulatory burden on their day-to-day operations, these changes will not affect the reporting, recordkeeping, or other compliance requirements of carriers, including small entities.

### *F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

215. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

216. In arriving at the conclusions described above, the Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of this Order, and made certain changes to the rules to reduce undue regulatory burdens, consistent with the Communications Act and with guidance received from the courts. These efforts to reduce regulatory burden will affect both large and small carriers. The significant alternatives that commenters discussed and that we considered are as follows.

217. *Maintaining the status quo.* The main alternative plan that was suggested in the comments was to simply leave the rules as they are. We decline to do so, in light of the importance of deployment of facilities-based competition and next-generation infrastructure, which is one of the central motivations behind this Order as well as the Commission's congressionally mandated goal.

218. *Business Data Services/DS1 & DS3 Loops.* In this Order, we have limited unbundling of DS1 and DS3 loops to areas where there is insufficient evidence of competition. In reaching this conclusion, we considered comments from small competitive LECs, who in general would prefer greater access to these UNEs. We rejected their arguments on the ground that the reasonably efficient competitor would not rely on DS1 or DS3 loops as reasonably efficient technology for market entry. Furthermore, we find that commenters do not adequately consider the prospect of competitive deployment nor the advantages held out by such

deployment, where feasible, for consumers and carriers alike.

219. *Transition Plans.* The Order also sets out transition plans to govern the migration away from UNEs where a particular element is no longer available on an unbundled basis. We have considered various comments indicating that many small businesses have built their business plans on the basis of continued access to UNEs and have worked to ensure that the transition plans will give competing carriers a sufficient opportunity to transition to alternative facilities or arrangements. This alternative represents a reasonable accommodation for small entities and others, which we believe will ultimately result in an orderly and efficient transition. Therefore, as set forth in the Order, we have adopted plans to grandfather unbundled access to dark fiber loops for eight years where they are already in use; for DS1 loops, a two-part transition of 24 months for new orders and 42 months for existing loops; for DS0 loops, a 24 month period for new orders and a 48-month grandfathering period for all competitive LEC customers; for OSS UNEs, a period equivalent to the respective UNE the OSS UNE is used to order and manage; and a three-year transition period for those who currently utilize other UNEs that will cease to be available.

*G. Report to Congress*

220. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

221. *Paperwork Reduction Act of 1995 Analysis.* This document does not contain information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

222. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is ''non-major'' under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

## V. Ordering Clauses

223. Accordingly, *it is ordered* that, pursuant to sections 1–4, 10, 201, 202, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 160, 201, 202, and 251, this Report and Order *Is adopted* and *shall be effective* thirty (30) days after publication in the **Federal Register**.

224. *It is further ordered* that part 51 of the Commission's rules *is amended* as set forth in the Final Rules and *shall be effective* on the effective date announced herein.

225. *It is further ordered* that the Commission *shall send* a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

226. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 51**

Communications, Communications common carriers, Telecommunications, Telephone.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary.*

## Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 51 as follows:

## PART 51—INTERCONNECTION

■ 1. The authority citation for part 51 continues to read as follows:

**Authority:** 47 U.S.C. 151–55, 201–05, 207–09, 218, 225–27, 251–52, 271, 332 unless otherwise noted.

■ 2. Section 51.319 is amended by:
■ a. Revising paragraph (a)(1) introductory text;
■ b. Adding paragraphs (a)(1)(v) and (vi);
■ c. Removing and reserving paragraph (a)(2)(ii) and removing paragraphs (a)(2)(iii) and (a)(3)(iii)(C);
■ d. Revising paragraph (a)(4)(i);
■ e. Adding paragraph (a)(4)(iii);
■ f. Revising paragraph (a)(5)(i);
■ g. Adding paragraph (a)(5)(iii);
■ h. Revising paragraph (b) introductory text;
■ i. Removing and reserving paragraph (b)(2);
■ j. Revising paragraph (b)(3)(i);
■ k. Removing paragraph (c);
■ l. Redesignating paragraph (d) through (f) as paragraph (c) through (e); and
■ m. Revising newly redesignated paragraphs (c)(2)(iv) and (e).

The revisions and additions read as follows:

**§ 51.319 Specific unbundling requirements.**

(a) * * *

(1) *Copper loops.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the copper on an unbundled basis in census blocks defined as rural or urban cluster by the Census Bureau. A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. For purposes of this section, copper loops include only digital copper loops (*e.g.,* DS0s and integrated services digital network lines) as well as two-wire and four-wire copper loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares. The copper loop does not include packet switching capabilities as defined in paragraph (a)(2)(i) of this section. The availability of DS1 and DS3 copper loops is subject to the requirements of paragraphs (a)(4) and (5) of this section.

* * * * *

(v) *Transition period for narrowband loops.* Notwithstanding any other provision of the Commission's rules in this part, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to two-wire and four-wire analog voice grade copper loops, the TDM-features, functions, and capabilities of hybrid loops, or to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop or fiber-to-the-curb loop for 36 months until February 8, 2024, provided such loop was being provided before February 8, 2021.

(vi) *Transition period for digital copper loops and two-wire and four-wire copper loops conditioned to transmit digital signals.* Notwithstanding the remainder of paragraph (a)(1) of this section, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to copper loops as defined in this section for 48 months until February 10, 2025, provided that the incumbent LEC began providing such loop no later than

February 8, 2023. Incumbent LECs may raise the rates charged for such loops by no more than 25 percent during months 37 to 48 of this transition period and may charge market-based rates after month 48.

* * * * *

(4) * * *

(i) *Availability of DS1 loops.* (A) Subject to the cap described in paragraph (a)(4)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators, but only if that building is located in:

(*1*) Any county or portion of a county served by a price cap incumbent LEC that is not included on the list of counties that have been deemed competitive pursuant to the competitive market test established under § 69.803 of this chapter; or

(*2*) Any study area served by a rate-of-return incumbent LEC provided that study area is not included on the list of competitive study areas pursuant to the competitive market test established under § 61.50 of this chapter.

(B) Once a wire center exceeds both the business line and fiber-based collocator thresholds, no future DS1 loop unbundling will be required in that wire center. A DS1 loop is a digital local loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services.

* * * * *

(iii) *Transition period.* Notwithstanding paragraph (a)(4)(i) of this section, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to DS1 loops for 42 months until August 8, 2024, provided the incumbent LEC began providing such loop no later than February 8, 2023.

(5) * * *

(i) *Availability of DS1 loops.* (A) Subject to the cap described in paragraph (a)(5)(ii) of this section, an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators, but only if that building is located in one of the following:

(*1*) Any county or portion of a county served by a price cap incumbent LEC that is not included on the list of counties that have been deemed competitive pursuant to the competitive market test established under § 69.803 of this chapter; or

(*2*) Any study area served by a rate-of-return incumbent LEC provided that study area is not included on the list of competitive study areas pursuant to the competitive market test established under § 61.50 of this chapter.

(B) Once a wire center exceeds the business line and fiber-based collocator thresholds, no future DS3 loop unbundling will be required in that wire center. A DS3 loop is a digital local loop having a total digital signal speed of 44.736 megabytes per second.

* * * * *

(iii) *Transition period.* Notwithstanding paragraph (a)(5)(i) of this section, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to DS3 loops for 36 months after until February 8, 2024, provided such loop was being provided before February 8, 2021.

* * * * *

(b) *Subloops and network interface devices.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to subloops on an unbundled basis in accordance with section 251(c)(3) of the Act and this part and as set forth in this paragraph (b), provided that the underlying loop is available as set forth in paragraph (a) of this section. Notwithstanding any other provision of the Commission's rules in this part, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to the subloop for access to multiunit premises wiring and network interface devices on an unbundled basis for 36 months until February 8, 2024, provided such subloop or network interface device was being provided before February 8, 2021.

* * * * *

(3) * * *

(i) *Technical feasibility.* If parties are unable to reach agreement through voluntary negotiations as to whether it is technically feasible, or whether sufficient space is available, to unbundle a copper subloop at the point where a telecommunications carrier requests, the incumbent LEC shall have the burden of demonstrating to the state commission, in state proceedings under section 252 of the Act, that there is not sufficient space available, or that it is not technically feasible to unbundle the subloop at the point requested.

* * * * *

(c) * * *

(2) * * *

(iv) *Dark fiber transport.* Dark fiber transport consists of unactivated optical interoffice transmission facilities. Incumbent LECs shall unbundle dark fiber transport between any pair of incumbent LEC wire centers except where, through application of tier classifications described in paragraph (d)(3) of this section, both wire centers defining the route are either Tier 1, Tier 2, or a Tier 3 wire center identified on the list of wire centers that has been found to be within a half mile of alternative fiber pursuant to the Report and Order on Remand and Memorandum Opinion and Order in WC Docket No. 18–14, FCC 19–66 (released July 12, 2019). An incumbent LEC must unbundle dark fiber transport only if a wire center on either end of a requested route is a Tier 3 wire center that is not on the published list of wire centers. Notwithstanding any other provision of the Commission's rules in this part, an incumbent LEC shall continue to provide a requesting telecommunications carrier with nondiscriminatory access to dark fiber transport for eight years until February 8, 2029, provided such dark fiber transport was being provided before February 8, 2021.

* * * * *

(e) *Operations support systems.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to operations support systems on an unbundled basis only when it is used to manage other unbundled network elements, local interconnection, or local number portability, in accordance with section 251(c)(3) of the Act and this part. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. An incumbent LEC, as part of its duty to provide access to the pre-ordering function, shall provide the requesting telecommunications carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC.

[FR Doc. 2020–25254 Filed 1–7–21; 8:45 am]

**BILLING CODE 6712–01–P**


# FEDERAL REGISTER

Vol. 86 Friday,
No. 5 January 8, 2021

Part IV

## Department of Homeland Security

8 CFR Part 214
Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions; Final Rule

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 214**

**[CIS No. 2679–21; DHS Docket No. USCIS–2020–0019]**

**RIN 1615–AC61**

## Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS or the Department) is amending its regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H–1B registrations for the filing of H–1B cap-subject petitions (or H–1B petitions for any year in which the registration requirement is suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment.

**DATES:** This final rule is effective March 9, 2021.

**FOR FURTHER INFORMATION CONTACT:** Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:**

### I. Table of Contents



### II. Table of Abbreviations

BLS—U.S. Bureau of Labor Statistics
CEQ—Council on Environmental Quality
CNMI—Commonwealth of the Northern Mariana Islands
CRA—Congressional Review Act

DHS—U.S. Department of Homeland Security
DOD—U.S. Department of Defense
DOL—U.S. Department of Labor
DOS—U.S. Department of State
EA—Environmental Assessment
EIS—Environmental Impact Statement
E.O.—Executive Order
FEMA—Federal Emergency Management Agency
FQHC—Federally Qualified Healthcare Center
FRFA—Final Regulatory Flexibility Analysis
FVRA—Federal Vacancies Reform Act
FY—Fiscal Year
GAO—U.S. Government Accountability Office
HHS—U.S. Department of Health and Human Services
HPSA—Health Professional Shortage Area
HSA—Homeland Security Act of 2002
ICE—U.S. Immigration and Customs Enforcement
IMG—International Medical Graduate
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
IT—Information Technology
LCA—Labor Condition Application
NAICS—North American Industry Classification System
NEPA—National Environmental Policy Act
NPRM—Notice of Proposed Rulemaking
OES—Occupational Employment Statistics
OMB—Office of Management and Budget
OPT—Optional Practical Training
R&D—Research and Development
SOC—Standard Occupational Classification
STEM—Science, Technology, Engineering, and Mathematics
UMRA—Unfunded Mandates Reform Act of 1995
USCIS—U.S. Citizenship and Immigration Services
VA—U.S. Department of Veterans Affairs

## III. Background and Discussion

### *A. Purpose and Summary of the Regulatory Action*

DHS is amending its regulations governing the selection of registrations submitted by prospective petitioners seeking to file H–1B cap-subject petitions (or the selection of petitions, if the registration process is suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on wage levels. When applicable, USCIS will rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. The proffered wage is the wage that the employer intends to pay the beneficiary. This ranking process will not alter the prevailing wage levels associated with a given position for U.S. Department of Labor (DOL) purposes, which are informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification. This final rule will not affect the order of selection as between the regular cap and the advanced degree exemption. The wage level ranking will occur first for the regular cap selection and then for the advanced degree exemption.

Rote ordering of petitions leads to impossible results because petitions are submitted simultaneously. While administering a random lottery system is reasonable, it is inconsiderate of Congress's statutory purposes for the H–1B program and its administration. Instead, a registration system that faithfully implements the Immigration and Nationality Act (INA) while prioritizing registrations based on wage level within each cap will incentivize H–1B employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection and eligibility to file an H–1B cap-subject petition. Moreover, it will maximize H–1B cap allocations, so that they more likely will go to the best and brightest workers; and it will disincentivize abuse of the H–1B program to fill relatively lower-paid, lower-skilled positions, which is a significant problem under the present selection system.[1]

### *B. Legal Authority*

The Secretary of Homeland Security's authority for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing this final rule is found in INA section 103(a), 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the immigration and nationality laws, as well as HSA section 102, 6 U.S.C. 112, which vests all of the functions of DHS in the Secretary and authorizes the Secretary to issue regulations.[2] Further authority for these regulatory amendments is found in:

- INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b), which classifies as nonimmigrants aliens coming temporarily to the United States to perform services in a specialty occupation or as a fashion model with distinguished merit and ability;
- INA section 214(a)(1), 8 U.S.C. 1184(a)(1), which authorizes the Secretary to prescribe by regulation the terms and conditions of the admission of nonimmigrants;
- INA section 214(c), 8 U.S.C. 1184(c), which, among other things, authorizes the Secretary to prescribe how an importing employer may petition for an H nonimmigrant worker, and the information that an importing employer must provide in the petition; and
- INA section 214(g), 8 U.S.C. 1184(g), which, among other things, prescribes the H–1B numerical limitations, various exceptions to those limitations, and criteria concerning the order of processing H–1B petitions.
- INA section 214(i), 8 U.S.C. 1184(i), which defines the term ''specialty occupation,'' referenced in INA section (101)(a)(15)(H)(i)(B), 8 U.S.C. 1101(a)(15)(H)(i)(B), a requirement for the classification.

Further, under HSA section 101, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.''

[1] *See* U.S. Department of Homeland Security, U.S. Citizenship, and Immigration Services, Office of Policy and Strategy, Policy Research Division, *I–129 Petition for H–1B Nonimmigrant Worker (Cap Subject) Wage Levels for H–1B Petitions filed in FY2018,* Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H–1B petitions for which wage levels were reported were for level I and II wages); *I–129 Petition for H–1B Nonimmigrant Worker (Cap Subject) Wage Levels for H–1B Petitions filed in FY2019,* Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H–1B petitions for which wage levels were reported were for level I and II wages). *See also* HaeYoun Park, *How Outsourcing Companies are Gaming the Visa System,* N.Y. Times (Nov. 10, 2015), *https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html* (noting ''H–1B workers at outsourcing firms often receive wages at or slightly above $60,000, below what skilled American technology professionals tend to earn, so those firms can offer services to American companies at a lower cost, undercutting American workers''); Daniel Costa and Ron Hira, *H–1B Visas and Prevailing Wage Level,* Economic Policy Institute (May 4, 2020), *https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/* (explaining that ''the fundamental flaw of the H–1B program is that it permits U.S. employers to legally underpay H–1B workers relative to U.S. workers in similar occupations in the same region).

[2] *See also* 6 U.S.C. 202(4) (charging the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States'').

Finally, as explained above, ''Congress left to the discretion of USCIS how to handle simultaneous submissions.'' [3] Accordingly, ''USCIS has discretion to decide how best to order those petitions'' in furtherance of Congress' legislative purpose.[4]

*C. Summary of Changes From the Notice of Proposed Rulemaking*

Following careful consideration of public comments received, including relevant data provided, DHS has declined to modify the regulatory text proposed in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on November 2, 2020.[5] Therefore, DHS is publishing this final rule as proposed in the NPRM.

*D. Implementation*

The changes in this final rule will apply to all registrations (or petitions, in the event that registration is suspended), including those for the advanced degree exemption, submitted on or after the effective date of the final rule. The treatment of registrations and petitions filed prior to the effective date of this final rule will be based on the regulatory requirements in place at the time the registration or petition, as applicable, is properly submitted. DHS has determined that this manner of implementation best balances operational considerations with fairness to the public. USCIS will engage in public outreach and provide training to the regulated public on the modified registration system in advance of its implementation.

*E. The H–1B Visa Program*

The H–1B visa program allows U.S. employers to temporarily hire foreign workers to perform services in a specialty occupation, services related to a U.S. Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling.[6] A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.[7]

Congress has established limits on the number of foreign workers who may be granted initial H–1B nonimmigrant visas or status each fiscal year (FY).[8] This limitation, commonly referred to as the ''H–1B cap,'' generally does not apply to H–1B petitions filed on behalf of certain aliens who have previously been counted against the cap.[9] The total number of foreign workers who may be granted initial H–1B nonimmigrant status during any FY currently may not exceed 65,000.[10] Certain petitions are exempt from the 65,000 numerical limitation.[11] The annual exemption from the 65,000 cap for H–1B workers who have earned a qualifying U.S. master's or higher degree may not exceed 20,000 foreign workers.[12] Moreover, H–1B petitions for aliens who are employed or have received offers of employment at institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, or nonprofit research organizations or government research organizations, are also exempt from the cap.[13]

*F. Current Selection Process*

DHS implemented the current H–1B registration process by regulation after determining that it could introduce a cost-saving, innovative solution to facilitate the selection of H–1B cap-subject petitions toward the annual numerical allocations. Under the current selection process, all petitioners seeking to file an H–1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H–1B cap-subject petition, unless USCIS suspends the registration requirement. A prospective petitioner whose registration is selected is then eligible to file an H–1B cap-subject petition for the selected registration during the associated filing period.

USCIS monitors the number of H–1B registrations it receives during the announced registration period and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H–1B numerical allocations. USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.

A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H–1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the employment start date).[14] When registration is required, a petitioner seeking to file an H–1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.[15]

*G. Final Rule*

Following careful consideration of all public comments received, DHS is issuing this final rule as proposed in the NPRM, without modifications to the regulatory text.

## IV. Response to Public Comments on the Proposed Rule

*A. Overview of Comments and General Feedback on the Proposed Rule*

In response to the rulemaking, DHS received 1103 comments during the 30-day public comment period, and 388 comments on the rule's information collection requirements before the comment period ended. A large majority of public comments received are form letter copies rather than unique submissions. Commenters consisted primarily of individuals, including anonymous submissions. DHS received the remaining submissions from professional associations, trade or

[3] *See Walker Macy* v. *USCIS,* 243 F.Supp.3d 1156, 1176 (D. Or. 2017) (finding that USCIS' rule establishing the random-selection process was a reasonable interpretation of the INA).

[4] *See* 243 F.Supp.3d at 1176.

[5] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H–1B Petitions,* 85 FR 69236 (Nov. 2, 2020).

[6] *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101–649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h).

[7] *See* INA section 214(i)(l), 8 U.S.C. 1184(i)(l).

[8] *See* INA section 214(g), 8 U.S.C. 1184(g).

[9] *See* INA section 214(g)(7), 8 U.S.C. 1184(g)(7).

[10] *See* INA section 214(g), 8 U.S.C. 1184(g).

[11] *See* INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7).

[12] *See* INA section 214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

[13] *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

[14] *See* 8 CFR 214.2(h)(8)(iii)(D)(*2*). *See also* 8 CFR 214.2(h)(8)(iii)(A)(*4*) (If the petition is based on a registration that was submitted during the initial registration period, then the beneficiary's employment start date on the petition must be October 1 of the associated FY, consistent with the registration, regardless of when the petition is filed).

[15] During the initial filing period, if USCIS does not receive a sufficient number of petitions projected as needed to reach the numerical allocations, USCIS will select additional registrations, or reopen the registration process, as applicable, to receive the number of petitions projected as needed to reach the numerical allocations. *See* 8 CFR 214.2(h)(8)(iii)(A)(*7*).

business associations, employers/companies, law firms, advocacy groups, schools/universities, attorneys/lawyers, joint submissions, research institutes/organizations, and a union.

DHS reviewed all of the public comments received in response to the proposed rule and is addressing substantive comments relevant to the proposed rule (*i.e.,* comments that are pertinent to the proposed rule and DHS's role in administering the registration requirement for petitioners seeking to file H–1B petitions on behalf of cap-subject beneficiaries) in this section IV, grouped by subject area. While DHS provides a brief overview of comments deemed out of scope of this rulemaking in section IV.F. (*e.g.,* comments seeking changes in U.S. laws, or regulations and agency policies unrelated to the changes proposed in the NPRM), DHS is not providing substantive responses to those comments.

Public comments may be reviewed in their entirety at the Federal Docket Management System (FDMS) at *http://www.regulations.gov,* docket number USCIS–2020–0019–0001.

1. General Support for the Proposed Rule

*Comments:* Multiple commenters expressed general support for the rule, providing the following rationale: The proposed rule should be implemented as soon as possible; the proposed rule is a step in the right direction; the proposed rule is necessary to protect U.S. workers; the proposed rule is a well-guided and legal attempt to strengthen the economy and legal immigration of workers; wage-based H–1B allocation can help economic growth; salary is the best and most reasonable criteria, since it is not practical to compare the skills of one professional with another; people with higher salaries should be prioritized to receive H–1B visas; the United States should increase the possibility of obtaining a visa for people with higher degrees or wages; the proposed rule would ensure more visas were allocated to the best workers; the proposed rule would keep high-level, meritorious employees in the United States; H–1B allocation should be merit-based; the proposed rule would ensure that workers who were to contribute most would get to stay in the United States while other workers still would have the same chance of being selected as previous years; if companies were willing to pay a higher salary for some workers, it would mean that they would deserve a better chance to stay and work in the United States; people with more professional experience should not have the same chance of staying in the United States as college graduates or less experienced professionals; the proposed rule would preserve the true intent of the H–1B program, which was to allow U.S. companies to seek out the best foreign talent; there would be less duplication of H–1B petitions for the same employees; every year, many highly qualified workers have had to leave the United States because they have not been selected in the existing lottery system; entry-level recruitment of U.S. citizens to fill roles occupied by H–1B beneficiaries can and should be done in high schools, vocational schools, and college campuses; the proposed rule would increase the average and median wage levels of H–1B beneficiaries; the current lottery process makes it difficult for employers to plan for their staffing needs, so the proposed rule will benefit both employers and employees.

*Response:* DHS thanks these commenters for their support and agrees with commenters that the proposed rule should be implemented as soon as possible; the proposed rule is a step in the right direction; the proposed rule is necessary to better protect U.S. workers, particularly those U.S. workers competing against H–1B workers for entry-level jobs; and this rule is a well-guided and legal attempt to improve the H–1B cap selection process. DHS further agrees that relative salary generally is a reasonable proxy for skill level and the wage level that a proffered wage equals or exceeds is a reasonable criterion for registration. DHS also agrees that this rule may lead to the selection of the most-skilled or most-valued H–1B beneficiaries; may lead to an increase in wages for H–1B beneficiaries; may increase access to entry-level positions for available and qualified U.S. workers; and is expected to reduce uncertainty about selection resulting from a purely randomized process. Prioritizing wage levels in the registration selection process is expected to incentivize employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for cap-subject petition filings. In doing so, prioritization, as compared to a purely random selection process, may reduce uncertainty about selection. In turn, U.S. employers that might have petitioned for cap-subject H–1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

*Comments:* Several commenters expressed support for the rule and the need to stop visa fraud, abuse, and flooding of petitions by certain staffing or consulting companies. One commenter said the proposed rule would disincentivize companies from abusing the H–1B program and harming U.S. workers. Other commenters stated that: The proposed rule would decrease potential visa abuse by employers and make sure all workers were paid according to their skillset as employers no longer would be able to lower labor expenses by hiring foreign workers; the proposed rule would have a positive impact on U.S. employees and college-educated U.S. citizens who take out loans for their education by making it harder for technology companies to discriminate against U.S. citizens; U.S. workers are being laid off in large numbers because corporations are outsourcing for profits; and the proposed rule is necessary because Indian corporations are acquiring U.S. jobs.

*Response:* DHS agrees that this rule will reduce abuse and provide incentives for employers to use the H–1B program to primarily fill relatively lower-paid, lower-skilled positions.[16] Prioritizing registrations or petitions, as applicable, reflecting higher wage levels for positions requiring higher skills and higher-skilled or more valued aliens will further Congressional intent for the program by helping U.S. employers fill labor shortages in positions requiring highly skilled and/or highly educated workers.

a. Positive Impacts on New Graduates and Entry-Level Workers

*Comments:* An individual commenter wrote that this rule would be extremely beneficial to international students graduating from U.S. universities. The commenter explained that, while recent graduates earning level I wages initially would be less likely to be selected in the lottery, many of those recent graduates actually would benefit from the rule over the long term. The commenter said that recent graduates who were not initially selected likely would gain additional experience in future years, which would make them more competitive for selection at higher wage levels. The commenter indicated that Science, Technology, Engineering, and Mathematics (STEM) graduates generally have three chances at the existing H–1B lottery, and, ideally, new graduates should not stay in level I positions for all three years. On the other hand, non-STEM graduates

[16] *See supra* note 1.

already have low selection odds under the existing lottery and, thus, face difficulties finding suitable employment. With this proposed rule, however, non-STEM graduates now would have a probable path forward and would be able to negotiate with their employers to get H–1B sponsorship. The commenter added that concerns that new graduate employees would not be able to receive an H–1B visa, even from large technology companies, are unfounded, knowing firsthand that new graduates regularly receive job offers at level II wages or above from large technology companies. A different commenter stated that there are many new graduates with greater academic achievements and capability who will be able to get job offers at level II wages or above. This commenter stated that, for graduates unable to get job offers with level II wages, this proposed rule could incentivize them to work hard to prove their value and be promoted.

*Response:* DHS agrees that this rule could be beneficial to international students, as the commenter explains. DHS recognizes that, under this final rule, it is less probable that USCIS will select registrations (or, if applicable, petitions) that reflect a wage level that is lower than the prevailing wage level II. DHS agrees with the comment that registrations (or, if applicable, petitions) reflecting prevailing wage levels II, III, and IV will have greater chances of being selected compared to the status quo. To the extent that recent foreign graduates, STEM-track or otherwise, in Optional Practical Training (OPT) can gain the necessary skills and experience to warrant prevailing wage levels II or above, the final rule may result in greater chances of selection of registrations (or, if applicable, petitions) for those beneficiaries. Further, recent graduates with master's or higher degrees from U.S. institutions of higher education already benefit from the advanced degree exemption and cap selection order, as eligibility for that exemption increases their chance of selection. A registration or petition, as applicable, submitted on behalf of an alien eligible for the advanced degree exemption is first included in the submissions that may be selected toward the regular cap projection. If not selected toward the regular cap projection, submissions eligible for the advanced degree exemption may be selected toward the advanced degree exemption projection. This existing selection order increases the chance of selection for registrations or petitions submitted on behalf of aliens who have earned a master's or higher degree from a U.S. institution of higher education.

b. Positive Impacts on Healthcare Workforce

*Comments:* An individual commenter and a submission from U.S. doctors indicated that thousands of U.S. citizen medical graduates have been unemployed because residency positions have been filled by foreign doctors on H–1B and J–1 visas. A submission from U.S. physicians stated that it is inappropriate to hire non-citizen physicians at the taxpayer's expense for federally funded residency training positions instead of available and skilled U.S. physicians. The commenter said the proposed rule is a step in the right direction to disincentivize a trend in the physician residency training programs that have favored foreign graduates and that have caused the displacement of several thousand qualified U.S. citizen medical school graduates, which has been an ongoing problem for the past few decades. The commenter explained that this displacement cripples the U.S. economy as thousands of qualified U.S. citizen doctors with federal student loan debt continue to go ''unmatched.''

*Response:* DHS agrees with commenters that there are more U.S. citizens who graduate from medical schools each year than are matched with residency programs. DHS believes that this final rule may lead to increased opportunities for entry-level positions for available and qualified U.S. workers by incentivizing employers seeking cap-subject H–1B beneficiaries to offer higher wage levels to increase the chance for selection. This, in turn, may have the effect of freeing up entry-level cap-subject positions for U.S. workers, including U.S. medical graduates in the event they are seeking to be employed in cap-subject positions.[17] In turn, DHS hopes that increased opportunities for those U.S. workers will benefit the U.S. economy.

c. Positive Impacts on the Economy

*Comments:* An individual commenter in support of this rule stated that the proposed rule would result in higher salaries for the H–1B population, which will lead to increased spending for the U.S. economy. The commenter also wrote that, under the proposed rule, employers would have access to higher wage and more talented employees increasing innovation and productivity. Another individual commenter similarly said the proposed rule would improve innovation because it would favor retaining more talented and highly paid individuals over less talented workers. The commenter said wages serve as a proxy for talent, and the proposed rule helps bring and retain talented individuals to the United States.

*Response:* DHS agrees with these commenters and believes that this rule may result in higher salaries for the H–1B population. This rule may also increase innovation and productivity,[18] and help retain and attract talented aliens to the United States.[19] DHS believes that facilitating the admission of more highly-paid and relatively higher-skilled workers ''would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market,'' consistent with the goals of the H–1B program.[20]

2. General Opposition to the Proposed Rule

Comments generally opposing the proposed rule fell into various

[17] *See* Rebecca Corey, *The coronavirus pandemic is straining hospitals, but many medical school grads can't get jobs,* yahoo!news (Mar. 27, 2020), *https://news.yahoo.com/the-coronavirus-pandemic-is-straining-hospitals-but-many-medical-school-grads-cant-get-jobs-194905748.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABHJK2wibpo_XDEjXtc-zr_UFFyWbMnPU1-_IO1uj9REueBPmgzPIgNToSGomCcZ5DQkT3lBW17oeLkUKfIZzPnh3TxqqonTKW84557Cgzfle-5_JPnq7_EzMIGQbadnRFvf7VrAscZWdh0IXCob34vhCnor9QYNsheYgNsFZMS* (''You have a lot of students who are unmatched who have been reporting working at delis, working as baristas. They might be teaching at a community college or something like that because they have an MD, but they can't work clinically,'' [Dr. Monya De, an internist in Los Angeles] said. ''Service industry jobs are really common. Bartending, waitering or waitressing. There are a lot of unmatched students driving for Uber and Lyft, I will tell you that.'').

[18] *See* William Craig, *How Your Productivity is Related To Career Growth,* Forbes (Dec. 31, 2015), *https://www.forbes.com/sites/williamcraig/2015/12/31/how-your-productivity-is-related-to-career-growth/?sh=8fc20583363a* (stating the ''basic tenet of economic theory'' that ''The wage a worker earns, measured in units of output, equals the amount of output the worker can produce'').

[19] *See* Drew Calvert, *Companies Want to Hire the Best Employees. Can Changes to the H–1B Visa Program Help?, KelloggInsight* (Feb. 26, 2017), *https://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers* (noting ''[u]nder the current system, U.S. companies are often discouraged from even attempting to hire a foreign worker, despite how uniquely qualified he or she might be).

[20] *See* Muzaffar Chrishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later,* Migration Policy Institute (July 2016), *https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf* (''Sponsors of [the Immigration Act of 1990 which created the H–1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market.'').

categories: Immigration policy concerns; negative impacts on new graduates and entry-level workers, academic institutions, healthcare workers and facilities, employers, and the economy; and general concerns about wage-based selection. In addition, some comments fell outside of the scope of these categories.

a. Immigration Policy Concerns

*Comments:* A few commenters opposed the rule and expressed immigration policy concerns without substantive rationale, offering only that: the proposed rule ''springs purely from nativism and no real concern for domestic workers''; the proposed rule is inconsistent with U.S. founding principles as a refuge for those seeking opportunity and freedom; and imposing a wage-based prioritization system is contrary to American values and would harm innovation.

*Response:* DHS disagrees with the comment that the proposal ''springs purely from nativism and no real concern for domestic workers[.]'' This rule does not reduce the total number of aliens who will receive cap-subject H–1B status in a given fiscal year. Instead, this rule will benefit those H–1B beneficiaries who are most highly paid and/or most highly skilled, relative to their SOC codes and areas of intended employment. DHS believes this rule will incentivize employers to offer higher wages and/or higher-skilled positions to H–1B workers and disincentivize the existing widespread use of the H–1B program to fill relatively lower-paid or lower-skilled positions, for which there may be available and qualified U.S. workers. In general, DHS recognizes that the admission of higher paid and/or higher skilled workers is likely to benefit the economy and increase the United States' competitive edge in the global labor market.[21]

Further, this rule is intended to potentially increase employment opportunities for relatively lower-skilled unemployed or underemployed U.S. workers. Recent college graduates, some of who otherwise would serve as U.S. workers, have the highest unemployment rate in decades, and the underemployment rate (which reflects the rate at which workers are accepting jobs lower than their academic or experience level) is at an all-time high.[22] Roughly 53 percent of recent college graduates, some of who could potentially work in these jobs, are currently unemployed or underemployed.[23] While the overall unemployment rates for college graduates is 3.8 percent, the unemployment rate is higher for graduates with majors in some fields common to the H–1B program such as computer science (5.2 percent), mathematics (4.9 percent) and information systems & management (4.9 percent).[24] This rule is intended to potentially benefit the population of unemployed or underemployed U.S. workers. DHS further disagrees that this rule is inconsistent with U.S. founding principles as a refuge for those seeking opportunity and freedom, and that instituting a ranking system is contrary to American values and would harm innovation. First, the H–1B program is a temporary, employment-based nonimmigrant program and not a form of humanitarian relief. Additionally, by maximizing H–1B cap allocations, so that they more likely would go to the best and brightest workers, DHS believes that this rule likely would promote opportunity, innovation, and development.

b. Negative Impacts on New Graduates and Entry-Level Workers, Academic Institutions, Healthcare Workers and Facilities, Employers, and the Economy

Multiple commenters said the proposal would have negative impacts on new graduates and entry-level workers, academic institutions, healthcare workers and facilities, employers, and the economy.

i. New Graduates and Entry-Level Workers

*Comments:* Commenters stated, without substantive rationale, that the proposed rule would negatively impact this population because: New foreign graduates would be disadvantaged by this rule; the proposed rule would prevent the future growth of new foreign graduates in the workplace; the proposed rule would be unfair to immigrants who earn lower wages; it takes time to be promoted from entry level to a more senior level; it is ''too difficult for most people to earn that much''; the proposed rule would dramatically reduce access to the H–1B visa program for early career professionals, including those who have completed master's or doctoral degrees at U.S. colleges and universities; the proposed rule would make it nearly impossible for entry-level employees with degrees in STEM majors to be eligible for H–1Bs; non-STEM graduates would have a more difficult time obtaining H–1B classification under the proposed rule; the rule would unfairly discriminate against aliens who work in areas related to humanities, arts, or accounting that do not receive high starting wages; the proposed rule would greatly decrease the number of H–1B visas that would be available to educators, translators, and other specialty positions; doctors who recently graduated and entered medical residency programs would have no chance of obtaining H–1B classification under this proposed rule; the rule would negatively impact U.S. biomedical research, as it would make it difficult for young scientists to study and conduct health research in the United States; the computer science industry requires experience to get to a higher level, which is something new graduates do not typically have; it is harder to earn higher wages quickly in certain industries, such as mechanical engineering or medicine; basing the selection on wage levels would be disadvantageous to people who work for small-sized companies, which offer lower wages; the proposed rule would send a message that the United States does not welcome talented foreign students; the rule would divide international students because everyone would be ''considering the interests of their own''; and pushing entry-level workers out in the beginning of their careers disobeys a fundamental economics principle, which states that

[21] *See* 85 FR 69236, 69239.

[22] *See* Jack Kelly, *Recent College Graduates Have the Highest Unemployment Rate In Decades—Here's Why Universities Are To Blame,* Forbes (Nov. 14, 2019), *https://www.forbes.com/sites/jackkelly/2019/11/14/recent-college-graduates-have-the-highest-unemployment-rate-in-decadesheres-why-universities-are-to-blame/?sh=333d181c320b. See also* Federal Reserve Bank of New York, The Labor Market for Recent College Graduates (Oct. 22, 2020), *https://www.newyorkfed.org/research/college-labor-market/college-labor-market_unemployment.html.* This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as US workers.

[23] *See* Darko Jacimovic, *College Graduates Unemployment Rate in the US,* What to Become (Nov. 25, 2020), *https://whattobecome.com/blog/college-graduates-unemployment-rate/#:~:text=The%20median%20pay%20for%20those,in%20the%20US%20is%202.1%25* (citing University of Washington data); Irene Sullivan, *What Now?,* The Oracle (Nov. 24, 2020), *http://www.tntechoracle.com/2020/11/24/7833/.* This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as U.S. workers. However, DHS notes that, in 2019, international students accounted for 5.5% of the students enrolled in U.S. colleges. *International Student Enrollment Statistics, https://educationdata.org/international-student-enrollment-statistics.*

[24] *See* Federal Reserve Bank of New York, The Labor Market for Recent College Graduates (Oct. 22, 2020), *https://www.newyorkfed.org/research/college-labor-market/college-labor-market_unemployment.html.* This data does not differentiate college graduates based on citizenship, and therefore, DHS cannot determine the exact percentage of these college graduates that could serve as U.S. workers.

laborers are underpaid in the early stage, but will make more with more experience and skillsets.

Multiple commenters said the proposal would have negative impacts on new foreign graduates and entry-level workers, and they provided substantive rationale in support of those assertions. Specifically, several commenters, including a form letter campaign, said the rule would have a ''direct and negative'' impact on college-educated foreign-born professionals by ''dramatically reducing'' access to the H–1B visa program for early-career professionals because no aliens who are paid a level I wage would be selected to submit a petition. A trade association stated that early-career workers in science, math, and engineering might be shut out by the proposed rule, but that those are the workers the U.S. economy needs. Several commenters, including a university, a professional association, and a joint submission, argued that the proposed rule would reduce access to the H–1B program, negatively impacting graduating international students. A university stated that the proposed rule indirectly would affect F–1 and J–1 students and scholars by removing a pathway to employment after completion of educational or training experiences in the United States, which would also negatively impact the economy. The university argued that almost all F–1 and J–1 visa holders enter at level I wages.

*Response:* DHS disagrees with the assertions that this rule will either preclude or essentially preclude H–1B status for recent graduates, entry-level foreign workers, and young alien professionals. In general, registrations (or petitions, if applicable) will be selected according to the wage level that the proffered wage equals or exceeds. Therefore, if an employer chooses to offer a recent foreign graduate a wage that equals or exceeds a particular wage level, the registration will be grouped at that wage level, regardless of the beneficiary's experience level or the requirements of the position. Further, as explained in the proposed rule, DHS believes that a purely random selection process is not optimal, and selection based on the highest wage level that a proffered wage equals or exceeds is more consistent with the primary purpose of the statute. DHS acknowledges that, under this rule, in years of excess demand, relatively lower-paid or lower-skilled positions will have a reduced chance of selection. However, DHS believes that selection in this manner is consistent with the primary purpose of the statute.

DHS further disagrees with the assertion that this rule will preclude recent foreign medical graduates from obtaining H–1B status. Importantly, according to DHS data, in FY 2019, more than 93 percent of H–1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and thus not subject to the H–1B cap selection process.[25] Thus, it is not accurate to say that recent foreign medical graduates, who may seek initial employment as physicians, would have ''no chance'' of obtaining H–1B status under this rule. DHS acknowledges that, under this rule, in years of excess demand, in the infrequent situation of recent foreign medical graduates seeking employment with a cap subject employer, recent foreign medical graduates may face a reduced chance of selection for cap-subject H–1B visas. However, because a significant majority of H–1B petitions filed for recent foreign medical graduates are cap-exempt, and thus not affected by this rule, this reduction likely will affect a minimal population, if any, of recent medical graduates. Further, as explained in the proposed rule, DHS believes that a random selection is not optimal, and selection based on the highest wage level that a proffered wage equals or exceeds is more consistent with the primary purpose of the statute.

In terms of STEM-specific concerns, DHS disagrees with comments that this rule will make it ''harder'' or ''nearly impossible'' for employers to hire entry-level employees with degrees in STEM majors. These types of potential foreign workers have multiple avenues to obtain employment in the United States. In general, foreign STEM graduates can apply for the regular 12-month OPT plus an additional 24-month extension of their post-completion OPT.[26] The additional 24-month extension of OPT is available only to foreign STEM graduates. During the 3-year cumulative OPT period, such a graduate can gain significant training and work experience with a U.S. employer and can demonstrate their value to that employer. If the employer wants to continue their employment by way of H–1B classification, then the employer can choose to offer the worker a wage that will maximize their chance of selection. Additionally, an employer could directly petition for an employment-based immigrant visa for the alien at any time. There is no statutory or regulatory requirement that an alien admitted on a F–1 nonimmigrant visa go through OPT and/or the H–1B program before being petitioned for an immigrant visa.

Concerning the comments about non-STEM graduates who work in the humanities, arts, accounting, education, or other areas that generally may not receive as high of starting wages as other occupations, DHS does not believe these graduates will be unfairly impacted by this rule. Because USCIS will be ranking and selecting registrations (or petitions) generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code, this method of ranking takes into account wage variations by occupation.

ii. Academic Institutions

*Comments:* A few individual commenters generally stated that the proposed rule would harm schools and universities. Multiple commenters, including a university, law firm, and individual commenters, stated that this rule would negatively impact U.S. universities' ability to recruit international students, which would affect enrollments, because U.S. institutions would be less attractive due to the lower possibility of remaining in the United States to work after completion of their studies or at the conclusion of their OPT. Similarly, several commenters said the proposal would make it difficult for universities to attract top talent that would contribute to the U.S. economy. A trade association stated that the rule would restrict the ability of graduating talent to switch from F–1 student status to H–1B status, particularly when operating in conjunction with the DOL Interim Final Rule (IFR), *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain*

[25] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *Wage Level of H–1B Initial Employment Physician Approvals (Cap-Subject and Cap-Exempt), Fiscal Year 2019,* Database Queried: PETAPP, Report Created: 11/18/2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2019. Note that the tables for ''Wage Level of H–1B Initial Employment Physicians Approvals'' and ''Wage Level of H–1B Initial Employment Dentists Approvals'' show approval counts for the cap year in which the petitions were filed. For these tables, DHS used the approval counts for FY 2019. Whereas the tables for ''Wage Level of Select Cap-subject H–1B Physicians Approvals'' and ''Wage Level of Select Cap-subject H–1B Dentists Approvals'' show approval counts for the cap year. For these tables, DHS used the cap counts for Cap Year 2020. For purposes of this data, DHS used the DOT code identified on the H–1B petition, namely, DOT codes 070–072 for physicians, surgeons, and dentists. The DOT Code is a three-digit occupational group for professional, technical, and managerial occupations and fashion models that can be obtained from the Dictionary of Occupational Titles. DHS then linked petition data to LCA data for wage level information.

[26] *See* 8 CFR 214.2(f)(10)(ii).

*Aliens in the United States* (DOL IFR).[27] Another commenter stated that the DOL IFR also is aimed at pricing international students and others out of the U.S. labor market, while the Student and Exchange Visitor Program proposed rule [28] to limit the time students are allowed to stay in the United States appears designed to deter foreign students from coming to U.S. universities.

A trade association stated, without evidence, that since graduating international students are unlikely to find employers who are willing to pay them the same rate as their median-wage workers, this would lead to U.S.-educated international students taking their knowledge and skills elsewhere. A university said that, if the proposed rule were implemented, the United States would lose ''advanced science, technology, engineering, and mathematics knowledge and talent'' because international students would choose to pursue their education in countries with more favorable immigration policies. Another commenter claimed that international students would study elsewhere if they could not identify employment opportunities after graduation, which would ''crippl[e] a critical pipeline of future community members, workers, innovators and entrepreneurs.'' A few commenters stated that, under this rule, the United States would lose money, talent, and inventiveness by reducing the employment potential of foreign students upon graduation from a U.S. educational institution, and the United States eventually would lose attractiveness and competitiveness because international students would go elsewhere. Some commenters provided specific figures to detail the contributions of foreign enrollment at U.S. universities. Specifically: Education service exports ranked sixth among service exports in 2019 according to data released by the U.S. Department of Commerce's Bureau of Economic Analysis; international students studying in the United States added an estimated $41 billion to the economy and supported over 458,000 jobs during the 2018 through 2019 academic year; international students make up 5.5 percent of the total U.S. higher education population and contributed $44.7 billion to the U.S. economy in 2018; international students have founded approximately one-quarter of U.S. start-up companies worth $1 billion or more; the Institution for International Education (IIE) reports that international students contributed $482.5 million to the State of Minnesota during 2018 through 2019, supporting 4,497 jobs; international students and scholars contributed an estimated $304.2 million to the local Ithaca, New York, economy and supported nearly 4,000 jobs during the 2018 through 2019 academic year; and, in one commenter's experience, foreign students paid more than $10,000 per year full tuition compared to less than $4,000 for in-state residents, which provided major subsidies for low income resident students.

Some commenters expressed that this is not the time to be driving students away, as State and college/university budgets have suffered greatly as a result of COVID–19. One commenter cited data indicating a ''shocking decline'' in international student enrollment at U.S. institutions of higher education for the Fall 2020 semester, as well as a study indicating that the overall economic impact generated by international students had already started to decline in 2019, down to $38.7 billion. The commenter said the declining enrollment numbers for 2020 are likely to perpetuate a large economic impact as we continue to deal with the economic fallout of the COVID–19 pandemic. A professional association stated that the proposed regulation would have a ''monumentally negative'' effect on U.S. colleges and universities at a time when those institutions would be reeling from the impact of the COVID–19 pandemic. The commenter cited statistics indicating that, in the current school year, new enrollment of international students dropped 43 percent because of COVID–19. The commenter concluded that the COVID–19 pandemic, uncertainty about immigration status, and ''anti-immigrant rhetoric[,]'' compounded with this rule that would further destabilize the career progression of foreign students by eliminating a legal pathway to temporary employment opportunities in the United States post-graduation, would create a ''perfect storm'' that would devastate the U.S. college and university system for years to come.

Several commenters, including a university, advocacy group, and individual commenters, said restricting the H–1B program for foreign students, while competitor nations seek to expand their ability to attract international students, would lead talented students to choose other countries of study and decrease enrollments in U.S. institutions. One of these commenters said countries such as Canada and Germany already are seeing increases in international student enrollment as U.S. restrictions to international students have led to waning interest from the future CEOs, inventors, and researchers of the world. An individual commenter said universities essentially would be training laborers for other countries.

Some commenters stated that colleges and universities rely, in particular, on foreign students who pay full tuition to help make up for declining Federal and State support and to subsidize the cost of education for U.S. students. An attorney stated that U.S. colleges, universities, and communities benefit financially from the attendance of foreign students, typically in F–1 foreign student nonimmigrant status or J–1 exchange visitor nonimmigrant status. The commenter said the economic and intellectual advancement of educational institutions and their communities is enhanced by the presence of these students from other countries.

A university stated that international students and scholars are essential to a university's makeup, as students and faculty benefit from exposure to intercultural differences and the leadership opportunities that arise from global collaborations. Another commenter stated that foreign national researchers and professors provide the needed diversity to help educate students to become the professionals they need, as they cannot compete globally if they do not have the ability to adapt culturally.

An individual stated that this rule would make it impossible for some colleges to fill teaching positions that they cannot fill with qualified U.S. workers. For example, the commenter stated that North Dakota colleges are not able to pay higher than the level I wage as that is the average salary paid to all of its beginning professors and researchers, and this rule would result in many of North Dakota colleges having unfilled teaching positions and a decrease in higher level class offerings, particularly in STEM fields, putting a strain on education in the state. Multiple commenters offered similar concerns, but at other levels of academic institutions and owing to their less-desirable locations.

*Response:* DHS appreciates the academic benefits, cultural value, and economic contributions that aliens make to academic institutions and local

[27] U.S. Department of Labor, Employment and Training Administration, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,* 85 FR 63872 (Oct. 8, 2020).

[28] U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media,* 85 FR 60526 (Sept. 25, 2020).

communities throughout the United States. DHS does not believe that this rule will negatively impact the ability of U.S. colleges and universities to recruit international students. Nor will the rule impact the ability of international students to study in the United States, which is the basis of their admission to the United States in that status. While increased employment opportunities, both in the United States and abroad, may be a factor in deciding whether to study in the United States, the reputation of the academic institutions themselves is also an important factor for the great majority of those choosing to study in the United States.[29] Further, DHS notes that international students will continue to have significant employment opportunities in the United States under this rule. First, this rule has no impact on OPT, which allows for 12 months of employment for most aliens admitted in F–1 student status, plus an additional 24-month extension of post-completion OPT available only to STEM graduates.[30] In addition, with the current random selection process, even the most talented foreign student may have less than a 50 percent chance of selection. This rule will increase the chance of employment at the higher wage levels and thus may facilitate the selection of the best and brightest students for cap-subject H–1B status. To the extent that that this change does negatively affect the potential of some colleges and universities to recruit international students, DHS believes that any such harm will be outweighed by the benefits that this rule will provide for the economy overall.[31]

Facilitating the admission of higher-skilled foreign workers, as indicated by their earning of wages that equal or exceed higher prevailing wage levels, would benefit the economy and increase the United States' competitive edge in attracting the ''best and the brightest'' in the global labor market, consistent with the goals of the H–1B program discussed in the NPRM.

Further, DHS disagrees that this rule will make it ''impossible'' for academic institutions to fill teaching and research positions. Congress already exempted from the annual H–1B cap aliens who are employed or have received offers of employment at institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, nonprofit research organizations or government research organizations.[32] Therefore, many petitions for academic institutions will not be affected by this rule.[33] In FY 2020 alone, USCIS approved over 41,000 petitions for petitioners that qualified under one of these cap exemptions.[34] These cap exemptions mitigate these commenters' concerns or misunderstanding of the H–1B program. Comments about the DOL IFR and the Student and Exchange Visitor Program proposed rule are out of scope, so DHS will not address them.

iii. Healthcare Workforce and Facilities

(a) Impact on Healthcare Workers

*Comments:* Some commenters expressed concern that the rule could prevent qualified and highly skilled entry-level health care workers and recent foreign-born graduates from medical school from obtaining an H–1B visa. A professional association said this proposal would reduce the overall number of international medical graduates (IMGs) practicing in the United States, also stating that pricing H–1B visa holders out of the physician employment market would only exacerbate ongoing physician shortages and worsen barriers to care for patients. Another professional association cited data forecasting an increasing physician shortage and said H–1B physicians fulfill a ''vital and irreplaceable role.'' The commenter said stringent performance and pay thresholds already exist that must be met to even be considered for an H–1B visa and placing additional wage barriers on the cap would garner no benefit and, instead, would harm U.S. patients and health care systems. A university and an individual commenter stated that physicians enter the field with a level I wage, despite high levels of education and training, and argued that, under the proposal, it would be ''virtually impossible'' for a new physician to obtain H–1B unless they are employed by a cap-exempt institution. The university and the commenter cited a 2016 Journal of the American Medical Association (JAMA) study, which found that 29 percent of physicians were born outside of the United States, helping to fill the physician shortage, and that this rule ignores problems like this. Another professional association stated that it is an incorrect assumption that skill level is definitively associated with wage amount, as there are many situations where a highly skilled H–1B physician may choose to accept a lower wage (*e.g.,* expand their skillset, altruistic motives, the potential to gain lawful permanent residency in a shorter time span). Therefore, the proposed rule would create a false presupposition that would stop highly qualified physicians from practicing in less affluent institutions. Thus, the proposed rule would create a situation where much needed physician positions remain vacant, only wealthy medical conglomerates are able to afford to sponsor H–1B physicians, or wages become so inflated that far fewer H–1B physicians can be hired. A few individuals noted that a number of rural and/or underserved communities rely on foreign trained dentists, and that this rule would make it difficult to recruit dentist in rural and/or underserved areas.

A couple of professional associations said the rule potentially could eliminate the H–1B visa option for recent graduates, including IMGs and postdoctoral researchers, with serious consequences for the U.S. healthcare workforce. One of these commenters said IMGs compose nearly one-fourth of the U.S. physician workforce and one-fourth of the country's resident physicians in training. The commenter stated that, due to this rule, these highly qualified physicians may choose to go to other countries rather than risk being unable to complete training requirements, build up a medical practice, or perform clinical duties.

A professional association wrote specifically about the impacts of the rule on the availability of primary care physicians. The commenter cited data indicating that the United States is facing a primary care physician shortage and stated that IMGs play a vital role in filling this gap. The commenter went on to say that family medicine and other primary care physicians typically have lower annual salaries than specialty

[29] *See* Daniel Obst and Joanne Forster, *Perceptions of European Higher Education in Third Countries, Outcome of a Study by the Academic Cooperation Association, Country Report: USA,* Institute of International Education, *https://www.iie.org/Research-and-Insights/Publications/International-Students-in-the-United-States.*

[30] *See* 8 CFR 214.2(f)(10)(ii).

[31] *See* Muzaffar Chrishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later,* Migration Policy Institute (July 2016), *https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf* (''Sponsors of [the Immigration Act of 1990 which created the H–1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market.'').

[32] *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

[33] *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5).

[34] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division (PRD), *Cap-Exempt H–1B Approvals in Certain Categories,* Dec. 9, 2020. This data shows the following breakdown for cap-exempt H–1B approvals: 20,097 for institution of higher education; 11,847 for affiliated or related non-profit entities; 5,131 for non-profit research organizations or government research organization; and 3,998 for beneficiaries employed at a qualifying cap exempt entity.

physicians, and, since this proposal favors H–1B petitioners with higher annual salaries, it also may discriminate against family physicians unfairly.

*Response:* DHS disagrees with the assertion that this rule will prevent recent medical or dental graduates from obtaining H–1B status, as Congress already exempted from the H–1B cap any alien who is employed or has received an offer of employment at an institution of higher education, a related or affiliated non-profit entity, or a non-profit research organization or a governmental research organization.[35] As stated above, in FY 2019, more than 93 percent of H–1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and, thus, not subject to the H–1B cap selection process. Because a significant majority are not affected by this rule, this reduction likely will affect a minimal population, if any, of recent foreign medical graduates.

In addition, Congress has established programs meant to encourage certain recent foreign medical graduates to serve in the United States as H–1B nonimmigrants. These programs are exempt from the annual caps and unaffected by this rule. Certain J–1 exchange visitors are subject to a 2-year foreign residence requirement under INA section 212(e), 8 U.S.C. 1182(e), which requires them to return to their country of nationality or country of last residence for at least two years in the aggregate prior to being eligible to apply for an immigrant visa; adjustment of status; or a nonimmigrant visa, such as an H–1B visa (with limited exceptions).[36] However, INA section 214(l), 8 U.S.C. 1184(l), contains provisions authorizing waivers of the 2-year foreign residence requirement for certain aliens, including foreign medical graduates who agree to work full-time (at least 40 hours per week) in H–1B classification for not less than three years in a shortage area designated by the U.S. Department of Health and Human Services (HHS) with a request from an interested federal government agency or state agency of public health or its equivalent, or with the U.S. Department of Veterans Affairs (VA).[37] The petition requesting a change to H–1B nonimmigrant status for these physicians is not subject to the numerical limitations contained in INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A).[38] While participation in the Conrad State 30 program (relating to waivers based on requests from a state agency of public health or its equivalent for service in an HHS-designated shortage area) is limited to 30 participants per eligible jurisdiction annually, the other programs have no limits on the number of participants.[39]

Further, DHS disagrees with the comment that this rule may unfairly discriminate against family physicians and other primary care physicians who typically have lower annual salaries than specialty physicians. In general, family physicians or other primary care physicians have different SOC codes than specialty physicians. As DOL prevailing wage level calculations generally differ by SOC codes, when wage data is available, the corresponding wage level would necessarily account for the different occupational classification for primary care physicians as opposed to other types of physicians. When such wage level data is unavailable, wage level ranking will be based on the skill, education, and experience requirements for the position, again taking into account the particulars of the relevant occupational classification, such that registrations or petitions for primary care physicians will be ranked in comparison to the normal requirements for primary care physicians and not in comparison to other types of physicians. As such, DHS does not believe that this rule will disadvantage registrations or petitions for primary care physicians or any other subset of physicians.

(b) Rural and/or Underserved Communities

*Comments:* Multiple commenters, including several professional associations, said the rule would negatively impact the U.S. health care system in areas that are rural and/or underserved where IMG and non-citizen physicians are particularly essential. A professional association cited data indicating that IMGs are more likely to become primary care physicians and practice in rural and other underserved areas where physician shortages are the direst and that rely heavily on family physicians for ambulatory and emergency care. A couple of professional associations similarly said IMGs typically serve in rural and/or medically underserved communities, providing care to many of our country's most at-risk citizens. One of these commenters stated that, although 20 percent of the country's population resides in rural areas, fewer than 10 percent of U.S. physicians actually practice in those communities, resulting in over 23 million rural Americans living in federally designated primary medical Health Professional Shortage Areas (HPSA). This commenter also stated that recently graduated H–1B physicians participating in pipeline programs in the beginning of their careers, such as Conrad State 30, fall within the first and second tiers of the prevailing wage determination. Therefore, the proposed rule would create a system that removes physicians who are willing and ready to practice in medically underserved areas and cuts off those patients who are most in need from receiving physician care.

A professional association stated that Federally Qualified Healthcare Centers (FQHC), institutions that serve high-risk, medically underserved populations in HPSAs, do not qualify for exemption from the H–1B visa cap. To fill the physician gap, FQHCs utilize H–1B physicians to care for patients in these health care underserved areas. The commenter stated that, if the proposed rule is enacted, these FQHCs would be unable to obtain early-career H–1B physicians and are unlikely to be able to compete with larger, more affluent organizations to offer a higher proffered wage to increase their chances of obtaining H–1B physician candidates and reducing the physician shortages identified by HPSA data.

A company stated that rural hospitals and other health care facilities rely heavily on healthcare-staffing companies to fill their staffing needs, but the rates staffing companies are able to charge rural facilities usually are much lower than the rates they are able to charge facilities in affluent metropolitan areas. Thus, the rule would cause staffing companies to place their professionals where the staffing companies can charge the highest rates, so that staffing companies can maintain sufficient profitability and ensure that their workers are able to obtain H–1B visas. The commenter concluded that the rule would decrease the supply of healthcare labor to rural and other underserved communities, where it is needed most.

*Response:* DHS acknowledges the important role that early career and entry level foreign physicians may play in providing health care in rural and/or underserved communities. As explained in response to the previous comments, Congress has established programs meant to direct foreign medical graduates to those communities.

[35] *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5); 8 CFR 214.2(h)(8)(iii)(F).

[36] *See* INA section 212(e), 8 U.S.C. 1182(e); INA section 248, 8 U.S.C. 1258.

[37] *See* INA section 214(l), 8 U.S.C. 1184(l). *See also* 8 CFR 212.7(c)(9).

[38] *See* INA section 214(l)(2)(A), 8 U.S.C. 1184(l)(2)(A).

[39] *See* INA section 214(l)(1)(B), 8 U.S.C. 1184(l)(1)(B).

Also as noted above, physicians whose nonimmigrant status is changed to H–1B through their participation in any of the three waiver programs in INA section 214(l), 8 U.S.C. 1184(l), are not subject to the annual H–1B caps. The Conrad State 30 program (relating to waivers based on requests from a state agency of public health or its equivalent for service in an HHS-designated shortage area) is limited to 30 participants per eligible jurisdiction annually.[40] However, there are no annual limits on the number of aliens who can obtain a waiver through service in an HHS-designated shortage area based on the request of a federal interested government agency. Since these programs are not subject to the annual H–1B caps, they will not be affected by this rule and the programs will continue to provide a pipeline for these physicians to serve in HHS-designated shortage areas.

Congress has established a similar statute in the immigrant context, which also channels physicians to serve in HHS-designated shortage areas, commonly known as the Physician National Interest Waiver Program.[41] That program has no limits on the number of physicians who can participate in a given fiscal year, though there are numerical limitations on the number of employment-based immigrant visas that can be allocated annually. This program is unaffected by this rule and will continue to provide a pipeline for an unlimited number of physicians to serve in HHS-designated shortage areas.

DHS agrees with the commenters who stated that medical institutions in rural and/or underserved areas may not be institutions of higher education, related or affiliated non-profit entities, or non-profit research organizations or governmental research organizations. As a result, aliens who are employed by or who have received an offer of employment from such medical institutions may not be exempt from the annual H–1B numerical limitations under INA section 214(g)(5), 8 U.S.C. 1184(g)(5). However, some of those medical institutions do meet the requirements to be cap-exempt, and their employees will not be subject to the numerical limitations.[42]

DHS acknowledges that some alien physicians who currently serve in rural and/or underserved areas as H–1B nonimmigrants are not participating in the waiver programs of INA section 214(l), 8 U.S.C. 1184(l), and they are not working for cap-exempt employers. These physicians may be in positions categorized as prevailing wage levels I or II, depending on their individual circumstances. However, such physicians may avail themselves of alternative pathways to serve in these areas such as the Physician National Interest Waiver Program and not be subject to the annual H–1B numerical limitations.

Further, as with all other cap-subject H–1B visas, DHS will rank and select registrations for these positions generally according to the highest OES prevailing wage level that the proffered wage equals or exceeds, which necessarily takes into account the area of intended employment when such wage level data is available. Where there is no current OES prevailing wage information for the proffered position, which DHS recognizes is the case for some physician positions based on limitations in OES data, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration. The determination of the appropriate wage level in those instances would be based on the skill, education, and experience requirements of the position, and generally does not take into consideration the area of intended employment. Therefore, DHS does not believe that this rule necessarily will disadvantage rural and/or underserved communities relative to registrations or petitions based on offers of employment in other areas.

(c) COVID–19

*Comments:* Several commenters stated that the rule would have particularly concerning impacts on the U.S. healthcare workforce as the United States grapples with the COVID–19 pandemic. A professional association said these visa cap requirements come at a most inopportune time, as the United States sustains some of the highest rates of COVID–19 cases worldwide and depends on early career physicians to serve on the frontlines. The commenter said H–1B physicians have played a large role in caring for those who are seriously ill from COVID–19, including those facing health complications following recovery from this disease. Similarly, another professional association cited data indicating that, currently, the States where H–1B physicians are providing care are also those with some of the highest COVID–19 case counts.

*Response:* DHS certainly appreciates the significant contributions of all healthcare professionals, especially during the current COVID–19 pandemic, but DHS continues to note that many foreign medical professionals are eligible for cap-exempt H–1B status and are not impacted by this rule. Additionally, DHS believes that this rule will provide benefits to the greater U.S. workforce that outweigh any potential negative impacts on the relatively small subset of H–1B cap-subject healthcare workers.

For example, DHS received submissions from unemployed and underemployed U.S. citizen medical graduates who attested to the decades-long problem of displacement of several thousands of qualified U.S. citizen IMGs and graduates of U.S. medical schools for federally funded residency training positions. This rule may benefit these unemployed and underemployed U.S. citizen medical graduates by potentially increasing employment opportunities. Further, DHS notes that this final rule is not a temporary rule that is limited in duration to the COVID–19 pandemic; moreover, this final rule will not have immediate impact on H–1B employment as it will first be applied to the FY 2022 registration and selection process, the beneficiaries of which will not be able to begin employment in H–1B classification until October 1, 2021.

(d) Healthcare Facilities

*Comments:* A professional association stated that larger, wealthier companies are much more likely to be able to pay augmented salaries to increase their chances of selection for filing of H–1B cap-subject petitions. In comparison, smaller, less affluent medical practices would not be able to compete with these large conglomerates, despite having a much greater need for physicians. As such, larger hospital systems would be able to buy H–1B visas for their physicians, leaving mid to small size practices even more understaffed.

A trade association stated that its members in the healthcare industry are very concerned about the impact this rule would have on their ability to continue hiring H–1B foreign medical graduates, who are critical for healthcare providers to meet the needs of their patients. The commenter said

[40] *See* INA section 214(l)(1)(B), 8 U.S.C. 1184(l)(1)(B).

[41] *See* INA section 203(b)(2)(B)(ii)(I), 8 U.S.C. 1153(b)(2)(B)(ii).

[42] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *Wage Level of H–1B Initial Employment Physician Approvals (Cap-Subject and Cap-Exempt), Fiscal Year 2019,* Database Queried: PETAPP, Report Created: 11/18/2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2019 (showing that, in FY 2019, more than 93 percent of H–1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and not subject to the H–1B cap selection process).

the disruptions caused by the rule would be profound on these employers, as they continue to struggle in confronting the ongoing COVID–19 pandemic.

A law firm stated that the salary market in healthcare is not like the salary market in other fields and explained that, because so much of hospitals' reimbursement processes are governed by Medicare and a tiny handful of large insurance companies, it would be impossible for U.S. healthcare facilities to negotiate reimbursement rates in a manner to significantly raise salaries. The commenter said that this rule is a ''blunt object'' that would lead to additional Silicon Valley, California, H–1B visas in place of visas that currently help the healthcare of U.S. citizens, and rural facilities would suffer the brunt of this policy.

*Response:* DHS appreciates the significant contributions of all healthcare professionals, especially during the current COVID–19 pandemic, but believes that this rule will provide benefits to the greater U.S. workforce. DHS does not believe that the changes in this rule will have a disproportionately negative impact on small- to mid-sized medical practices as compared to larger hospital systems. It is not necessarily the case that larger hospital systems are more willing or able to provide higher salaries to their employees.[43] DHS also does not believe that the changes in this rule will have a disproportionately negative impact on rural facilities, as it is not necessarily the case that rural facilities are unwilling or unable to provide relatively higher salaries compared to facilities in other areas.[44] With respect to the ability to offer increased wages generally, DHS acknowledges that employers of healthcare professionals, like employers in all industries, must consider a variety of factors in determining employee salaries. However, this rule does not require employers to pay a higher wage, and, as stated in the NPRM and above, employers that might have petitioned for a cap-subject H–1B worker to fill relatively lower-paid, lower-skilled positions may be incentivized to hire available and qualified U.S. workers for those positions. Also as noted above, DHS believes that selecting by wage level in such years is more consistent with the dominant legislative purpose of the H–1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers.

iv. Employers

*Comments:* Multiple commenters said the proposal would have the following negative impacts on employers without providing substantive rationale: Many industries and companies benefit from entry-level employees who bring energy, innovation, and diversity; the proposal would reduce the number of H–1B workers ''that employers can access''; the rule may incentivize employers to favor domestic applicants in the short term, but businesses may not be able to hire the people best suited for the job in the long run; companies would suffer because foreign employees will not waste their time with companies that they do not think will be able to sponsor them for a visa; to be competitive in the H–1B registration process, companies would have to pay double the costs for new hires; this rule would be beneficial for a few industries and create biases for other industries; the rule would jeopardize the employers' ability to meet business objectives, develop and provide new products to market, and stay competitive in a global market; this proposal would create ''vicious competition cycles'' among H–1B candidates and their employers; and, if this proposal were implemented, there would be a shortage in the job market for junior level employees.

*Response:* For the reasons explained above, DHS disagrees with the assertions that this rule will preclude or essentially preclude H–1B status for recent graduates and entry-level workers. The rule is not intended to, and DHS does not expect that it will, reduce the number of cap-subject H–1B workers. As explained in the NPRM and above, DHS believes that the rule will maximize H–1B cap allocations so that they more likely will go to the best and brightest workers, consistent with Congressional intent. DHS believes that this rule will facilitate the admission of higher-skilled workers or those for whom employers proffer wages commensurate with higher prevailing wage levels, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program. Finally, as stated in the NPRM and above, employers that might have petitioned for a cap-subject H–1B worker to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

(a) Impacts on Companies

*Comments:* A couple of professional associations stated that the proposal would have an adverse impact on petitioners in terms of employment, productivity loss, search and hire costs, lost profits resulting from labor turnover, and more. One of these professional associations added that the use of wage data for selection of H–1B registrants would unfairly discriminate against and burden law-abiding employers. The commenter also argued that the current H–1B registration has been beneficial to employers because it has a much earlier indication of the lottery's outcome, and that the proposal would ''diminish predictability'' for companies.

A trade association said the rule would place an excessive cost burden on petitioners because they would be required to offer dramatically increased wages to prospective H–1B employees, especially in conjunction with the new increased wage levels implemented through the DOL IFR.[45] The commenter stated that employers would be ''forced'' to offer prevailing wages above the 95th percentile to equal or exceed level IV prevailing wages. Another trade association argued that the proposal, in conjunction with the DOL IFR, may result in pay that exceeds that of comparable U.S. workers, which may result in personnel strains and new costs for U.S. companies. Several commenters, including a professional association, company, and research organization, stated that employers would be ''forced'' to either forego hiring foreign professionals or hire foreign workers at a salary level higher than U.S. workers, which would cause problems for the employers such as internal equity issues. An individual commenter stated that the rule would create public relations problems for companies, arguing that ''forcing'' companies to pay foreign workers more than the market currently dictates would disenfranchise U.S. workers in similar positions.

*Response:* DHS disagrees that this rule will unfairly discriminate against and burden law-abiding employers. While petitioners may initially spend more on search and hire costs to obtain foreign workers who command higher wages or have higher skill levels, DHS believes

[43] *See* Wayne Lipton, *Is a Bigger Medical Practice Always Better?,* Physicians Practice (June 21, 2012), *https://www.physicianspractice.com/view/bigger-medical-practice-always-better.*

[44] *See* Bonnie Darves, *Demystifying Urban Versus Rural Physician Compensation,* The New England Journal of Medicine Career Center (Mar. 4, 2019), *https://www.nejmcareercenter.org/article/demystifying-urban-versus-rural-physician-compensation/.*

[45] *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,* 85 FR 63872.

these petitioners will see an increase in productivity as a result of hiring such higher-skilled workers. Regarding the benefits of the registration process, this rule will continue to use the same registration process (with the added factor of ranking and selection by wage level), which will continue to provide predictability for companies in the H–1B cap selection process. In fact, this rule may increase predictability for companies offering relatively higher wages in order to increase their chances of selection.

As for the concern about offering prevailing wages above the 95th percentile, DHS notes that the DOL IFR was set aside and no longer is being implemented as of the publication of this final rule.[46] As for the concerns about ''internal equity issues'' or ''public relations problems'' caused by paying foreign workers more than the U.S. workers in similar positions, nothing in this rule requires an employer to offer an H–1B worker a higher wage than a U.S. citizen worker for the same position.

(b) Impacts on Available Workforce

*Comments:* Several commenters, including a professional association and a trade association, argued that the proposal would harm the ability of U.S. companies to hire aliens for entry-level jobs. A company asserted that the NPRM would diminish U.S. companies' access to the full range of talent, across all career stages, necessary to build a complete workforce. An advocacy group similarly said that the rule does a disservice to companies struggling to fill talent gaps across multiple levels of employment. An individual commenter said the rule would end the H–1B program ''for good'' for many professions that are in short supply. An individual commenter argued that the proposal makes the H–1B process more challenging for both small and large employers who have relatively small numbers of H–1B workers compared to the overall workforce, and makes it ''almost impossible'' to fill certain positions without being able to supplement the U.S. workforce. A trade association said that the proposal is an example of ''government heavy-handedness'' which presents U.S. companies with prospective difficulties in meeting workforce needs.

An anonymous commenter said the rule would severely interrupt many U.S. companies' operations, as it would disqualify many foreign workers fulfilling specialty jobs and make it difficult for companies to find reasonable substitutes for the labor. The commenter stated that DHS' statement that these disadvantages would be offset by increased productivity and availability of higher wage H–1B petitioners is ''optimistic'' and lacks support.

An individual commenter said their company would be impacted because entry-level STEM candidates have played critical roles throughout the organization, and the proposal would mean they would be unable to draw from the world's leading talent. In addition, some of their H–1B employees gain OPT through the company, and it would be detrimental to their business to be forced to terminate these employees after they have received training.

*Response:* DHS acknowledges that, under this final rule, an employer offering a level I wage under the regular cap, and an employer offering a level I or II wage under the advanced degree exemption, may have a reduced chance of selection than under the current random selection process. However, DHS believes that selecting based on wage level is necessary and consistent with the intent of the H–1B statutory scheme to utilize the numerical cap in a way that incentivizes a U.S. employer's recruitment of beneficiaries for positions requiring the highest prevailing wage levels or proffering wages equaling or exceeding the highest prevailing wage levels relative to their SOC code and area of intended employment, either of which correlate with higher skill levels.[47] Prospective employers who seek to ''draw from the world's leading talent'' may maximize their likelihood of selection by offering wages commensurate with such a high skill level rather than offering relatively low wages. Further, DHS disagrees with suggestions that this rule would end the H–1B program's utility for certain companies or disqualify many foreign workers fulfilling specialty occupation jobs. This rule does not affect current H–1B employees (unless such workers become subject to the H–1B numerical allocations in the limited circumstance that their cap-exempt employment terminates) nor does the rule change the eligibility criteria to qualify for an H–1B visa.

(c) Impacts on Specific Types of Employers

*Comments:* A professional association said that the proposal would negatively impact the information technology (IT) industry, which already is facing a scarcity of high-skilled candidates. The commenter cited a study, which found that there were over 650,000 unfilled computer-related jobs posted between September and October 2020, which often are filled with employees from abroad with degrees. The proposed rule would limit the ability of IT companies to hire foreign workers and would stifle U.S. innovation, harm economic growth and, therefore, impact job opportunities for U.S. workers. An individual commenter discussed how the proposed rule actually would achieve the opposite of its desired outcome, which would be increased wages for H–1B workers, particularly in the IT sector. The commenter explained that companies are realizing that employees can accomplish their jobs at home during the COVID–19 crisis. If this is the case, employers could avoid the costs associated with foreign worker sponsorship and, instead, employ H–1B workers at lower wages while they remain in their respective countries. A research institute explained that the proposed rule is targeting the IT industry to prevent employers in that industry from obtaining H–1B visas or making it too expensive for them to employ H–1B visa holders.

An individual argued that a financial technology company would be negatively impacted, giving the example of a Database Administrator position, which the commenter said does not require a level III or IV prevailing wage, but often is difficult to fill with U.S. workers.

A couple of individual commenters, an advocacy group, and a professional association said that companies need workers through the H–1B program because there are not enough qualified U.S. workers in STEM fields. Another individual commenter cited a STEM worker shortage, arguing that the United States should be ''rolling out the welcome mat'' for high-skilled talent. A professional association and an individual commenter also addressed the claimed current STEM shortage and explained how the proposed rule would further hurt employers' ability to hire college-educated foreign workers. A trade association stated that the proposed rule would make the H–1B visa program unusable for many engineering firms. The association,

[46] On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20-cv-7331, setting aside the DOL IFR, 85 FR 63872. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20-cv-14604, applying to the plaintiffs in that case. Also on December 3, 2020, DOL announced that it will no longer implement the IFR, consistent with the above referenced court orders.

[47] *See* 85 FR 69236, 69239.

citing data from the National Science Foundation, asserted that the engineering workforce is growing slower than the demand for engineers, and is growing older. Therefore, the engineering industry needs to be able to access labor from around the world to fill key positions. A company and a professional association said that U.S. graduates with advanced degrees in STEM, such as computer science, IT, or industrial engineering, are predominately foreign students and that the NPRM would negatively harm companies seeking these employees. A medical device company that employs research and development (R&D) engineers stated that the rule would result in poorer talent to develop medical technologies or higher wages to international talent, which would reduce overall R&D resources and impact their ability to deliver the best healthcare technologies.

A trade association said that restricting H–1B visas to senior professionals with higher wages would negatively impact manufacturers and their ability to hire aliens with STEM education and training to fill roles as researchers, scientists, engineers, and technicians. The commenter explained that the NPRM may deter aliens from attending college in the United States and restrict the talent pipeline. Further, the commenter stated that manufacturers rely on a skilled and innovative workforce that allows them to remain competitive, and that this NPRM will provide other countries a competitive advantage. This is coupled with the claim that the workforce challenge is expected to get worse in the future, with studies showing that nearly half of the 4.6 million manufacturing jobs could go unfilled, according to the commenter.

A university and an individual stated that the proposed system would encourage employers to artificially inflate their job requirements to increase the chance of acceptance through the lottery, creating an unfair advantage for larger employers. An individual commenter similarly said the rule disproportionately favors companies willing to pay the most money to foreign workers. An individual commenter said the rule would pit companies against each other to provide the highest salary, which would give larger tech companies control over the H–1B selection lottery. A law firm stated that start-up companies would be negatively impacted because they do not have the capital to be able to offer ''obscenely high salaries'' to be competitive in this process.

A few commenters noted that the increased difficulty in obtaining H–1B workers could have a negative effect on R&D or innovation at their companies. For example, a professional association said that companies in the automotive sector that have committed hundreds of millions of dollars to developing fuel-efficient engines no longer would be able to hire and retain recent graduates who have the academic background necessary to drive innovation through the H–1B program. Another professional association wrote that the proposed rule would negatively impact companies developing products that strengthen national security, as it would diminish the ability of U.S. employers to hire workers for the development of technology including artificial intelligence, quantum information science, robotics, and fifth-generation communications technology.

*Response:* DHS does not believe this rule will have a disparate negative impact on IT companies, financial technology companies, engineering firms, manufacturers, or companies in any particular industry. Additionally, DHS does not believe this rule will disadvantage companies developing products that strengthen national security or companies driving innovation in the automotive sector. Instead, DHS believes this rule will incentivize employers to proffer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, thereby attracting the best and the brightest employees and promoting innovation across all industries.

Moreover, DHS disagrees with the assertion that this rule will make the H–1B visa program ''unusable'' for engineering firms. While DHS acknowledges that some data may show that the engineering workforce is growing slower than the demand for engineers, DHS disagrees with the commenter that this means engineering firms must hire entry-level foreign workers to fill this gap. In fact, DHS data shows that, for ''Architecture and Engineering Occupations,'' there has been a significant number of petitions filed for level III and IV positions. Specifically, for FYs 2018 and 2019, employers filed 11,519 and 7,045 petitions (total of 18,564) for level III and IV positions, respectively, compared to 15,625 and 25,147 petitions (total of 40,772) for level I and II positions, respectively.[48] While registrations ranked according to prevailing wage level I and below likely will face reduced chances of selection, those ranked according to level II and greater stand increased chances of selection, as discussed in the NPRM.

DHS also disagrees that the rule will disadvantage the IT industry or stifle innovation. Conversely, DHS believes this rule may increase innovation and productivity.[49] Notably, other commenters claimed that this rule would favor the IT industry (which DHS disputes as well). Again, and as made apparent through these conflicting comments, DHS does not believe this rule will have a disparate negative or positive impact on the IT industry or companies in any particular industry.

*Comment:* An individual commenter stated that the rule would negatively impact non-profit organizations and public schools because they would need to compete with and pay the prevailing wages offered by for-profit businesses. Another individual commenter said that non-profits do not operate to maximize profit, and that their budgets cannot accommodate level III or IV prevailing wages. The commenter also argued that there is a large need for immigrant social workers who are able to better connect with and relate to the large population of noncitizens in the United States. Another commenter claimed that, if the H–1B proposed changes go into effect, many school districts throughout the United States would have a difficult time finding teachers.

*Response:* DHS does not believe that this rule will have a significant negative impact on non-profit organizations or public schools. Congress already exempted from the H–1B cap any alien who is employed or has received an offer of employment at an institution of higher education, a related or affiliated non-profit entity, or a non-profit research organization or a governmental research organization.[50] Thus, many petitions for non-profits will not be affected by this rule. Some public schools also are exempt from the H–1B cap based on their affiliation with

[48] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *H1B Petitions for Non Immigrant Worker (I–129) Summarized by SOC CODE Occupation by Wage Level As of August 28, 2020,* Database Queried: Aug. 28, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019. This data does not further break down how many of these petitions were for ''Architecture'' occupations versus ''Engineering'' occupations.

[49] *See* Michael R. Strain, *The link between wages and productivity is strong,* American Enterprise Institute (AEI) and Institute for the Study of Labor (IZA) (Feb. 4, 2019), *https://www.aei.org/research-products/report/the-link-between-wages-and-productivity-is-strong/.*

[50] *See* INA section 214(g)(5), 8 U.S.C. 1184(g)(5); 8 CFR 214.2(h)(8)(iii)(F).

institutions of higher education.[51] For those non-profit entities or public school districts that are not cap-exempt and are unable to proffer wages that equal or exceed prevailing wage levels with greater chances of selection, they may be able to find available and qualified workers outside of the H–1B program.[52]

(d) Other Comments on Impacts on Employers

*Comments:* Multiple commenters argued that the rule likely would result in a significant and sudden downturn in immigration casework, and would cause immigration law firms to scale back operations and lay off staff, at a time when the U.S. economy already is in a precarious position and unemployment is high.

*Response:* DHS disagrees with these commenters as this rule is not intended or expected to result in fewer H–1B workers in the United States, and will not affect existing H–1B workers, unless such workers become subject to the numerical allocations, and therefore should not reduce workload for immigration law firms overall. Employers with existing H–1B employees, who are not affected by this rule, may still need immigration law firm services. In addition, while some employers may opt not to participate in the H–1B program as a source for potential new employees and may not require immigration law firm services for those potential new employees as a result, given the high demand for H–1B visas, other employers may have the opportunity to begin participating in the program or to increase their existing participation in the program and may require increased services of immigration firms and attorneys. Therefore, DHS does not anticipate that this rule will have a negative overall impact on law firms and attorneys.

*Comments:* Multiple commenters reasoned that, with a focus on base wages, the proposed rule may result in employers abandoning the use of variable compensation, such as bonuses, profit-sharing payments, stock, and other incentives tied to performance. A commenter argued that variable pay can benefit a company by focusing organizations, business units, and individuals on specific goals and objectives. Alternatively, employers offering such compensation packages may be disadvantaged relative to others offering solely wage-based compensation.

*Response:* DHS recognizes that companies may offer various forms of benefits and benefits provided as compensation for services, such as cash bonuses, stock options, paid insurance, retirement and savings plans, and profit-sharing plans. While cash bonuses may, in limited circumstances, be counted towards the annual salary,[53] other forms of benefits such as stock options, profit sharing plans, and flexible work schedules may not be readily quantifiable or guaranteed, which means that they cannot reliably be calculated into proffered wages. Further, as one commenter pointed out, if a beneficiary is highly valued, that beneficiary may be able to discuss with their employer changes to their compensation structure that could result in a more easily quantifiable proffered wage.

v. Economy

*Comments:* Multiple commenters said the proposal would have the following negative impacts on the economy without providing substantive rationale: The rule would hurt the overall economy; the American public would assume the increased cost of labor through hidden corporate taxes or increased costs of services; this would affect U.S. economic development because many young people will be blocked by this new rule; this proposal would increase economic and cultural divisions that already exist because it would eliminate all ''interactive possibilities from social and cultural disciplines''; the proposed rule would harm the U.S. economy because the United States needs international students to bring funds to the country to study and live; international students educated at U.S. colleges have better acculturation to U.S. society, which is very important for long-term growth of the economy.

An individual commenter stated that the proposal would ''gut the system'' and lead to further economic decline. Other commenters argued that this rule would hurt the economy during a global pandemic when the economy is suffering. An individual commenter said that, to rebound from the pandemic and meet the challenges that face the United States, the country must expand opportunities for skilled workers, particularly in the STEM and health professions. A few individual commenters asserted, without evidence, that the proposal is based on the ''false premise'' that individuals who earn more contribute more to the economy, and that the rule promotes falsities about the workers who strengthen the U.S. economy. A few individual commenters stated that the proposal provides no evidence that higher wages correspond with labor needs of employers or provide a greater economic benefit.

*Response:* DHS does not agree that this rule will harm the U.S. economy or economic development, increase costs for the American public, or increase cultural or economic divisions. Instead, DHS believes that this rule will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program. It may also benefit U.S. workers, as employers that might have petitioned for cap-subject H–1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

*Comments:* A university said that foreign graduates do not take jobs from U.S. citizens, but, rather, they create new jobs and contribute ''billions'' to the economy. An individual commenter argued that attracting the best and brightest from around the world for education and employment helps to drive innovation and benefits the U.S. economy and nation as a whole, but the proposed rule would not lead to that outcome. An individual cited numerous studies in arguing that the current framework, in contrast to a proposed ''best and brightest'' prioritization, generates more economic benefits of the type intended by Congress. Several other commenters argued that the rule would cause professionals to seek careers elsewhere. A law firm stated that the rule could halt innovation in the United States, as studies have shown a positive correlation between foreign students and innovation.

An advocacy group said that the rule would risk preventing highly skilled professionals from bringing their talents to the United States, despite their education and skill, which likely would result in the United States missing out on the contributions of needed talent across multiple industries. A trade association stated that ''each facet'' of the U.S. workforce is enabled by an

[51] *See* Burr Forman McNair et al., *School Districts Taking Advantage of New H–1B Cap Exempt Regulations,* JDSUPRA (June 1, 2017), *https://www.jdsupra.com/legalnews/school-districts-taking-advantage-of-64663/.*

[52] Data shows that roughly 53 percent of recent college graduates in the United States are currently unemployed or underemployed. *See* Darko Jacimovic, *College Graduates Unemployment Rate in the US,* What to Become (Nov. 25, 2020), *https://whattobecome.com/blog/college-graduates-unemployment-rate/#:~:text=The%20median%20pay%20for%20those,in%20the%20US%20is%202.1%25* (citing University of Washington data).

[53] *See* 20 CFR 655.731(c)(2).

immigration system that allows access to foreign talent to allow employers to remain competitive, and argued that highly-skilled foreign executives and managers help run key aspects of U.S. companies that create thousands of jobs for domestic workers. The commenter said that it is this ''synergy'' between aliens and U.S. residents that underpins the United States' ''vibrant'' economy. An attorney argued that the United States would lose the benefits that come with younger, recently educated professionals whose value already has been assessed against the ease of employing U.S. applicants. An advocacy group said that the U.S. population is aging, and the country needs immigrants to help the economy grow. In addition, the commenter said that, for the United States' innovation future, the country needs international students. An individual commenter stated that favoring aliens far into their careers over young professionals is ''perverse'' because they may have only a decade of their careers left, which is not in the country's best interest. Another commenter said that this proposal could result in future H–1B participants who are older, not necessarily high-skilled, and have no exposure to American culture. The commenter said international students and the H–1B program are key drivers of job growth and economic dynamism, and altering the H–1B program to exclude recent graduates may stymie these positive effects.

*Response:* DHS appreciates the economic contributions that highly skilled aliens make to the United States. Rather than reducing such contributions or halting innovation, DHS believes that this rule will incentivize employers to attract and recruit highly-skilled aliens, as opposed to the current random selection process that ''favors companies hiring workers with interchangeable skills en masse over those with a pressing need to hire specific foreign experts,'' [54] and, thus, will benefit the economy overall.[55] The rule is not intended to, and DHS does not expect that it will, reduce the number of H–1B workers. DHS also notes that this rule does not preclude recent graduates from obtaining H–1B status or employers from directly sponsoring a recent foreign graduate for an employment-based immigrant visa. Although this rule will reduce the chance of selection for those at lower wage levels in years of excess demand, DHS believes that selecting by wage level in such years is more consistent with the dominant legislative purpose of the H–1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. Furthermore, DHS disagrees with the commenter that selecting higher paid and/or more highly skilled workers necessarily means that employers will be selecting those with less time left in their careers and thus those who will not be in the country's best interest. In addition, DHS does not believe that the time spent in the workforce determines the degree of contribution to the economy or the country. As explained in the NPRM and above, DHS believes that the rule will maximize H–1B cap allocations so that they more likely would go to the best and brightest workers.

*Comments:* Several commenters said that the proposal could have the unintended consequence of ''forcing'' entire businesses offshore. A professional association said that the proposal would result in more companies outsourcing jobs abroad and would discourage innovation. An individual commenter said that each job that is off-shored will take with it multiple other U.S. positions because the United States will lose the economic contributions of foreign workers, such as rented apartments, home mortgages, cares, groceries, and more. Another commenter said that this rule would make it more expensive for companies to hire in U.S. locations, and they eventually would move entire sections of their operation overseas or outsource labor, hurting U.S. workers in the long run.

*Response:* DHS disagrees with the commenters who state that this rule will cause employers to move operations to other countries. These commenters cited research [56] suggesting that restricting H–1B immigration is likely to cause multinational firms to offshore their highly skilled labor as the basis for concerns about this rule. However, DHS disagrees that this rule restricts H–1B immigration. Again, this rule does not affect the statutorily mandated annual H–1B cap, nor does it affect substantive eligibility requirements for an H–1B visa. While DHS acknowledges this rule may impose costs to individual employers, neither the comments nor sources cited address the countervailing impact on those level III and IV employers impacted or benefited by this rule. DHS believes that this rule, instead, will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program.

*Comments:* A couple of commenters, including a trade association, said that, in many cases, the proposed rule would require employers to pay their H–1Bs more than the actual market wages for U.S. citizens holding comparable positions. An individual commenter argued that prioritizing wages conflicts with the current DOL Prevailing Wage system, which ensures that H–1B holders do not depress the wages of U.S. workers. A company said that artificially raising the amount of money an employer must devote to paying H–1B workers would result in the company employing fewer workers overall, including U.S. workers. The commenter's reasoning was that, as a salary-focused ''arms race'' begins, employers would rely less and less on labor and more on technology and other means to avoid the unsustainable wage levels. Another commenter said the proposal would create the issue of wage discrimination against U.S. employees because an employer would have to offer a higher level of pay to H–1B applicants than to citizens for the same position.

*Response:* To the extent that these comments refer to wages required as a result of the DOL IFR, DHS notes that, on December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the Interim

[54] *See* Drew Calvert, *Companies Want to Hire the Best Employees. Can Changes to the H–1B Visa Program Help?,* KelloggInsight (Feb. 6, 2017), *https://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers* (further noting ''[u]nder the current system, U.S. companies are often discouraged from even attempting to hire a foreign worker, despite how uniquely qualified he or she might be'').

[55] *See* Muzaffar Chrishti and Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later,* Migration Policy Institute (July 2016), *https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf* (''Sponsors of [the Immigration Act of 1990 which created the H–1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the 'best and the brightest' in the global labor market.'').

[56] *See* Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H–1B Program,* National Bureau of Economic Research (July 2020), *https://www.nber.org/papers/w27538;* Michelle Marks, *Skilled, foreign workers are giving up on their American dreams—and turning to Canada,* Business Insider (Mar. 31, 2019), *https://www.businessinsider.com/h-1b-visa-rejects-moving-to-canada-2019-3.* Notably, the latter article focuses on how the current random lottery process disincentivizes prospective high-skilled beneficiaries seeking H–1B visas in the United States and incentivizes them to seek visas in countries with more merit-based selection processes.

Final Rule *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,* 85 FR 63872 (Oct. 8, 2020), which took effect on October 8, 2020, and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H–1B, H–1B1, and E–3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. On December 3, 2020, DOL announced that it is taking necessary steps to comply with the courts' orders and is no longer implementing the IFR.[57]

As explained in the NPRM, the ranking process established by this rule does not alter the prevailing wage level associated with a given position for DOL purposes, which is informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification. While DHS acknowledges that this final rule will result in more registrations (or petitions, as applicable) being selected for relatively higher paid, higher-skilled beneficiaries, the rule does not change, and does not conflict with, prevailing wage requirements. This final rule merely fills in a statutory gap regarding how to administer the H–1B numerical allocations in years of excess demand.

DHS disagrees with the contentions that, by raising salaries for H–1B workers, this rule will cause employers to reduce their overall workforce including U.S. workers, rely less on labor, or pay their H–1B workers more than their U.S. workers holding comparable positions. First, by incentivizing employers to use the H–1B program to fill positions requiring higher prevailing wage levels, or proffering wages commensurate with higher prevailing wage levels, employers may see a possible increase in productivity, as explained in the NPRM. Because of the possible increase in productivity, it is not necessarily the case that employers would employ fewer workers overall or rely less on labor. DHS believes that this rule will facilitate the admission of higher-skilled workers, which will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program.

Second, concerning the contentions that this rule would force employers to pay their H–1B workers more than their U.S. workers or otherwise harm U.S. workers, this final rule does not mandate employers to pay more for their H–1B workers; again, this rule merely fills in a statutory gap regarding how to administer the H–1B numerical allocations in years of excess demand. And as stated in the NPRM, this rule may provide increased opportunities for lower-skilled U.S. workers in the labor market to compete for work as there would be fewer H–1B workers paid at the lower wage levels to compete with U.S. workers, and may incentivize employers to recruit available and qualified U.S. workers.

c. General Wage-Based Selection Concerns

*Comments:* Many commenters, mostly individual commenters, generally disagreed with the proposed rule and expressed wage-based selection concerns without providing substantive rationale, stating that: Wage is not the only factor to judge the value of a worker, and the rule erroneously assumes that salary is the best indicator of a worker's value to society; H–1B wages are commensurate with experience and should not be used to establish eligibility; basing selection on wage levels violates U.S. values, such as fairness and justice; every position has ''many wages,'' so it is better to distinguish people within a position rather than based on wages; certain locations in the United States, such as rural areas, have lower wages compared to large cities with higher wage levels; the proposed rule would hamper regional development for rural areas because employers in these communities would not be able to pay the high wages to hire H–1B workers; whether an individual can get an H–1B visa depends on how important their work is to the country and does not depend on how much they can earn; the rule will damage U.S. talent capital investments because ''current price does not equal to final quality''; ranking by wage is not an accurate reflection of one's skill level because it could simply be based on age or years of experience; there are lower-paying jobs which still need to be filled by H–1B visa workers; basing selection on salary is unfair because the salary starting point and growth speed are different for different industries; the proposed rule does not address abuse in the H–1B program, such as staffing companies filing multiple petitions for each person and full-time workers filing as part-time so that their salary on file is doubled; this proposal artificially could increase wages, and wages should be determined by supply and demand instead; and, in some industries or locations, the beneficiaries' base salaries are similar enough to fall into one or two categories, which would make them likely to be the same as a random lottery under DOL's new prevailing wage level calculations.

*Response:* DHS believes that an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which reflects the unique qualities the beneficiary possesses. Thus, DHS believes this rule will benefit the best and brightest workers in all professions. DHS does not agree that this rule will favor certain high-paying professions or companies, as the rule takes into account the wage level relative to the SOC code—as opposed to salary alone—when ranking registrations. Regarding the concern for depressed areas, the rule equalizes geographic differences in salary amounts by taking into account the area of intended employment when ranking registrations. Particularly, as stated in the final rule, USCIS will select H–1B registrations based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. In ranking according to the wage level, the final rule makes it so that registrations for the same wage level will be ranked the same regardless of whether their proffered wages are different owing to their areas of intended employment.

Regarding the concerns about fairness, DHS believes that this rule is fair to U.S. workers, H–1B workers, and petitioners. Conversely, the current random selection process is not fair to U.S. workers whose wages may be adversely affected by an influx of relatively lower-paid H–1B workers, or to U.S. employers who have sought to petition for foreign workers at higher OES prevailing wage levels and are not selected.

3. Other General Feedback

*Comment:* An immigration practitioner in Guam noted that many H–1B visas are awarded to engineers coming to perform projects for the military realignment in Guam, and that this rule poses a threat to those projects' timely completions.

*Response:* DHS disagrees with this commenter. H–1B workers in Guam (or the Commonwealth of the Northern

[57] U.S. Department of Labor, Employment and Training Administration, Foreign Labor Certification, *Announcements, https://www.dol.gov/agencies/eta/foreign-labor* (last visited Dec. 21, 2020).

Mariana Islands (CNMI)) are exempt from the statutory numerical limitation for H–1B classification until December 31, 2029.[58] As this final rule simply modifies the registration requirement applicable to cap-subject H–1B petitions, it will not affect cap-exempt H–1B petitions for engineers or other H–1B workers coming to work in Guam (or the CNMI).

*B. Basis for Rule*

1. DHS Statutory/Legal Authority

*Comments:* A few individuals supported the rule, saying that the changes to H–1B selection are consistent with Congressional intent and statutory language. Another commenter argued that the INA's silence is an ''invitation'' for USCIS to establish criteria to prioritize petitions. Likewise, a research organization commented that the statutory language is ambiguous and USCIS' proposal would reasonably address the ambiguity.

*Response:* DHS agrees with these comments that the rule is consistent with Congressional intent and statutory language; the statute is silent as to how USCIS must select H–1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand; the term ''filed'' as used in INA section 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous; and these changes are reasonable and within DHS' general authority. DHS, therefore, is relying on its general statutory authority to implement these regulations to design a selection system that prioritizes selection generally based on the highest prevailing wage level that a proffered wage equals or exceeds. *See* INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

*Comment:* A business association generally argued that Acting Secretary Chad Wolf's tenure is in violation of the Homeland Security Act and the Federal Vacancies Reform Act (FVRA). Similarly, a professional association commented that Acting Secretary Wolf's tenure also violates Executive Order (E.O.) 13753, which established a DHS order of succession. The commenter added a citation to a U.S. Government Accountability Office (GAO) report concluding that Acting Secretary Wolf's appointment violated the order of succession. The commenter also provided citations to court decisions overturning DHS rulemakings based on Acting Secretary Wolf's authority. Finally, the commenter argued that DHS's attempted corrections of issues concerning Acting Secretary Wolf's tenure are insufficient to cure rules promulgated under his authority.

*Response:* DHS disagrees with the commenters that Acting Secretary Wolf's tenure is in violation of the HSA and the FVRA; Secretary Wolf is validly acting as Secretary of Homeland Security. On April 9, 2019, then-Secretary Nielsen, who was Senate-confirmed, used the authority provided by 6 U.S.C. 113(g)(2) to establish the order of succession for the Secretary of Homeland Security.[59] This change to the order of succession applied to any vacancy. This exercise of the authority to establish an order of succession for DHS pursuant to 6 U.S.C. 113(g)(2) superseded the FVRA and the order of succession found in Executive Order 13753, 81 FR 90667 (Dec. 9, 2016). As a result of this change, and pursuant to 6 U.S.C. 113(g)(2), Kevin K. McAleenan, who was Senate-confirmed as the Commissioner of U.S. Customs and Border Protection, was the next successor and served as Acting Secretary without time limitation. Acting Secretary McAleenan subsequently amended the Secretary's order of succession pursuant to 6 U.S.C. 113(g)(2), placing the Under Secretary for Strategy, Policy, and Plans position third in the order of succession, below the positions of the Deputy Secretary and Under Secretary for Management.[60] Because the Deputy Secretary and Under Secretary for Management positions were vacant when Mr. McAleenan resigned, Mr. Wolf, as the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was the next successor and began serving as the Acting Secretary.

Further, because he has been serving as the Acting Secretary pursuant to an order of succession established under 6 U.S.C. 113(g)(2), the FVRA's prohibition on a nominee's acting service while his or her nomination is pending does not apply, and Mr. Wolf remains the Acting Secretary notwithstanding President Trump's September 10, 2020, transmission to the Senate of Mr. Wolf's nomination to serve as DHS Secretary.[61]

That said, there have been recent challenges to whether Mr. Wolf's service is invalid, resting on the erroneous contention that the orders of succession issued by former Secretary Nielsen and former Acting Secretary McAleenan were invalid. The Department believes those challenges are not based on an accurate view of the law. But even if those contentions are legally correct—meaning that neither former Secretary Nielsen nor former Acting Secretary McAleenan issued a valid order of succession—under 6 U.S.C. 113(g)(2)—then the FVRA would have applied, and Executive Order 13753 would have governed the order of succession for the Secretary of Homeland Security from the date of former Secretary Nielsen's resignation.

The FVRA provides an alternative basis for an official to exercise the functions and duties of the Secretary temporarily in an acting capacity. In that alternate scenario, under the authority of the FVRA, Mr. Wolf would have been ineligible to serve as the Acting Secretary of DHS after his nomination was submitted to the Senate, 5 U.S.C. 3345(b)(1)(B), and Peter Gaynor, the Administrator of the Federal Emergency Management Agency (FEMA), would have—by operation of Executive Order 13753—become eligible to exercise the functions and duties of the Secretary temporarily in an acting capacity. This is because Executive Order 13753 pre-established the President's succession order for DHS when the FVRA applies. Mr. Gaynor would have been the most senior official eligible to exercise the functions and duties of the Secretary under that succession order, and thus would have become the official eligible to act as Secretary once Mr. Wolf's nomination was submitted to the Senate.[62] Then, in this alternate scenario in which, as assumed above, there was no valid succession order under 6 U.S.C. 113(g)(2), the submission of Mr. Wolf's nomination to the Senate would have restarted the FVRA's time limits. 5 U.S.C. 3346(a)(2).

Out of an abundance of caution, and to minimize any disruption to DHS and to the Administration's goal of maintaining homeland security, on November 14, 2020, with Mr. Wolf's nomination still pending in the Senate, Mr. Gaynor exercised the authority of Acting Secretary that he would have had (in the absence of any governing succession order under 6 U.S.C. 113(g)(2)) to designate a new order of succession under 6 U.S.C. 113(g)(2) (the

[58] *See* 48 U.S.C. 1806(b)(A).

[59] DHS, *Orders of Succession and Delegations of Authorities for Named Positions,* Delegation No. 00106, Revision No. 08.5 (Apr. 10, 2019).

[60] DHS, *Orders of Succession and Delegations of Authorities for Named Positions,* Delegation No. 00106, Revision No. 08.6 (Nov. 8, 2019).

[61] *Compare* 6 U.S.C. 113(a)(1)(A) (cross-referencing the FVRA without the ''notwithstanding'' caveat), *with id.* 113(g)(1)–(2) (noting the FVRA provisions and specifying, in contrast, that section 113(g) provides for acting secretary service ''notwithstanding'' those provisions); *see also* 5 U.S.C. 3345(b)(1)(B) (restricting acting officer service under section 3345(a), in particular, by an official whose nomination has been submitted to the Senate for permanent service in that position).

[62] 5 U.S.C. 3346(a)(2).

''Gaynor Order'').[63] In particular, Mr. Gaynor issued an order of succession with the same ordering of positions listed in former Acting Secretary McAleenan's November 2019 order. The Gaynor Order thus placed the Under Secretary for Strategy, Policy, and Plans above the FEMA Administrator in the order of succession. Once the Gaynor Order was executed, it superseded any authority Mr. Gaynor may have had under the FVRA and confirmed Mr. Wolf's authority to continue to serve as the Acting Secretary. Hence, regardless of whether Mr. Wolf already possessed authority pursuant to the November 8, 2019, order of succession effectuated by former Acting Secretary McAleenan (as the Departments have previously concluded), the Gaynor Order provides an alternative basis for concluding that Mr. Wolf currently serves as the Acting Secretary.[64]

On November 16, 2020, Acting Secretary Wolf ratified any and all actions involving delegable duties that he took between November 13, 2019, through November 16, 2020, including the NPRM that is the subject of this rulemaking.

Under section 103(a)(1) of the Act, 8 U.S.C. 1103(a)(1), the Secretary is charged with the administration and enforcement of the INA and all other immigration laws (except for the powers, functions, and duties of the President, the Attorney General, and certain consular, diplomatic, and Department of State officials). The Secretary is also authorized to delegate his or her authority to any officer or employee of the agency and to designate other officers of the Department to serve as Acting Secretary.[65] The Homeland Security Act further provides that every officer of the Department ''shall perform the functions specified by law for the official's office or prescribed by the Secretary.'' [66]

*Comments:* Multiple commenters asserted that this rule is *ultra vires,* inconsistent with Congressional intent, and a clear violation of the INA. Specifically, they contend that the INA sets forth the procedure for allocating visas and prioritizes the selection of H–1B cap-subject petitions in the ''order in which they are filed[,]'' which does not limit selection under the H–1B cap to those employers who pay the most or otherwise authorize DHS to impose substantive selection criteria. Several commenters stated that USCIS lacks the statutory authority to make such a change and cannot use the statute's purported silence as an invitation to adopt criteria, such as wage level or skill level, to prioritize the selection of H–1B cap subject visas. Some of these commenters also disagreed with DHS about the statute's silence and stated that Congress has previously made specific modification to the way in which H–1B cap numbers are allocated, specifically, the American Competitiveness in the Twenty-First Century Act of 2000 providing for the numerically limited exemption for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education. If Congress intended to make any other changes to the statutory language that H–1B cap numbers ''shall be issued . . . in the order in which petitions are filed[,]'' it could have done so as part of that or subsequent legislation. One commenter cited several cases in arguing that general rulemaking authority and statutory silence on an issue is not tantamount to Congressional authorization for rulemaking on a given issue; another commenter stated that the statute is neither silent nor ambiguous as it states that H–1B visas shall be issued, or H–1B status granted, ''in order in which petitions are filed''; and a trade association commented that the use of the term ''shall'' indicates that there is no ambiguity as to how petitions may be sorted. One commenter cited several INA provisions in arguing that, where it intended to do so, Congress made distinctions within classes of potential visa applicants, and thus the statute reflects Congressional intent *not* to distinguish on other bases. One commenter said that the proposed rule would be found unlawful in court, because the law does not make an allowance for basing H–1B visas on salary, and the rule is contrary to the plain language of the statute. A form letter campaign wrote that the law does not require employers to pay H–1B workers more than U.S. workers, and the law does not allow the agency to prioritize petitions for higher-wage applicants.

*Response:* DHS disagrees with the commenters' assertions that the statute is not silent or ambiguous and that this rulemaking is *ultra vires.* As stated in the NPRM, this rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.[67] DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H–1B cap selection process. Congress expressly authorized DHS to determine eligibility for H–1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.[68] ''Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order 'received,' 'submitted,' or 'delivered.' Instead, they must be processed in the order 'filed.' What it means to 'file' a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.'' [69] Rather, these implementation details are entrusted to DHS to administer. So, while the statute provides annual limitations on the number of aliens who may be issued initial H–1B visas or otherwise provided H–1B nonimmigrant status, the statute does not specify how petitions must be

[63] Mr. Gaynor signed an order that established an identical order of succession on September 10, 2020, the day Mr. Wolf's nomination was submitted, but it appears he signed that order before the nomination was received by the Senate. To resolve any concern that his September 10 order was ineffective, Mr. Gaynor signed a new order on November 14, 2020. Prior to Mr. Gaynor's new order, the U.S. District Court for the District of New York issued an opinion concluding that Mr. Gaynor did not have authority to act as Secretary, relying in part on the fact that DHS did not notify Congress of Administrator Gaynor's service, as required under 5 U.S.C. 3349(a). *Batalla Vidal* v. *Wolf,* No. 16CV4756NGGVMS, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). The Departments disagree that the FVRA's notice requirement affects the validity of an acting officer's service; nowhere does section 3349 indicate that agency reporting obligations are tied to an acting officer's ability to serve.

[64] On October 9, 2020, the U.S. District Court for the District of Columbia issued an opinion indicating that it is likely that section 113(g)(2) orders can be issued by only Senate-confirmed secretaries of DHS and, thus, that Mr. Gaynor likely had no authority to issue a section 113(g)(2) succession order. *Nw. Immigrant Rights Project* v. *United States Citizenship & Immigration Servs.,* No. CV 19–3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020). This decision is incorrect because the authority in section 113(g)(2) allows ''the Secretary'' to designate an order of succession, 6 U.S.C. 113(g)(2), and an ''acting officer is vested with the same authority that could be exercised by the officer for whom he acts.'' *In re Grand Jury Investigation,* 916 F.3d 1047, 1055 (D.C. Cir. 2019). The Acting Secretary of DHS is accordingly empowered to exercise the authority of ''the Secretary'' of DHS to ''designate [an] order of succession.'' 6 U.S.C. 113(g)(2). In addition, this is the only district court opinion to have reached such a conclusion about the authority of the Acting Secretary, and the Departments are contesting that determination.

[65] *See* INA 103, 8 U.S.C. 1103, and 6 U.S.C. 113(g)(2).

[66] *See* 6 U.S.C. 113(f).

[67] *See* 85 FR 69236, 69242.

[68] *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1). *See also Walker Macy,* 243 F.Supp.3d at 1176 (''Congress left to the discretion of USCIS how to handle simultaneous submissions, [and accordingly], USCIS has discretion to decide how best to order those petitions.'').

[69] *See* 243 F.Supp.3d at 1175.

selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H–1B numerical allocations. Consequently, ''Congress left to the discretion of USCIS how to handle simultaneous submissions'' and ''USCIS has discretion to decide how best to order those petitions.'' [70]

DHS acknowledges that INA section 214(g)(3), 8 U.S.C. 1184(g)(3), states that aliens subject to the H–1B numerical limitation in INA section 214(g)(1), 8 U.S.C. 1184(g)(1), shall be issued H–1B visas or otherwise provided H–1B nonimmigrant status ''in the order in which petitions are filed for such visas or status.'' Contrary to the commenters' assertions, this statutory provision, and, more specifically the term ''filed'' as used in INA section 214(g)(3), 8 U.S.C. 1184(g)(3), is ambiguous.[71] As discussed in the preamble to the *Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens* Final Rule (H–1B Registration Final Rule), an indiscriminate application of this statutory language would lead to absurd or arbitrary results; the longstanding approach has been to project the number of petitions needed to reach the numerical allocations.[72]

A literal application of this statutory language, as suggested by various commenters, would lead to an absurd or impossible result. The Department of State (DOS) does not issue H–1B visas, and USCIS does not otherwise provide H–1B status, based on the order in which petitions are filed. Such a literal application would necessarily mean that processing delays pertaining to a petition earlier in the petition filing order would preclude issuance of a visa or provision of status to all other H–1B petitions later in the petition filing order. To avoid such an absurd result, the longstanding approach to implementing the numerical limitation has been to project the number of petitions needed to reach the numerical limitation. The issue, however, is how to select registrations or petitions, as applicable, when the number of submissions exceeds the number projected as needed to reach the numerical limitation or the advanced degree exemption, particularly when those submissions all occur within the same narrow window of time. DHS is not changing the approach to administering the numerical allocations as it relates to the use of projections. DHS is, however, changing the selection process for selecting registrations or petitions, as applicable, to determine which petitions are properly filed and eligible for further processing consistent with INA section 214(g)(3), 8 U.S.C. 1184(g)(3).

DHS created the registration requirement based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H–1B cap selection process. As provided in the H–1B Registration Final Rule, unless suspended by USCIS, registration is an antecedent procedural step that must be completed by prospective petitioners before they are eligible to file an H–1B cap-subject petition. As with the filing of petitions, and as explained above, a first-come, first-served basis for submitting electronic registrations is unreasonable and practically impossible.

While the random selection of registrations or petitions, as applicable, DHS established in the H–1B Registration Final Rule is reasonable, it is neither the optimal nor the exclusive method of selecting petitions or registrations toward the numerical allocations when more registrations or petitions, as applicable, are submitted than projected as needed to reach the numerical allocations.

In that vein, DHS concludes that prioritization and selection based on wage levels ''is a reasonable and rational interpretation of USCIS' obligations under the INA to resolve the issues of processing H–1B petitions'' [73] in years of excess demand and is within DHS's existing statutory authority.

*Comment:* Multiple commenters cited a USCIS response to a comment in the H–1B Registration Final Rule and wrote that USCIS previously supported the position that prioritization of selection based on salary or other substantive factors would require explicit Congressional authorization. Commenters also cited a 1991 rulemaking in arguing that Immigration and Naturalization Service (INS) previously acknowledged that the INA does not authorize establishing criteria to prioritize petitions. These commenters also provided language from a 1990 INS rulemaking indicating that a statutory change would be necessary to exclude entry-level H–1B workers. A law firm argued that the Agency cannot reverse a position of this kind without providing a reasoned explanation.

*Response:* DHS disagrees with the commenters that prior statements by INS or USCIS preclude DHS from making the changes set forth in this final rule. DHS acknowledged in the proposed rule that the preamble to the H–1B Registration Final Rule states that prioritization of registration selection on factors other than degree level, such as salary, would require statutory changes. DHS also explained that the prior statement did not provide further analysis regarding that conclusion and that upon further review and consideration of the issue initially raised in comments to the *Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens* NPRM (H–1B Registration Proposed Rule),[74] DHS concluded that the statute is silent as to how USCIS must select H–1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. DHS continues to believe that the changes made in this final rule are within its general authority, consistent with the existing statute, and despite prior statements to the contrary, does not require statutory change or explicit congressional authorization. DHS is relying on its general statutory authority to implement the statute and, consistent with that authority, is revising the regulations to implement a selection system that realistically, effectively, efficiently, and more faithfully administers the cap selection process. *See* INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

[70] *See* 243 F.Supp.3d at 1176.

[71] *See* 243 F.Supp.3d at 1167–68 (finding that USCIS's rule establishing the random-selection process was a reasonable interpretation of the INA that was entitled at least to Skidmore deference because what it means to ''file'' a petition is ambiguous and undefined under the INA and that Congress left to the discretion of USCIS how to handle simultaneous submissions. Specifically, the court said: ''Additionally, because § 1184(g)(3) was passed by Congress in 1990 when there was not widespread public use of electronic submissions, it is logical that Congress anticipated H–1B petitions would be submitted either by U.S. mail or other carriers. Thus, it was reasonable to anticipate multiple petitions would arrive on the same day. It is therefore a reasonable interpretation of 'filed' to include some further administrative step beyond mere receipt at a USCIS office to 'order' multiple petitions that arrived in such a manner on the same day.''). The availability of electronic submission of H–1B registrations has not alleviated this issue as multiple registrations can still be submitted simultaneously.

[72] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens,* 84 FR 888, 896 (Jan. 31, 2019).

[73] *See Walker Macy,* 243 F.Supp.3d at 1175.

[74] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Registration Requirement for Petitioners Seeking to File H–1B Petitions on Behalf of Cap-Subject Aliens,* 83 FR 62406 (proposed Dec. 3, 2018).

DHS disagrees with the assertion that this rule will exclude entry-level workers. This final rule merely revises how USCIS will select H–1B cap-subject petitions toward the H–1B numerical allocations to determine which petitions are ''filed'' and eligible for further processing. The rule does not change substantive eligibility requirements. While DHS acknowledges that registrations or petitions, as applicable, based on a proffered wage that corresponds to a level I or level II wage likely will face a reduced chance of selection in the H–1B cap selection process, the rule does not preclude selection of registrations or petitions for entry-level workers.

DHS also disagrees with the commenters' claim that the prior statements by INS in the preamble to the *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act* final rule are relevant to this final rule.[75] INS was responding to general comments about administering the numerical limitation, but was not considering how to administer the H–1B numerical allocations when the number of submitted petitions exceeds the numerical allocation. Such circumstances did not exist at the infancy of the H–1B program and when the numerical limitation was created, so this issue was not considered at that time. Again, this final rule merely revises how USCIS will select H–1B cap-subject registrations or petitions, as applicable, toward the H–1B numerical allocations to determine which petitions are ''filed'' and thus eligible for further processing; in addition, this final rule addresses how USCIS will select registrations or petitions, as applicable, when the number of submitted registrations or petitions exceeds the projected number needed to reach the numerical allocations. Once properly filed, H–1B cap-subject petitions generally will be processed in order based on the assigned filing date.

DHS also disagrees that comments made by INS in the preamble to the 1990 final rule,[76] are relevant to the interpretation of DHS's authority to implement the numerical allocations under the existing statute. The 1990 rule preceded the enactment of the Immigration Act of 1990 (IMMACT 90), Public Law 101–649, 104 Stat. 4978, the creation of the H–1B classification for specialty occupation workers, and the implementation of a numerical limitation on H–1B workers. As such, the statements cited by the commenter are not relevant to the interpretation of the existing statute, including the authority of DHS to administer the H–1B numerical allocations.

*Comment:* A company stated that USCIS' ability to interpret the term ''filed'' is not unlimited and that the proposed, complex prioritization scheme unambiguously exceeds the scope of the term. Similarly, a law firm and individual argued that, according to *Walker Macy* v. *USCIS,* USCIS does not have ''unfettered'' discretion to determine which petitions are filed, but, instead, must reasonably interpret the statute. The law firm said the proposed interpretation is unreasonable because of the impacts it would have on U.S. companies and innovation. Multiple commenters said that the current system of putting applicants in a lottery when they apply simultaneously comports with the INA's language, but that the proposed methodology would impermissibly deviate from the INA. Similarly, a company stated that Congress' guiding principal for selecting H–1B petitions is timing and that the current lottery system conforms to this principal. An individual commenter similarly argued, citing *Walker Macy* v. *USCIS,* that the proposed rule deviates from the temporal principal without statutory or judicial basis. Other commenters asserted that USCIS' reference to the ''dominant legislative purpose'' of the statute, construed as prioritizing the application of the most skilled workers, is unreasonable. The commenters reasoned that the INA simply prioritizes filling labor shortages, without regard to wage levels. Several commenters stated that the allowance of H–1B visas for aliens with undergraduate degrees precludes prioritizing petitions based on wage levels.

*Response:* DHS disagrees with the commenters' assertions that this rule misstates the scope of the term ''filed'' or that the rule is based on an unreasonable interpretation of the statute. As stated in the NPRM and in response to other comments in this preamble, DHS believes that this rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.[77] DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations (*i.e.,* situations where prioritizing petitions solely in a temporal manner is impossible), to effectively and efficiently administer the H–1B cap selection process. Congress expressly authorized DHS to determine eligibility for H–1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.[78] ''Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order 'received,' 'submitted,' or 'delivered.' Instead, they must be processed in the order 'filed.' What it means to 'file' a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.'' [79] Rather, these implementation details are entrusted for DHS to administer. So, while the statute provides annual limitations on the number of aliens who may be issued initial H–1B visas or otherwise provided H–1B nonimmigrant status, the statute does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H–1B numerical allocations. Consequently, ''Congress left to the discretion of USCIS how to handle simultaneous submissions'' and ''USCIS has discretion to decide how best to order those petitions.'' [80]

DHS believes, contrary to commenters' assertions, that prioritization and selection generally based on the highest OES wage level that the proffered wage equals or exceeds ''is a reasonable and rational interpretation of USCIS's obligations under the INA to resolve the issues of processing H–1B petitions'' [81] in years of excess demand and is within DHS's existing statutory authority. ''It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.'' [82] Yet, under the

[75] U.S. Department of Justice, Immigration and Naturalization Service, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 56 FR 61111 (Dec. 2, 1991).

[76] U.S. Department of Justice, Immigration and Naturalization Service, *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act,* 55 FR 2606 (Jan. 26, 1990).

[77] *See* 85 FR 69236, 69242.

[78] *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1). *See also Walker Macy,* 243 F.Supp.3d at 1176 (''Congress left to the discretion of USCIS how to handle simultaneous submissions, [and, accordingly], USCIS has discretion to decide how best to order those petitions.'').

[79] *See* 243 F.Supp.3d at 1175.

[80] *See* 243 F.Supp.3d at 1176.

[81] *See* 243 F.Supp.3d at 1175.

[82] *See Spilker* v. *Shayne Labs., Inc.,* 520 F.2d 523, 525 (9th Cir. 1975) (citing *F.T.C.* v. *Fred Meyer, Inc.,* 390 U.S. 341, 349 (1968) (''[W]e cannot, in the absence of an unmistakable directive, construe the

current registration system the majority of H–1B cap-subject petitions have been filed for positions certified at the two lowest wage levels: I and II.[83] This contradicts the dominant legislative purpose of the statute because the intent of the H–1B program is to help U.S. employers fill labor shortages in positions requiring *highly skilled* or *highly educated* workers.[84] By changing the selection process, for these years of excess demand, from a random lottery selection to a wage-level-based selection process, DHS will implement the statute more faithfully to its dominant legislative purpose, increasing the chance of selection for registrations or petitions seeking to employ beneficiaries at wages that would equal or exceed the level IV or level III prevailing wage for the applicable occupational classification.

*Comments:* A couple of commenters said the changes made by the rule should be decided by Congress. Similarly, a few commenters stated generally that the proposal is not authorized by Congress or is in violation of Congressional intent. A few commenters said that 8 U.S.C. 1184(g)(5)(C) (the exemption from the cap for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education) demonstrates that, where Congress intends to target petitions for highly skilled workers, it has done so explicitly. Others commented that, when this cap was legislated, it was clear that petitions still would exceed visa allocations and that the statute should be understood to have intentionally omitted any change to the priority of visa petitions; and one commenter added that the proposed rule would impact the ratio of advanced-degree holders to other H–1B recipients that Congress authorized when providing the 20,000 U.S. advanced degree exemption. A company stated that the proposal is untethered to statutory language, providing examples of Congressional ''guidance'' and reasoning that nowhere in such guidance or the INA is there reference to salary or the OES prevailing wage level as a basis for selecting H–1B petitions. A professional association stated that effectively imposing an additional wage requirement would be inappropriate, especially for physicians.

*Response:* DHS disagrees with these comments. As stated in the NPRM and as explained above, this rule is consistent with Congressional intent and is permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.[85] Furthermore, DHS disagrees with the commenters' assertions that the statute, or legislative history, indicates that Congress has spoken to the specific issue addressed by this final rule: how to select petitions toward the numerical allocations when the number of petitions filed is greater than the number of petitions projected as needed to reach the H–1B numerical allocations. As explained in the NPRM and in response to other comments, the statute is silent on this issue. DHS created the registration requirement, based on its general statutory authority and its discretion to determine how best to handle simultaneous submissions in excess of the numerical allocations, to effectively and efficiently administer the H–1B cap selection process. Congress expressly authorized DHS to determine eligibility for H–1B classification upon petition by the importing employer, and to determine the form and information required to establish eligibility.[86] ''Moreover, INA section 214(g)(3) does not provide that petitions must be processed in the order 'received,' 'submitted,' or 'delivered.' Instead, they must be processed in the order 'filed.' What it means to 'file' a petition and how to handle simultaneously received petitions are ambiguous and were not dictated by Congress in the INA.'' [87] Rather, these implementation details are entrusted for DHS to administer. Nor should it be understood that Congress had spoken on this issue when the cap was legislated because it was not clear at that time that petitions would exceed visa allocations on the very first day that petitions could be filed, thus leading to a situation where prioritizing petitions solely in a temporal manner is impossible. So, while the statute provides annual limitations on the number of aliens who may be issued initial H–1B visas or otherwise provided H–1B nonimmigrant status, the statute does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H–1B numerical allocations. Consequently, ''Congress left to the discretion of USCIS how to handle simultaneous submissions'' and ''USCIS has discretion to decide how best to order those petitions.'' [88]

*Comments:* Some commenters expressed that this rule is not consistent with the statutory framework Congress implemented for the admission of foreign workers into the United States, as Congress designated DOL to have the primary authority in protecting and enforcing the statute related to the U.S. labor market and wages. Multiple commenters stated that Congress did not intend for wage levels to serve as a basis for preferring certain petitions, as evidenced by the statute's prevailing wage requirement. An individual commented that the preamble's statement that ''Congress expressly authorized DHS to determine eligibility for H–1B classification upon petition by the importing employer'' fails to recognize that this authorization is for USCIS' determination regarding specific employers' applications, rather than for categorically determining which wages or jobs qualify for H–1B visas.

*Response:* DHS disagrees with the commenters assertion that this rule is inconsistent with the statute. As explained in the NPRM and in response to other comments, DHS believes that this rule is consistent with its statutory authority. DHS agrees that DOL has the primary authority to protect the wages and working conditions of U.S. workers consistent with the provisions of INA section 212(n), 8 U.S.C. 1182(n), but

Act in a manner which runs counter to the broad goals which Congress intended it to effectuate.'')).

[83] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration. Services, Office of Policy and Strategy, Policy Research Division, *H–1B Wage Level by Top 25 Metro,* Database Queried: July 10, 2020, Report Created: July 14, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019, Bureau of Labor Statistics: Occupational Employment Statistics for 2018, 2019 (establishing that, for the top 25 metropolitan service areas for which H–1B beneficiaries were sought in FYs 2018 and 2019, all level I wages, 84% of level II wages, and 76% of ''No Wage Level'' wages fell below the Bureau of Labor Statistics median wages); Daniel Costa and Ron Hira, *H–1B Visas and Prevailing Wage Level,* Economic Policy Institute (May 4, 2020), *https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/* (explaining that ''three-fifths of all H–1B jobs were certified at the two lowest prevailing wages in 2019...., and, ''[i]n fiscal year (FY) 2019, a total of 60% of H–1B positions certified by Department of Labor (DOL) had been assigned wage levels [I and II]: 14% were at H–1B Level 1 (the 17th percentile) and 46% per at H–1B Level 2 (34th percentile)''). Data concerning FY 2018 and 2019 petition filings pre-dates the publication of the DOL IFR, 85 FR 63872.

[84] *See* H.R. Rep. 101–723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating ''The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages'').

[85] 85 FR 69236, 69242.

[86] *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1). *See also Walker Macy,* 243 F.Supp.3d at 1176 (''Congress left to the discretion of USCIS how to handle simultaneous submissions, [and accordingly], USCIS has discretion to decide how best to order those petitions.'').

[87] *See* 243 F.Supp.3d at 1175.

[88] *See* 243 F.Supp.3d at 1176.

those provisions are separate from INA section 214, 8 U.S.C. 1184, and the statutory provisions pertaining to the form and manner of submitting H–1B petitions and the administration of the H–1B numerical allocations, both of which are within DHS's authority consistent with INA section 214, 8 U.S.C. 1184. Further, the fact that Congress authorized DOL to administer and enforce a wage requirement, including setting prevailing wage levels for the H–1B program, does not speak to or limit DHS' authority to establish an orderly, efficient, and fair system for selecting registrations (or, if applicable, petitions), based on OES prevailing wage levels, toward the projected number needed to reach annual H–1B numerical allocations.

*Comments:* Multiple commenters, as part of a form letter campaign, stated that the legal impact of the proposed rule must be considered together with other recent rules, including the recently published DOL. Another commenter stated that USCIS should work with DOL to appropriately set up the wage levels.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the DOL IFR. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and is no longer implementing the DOL IFR. DHS, therefore, disagrees with the commenter's assertion that DHS must consider the DOL IFR in the context of this final rule.

DHS also disagrees with the premise of the commenters' recommendation that DHS work with DOL to set appropriate wage levels. This final rule is not setting wage levels. As explained in the NPRM and in response to other comments, this final rule changes how DHS will select registrations or petitions, as applicable, toward the projected number needed to reach the annual H–1B numerical allocations. While this final rule uses DOL wage levels to determine how to rank and select registrations or petitions, as applicable, based generally on the wage level that the proffered wage equals or exceeds, this final rule is not mandating employers pay a higher wage nor is it changing wage levels.

*Comments:* One commenter noted the proposal would make the H–1B process similar to that of the O–1 visa, but that Congress knowingly avoided doing so in 1990. According to the commenter, the new rule, in effect, is redrafting the 1990 legislation to make the H–1B visa more closely resemble the O–1 visa and Congress certainly could have ranked H–1Bs in 1990 if it wanted to do so. Other commenters also noted that the O–1 visa is for those with extraordinary ability, not those just starting their careers, and that the H–1B program serves different purposes. Another commenter also cited a House sponsor of the H–1B program as saying that the O–1 program, not H–1B, was the ''best and brightest'' program.

*Response:* DHS disagrees with the claim that it is reforming the H–1B classification to more closely resemble the O–1 classification.[89] While DHS acknowledges that this rule will result in more registrations (or petitions, as applicable) being selected for relatively higher-paid, higher-skilled beneficiaries, the rule is not changing substantive eligibility requirements for the H–1B classification and is not, in any way, reforming the H–1B classification to more closely resemble the O–1 classification. This final rule merely fills in a statutory gap regarding how to administer the H–1B numerical allocations in years of excess demand. The statute provides annual limitations on the number of aliens who may be issued initial H–1B visas or otherwise provided H–1B nonimmigrant status, but it does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives more petitions on the first day than are projected as needed to reach the H–1B numerical allocations. Consequently, ''Congress left to the discretion of USCIS how to handle simultaneous submissions'' and ''USCIS has discretion to decide how best to order those petitions.'' [90] The current scheme of pure randomization of selectees does not optimally serve Congress' purpose for the H–1B program. Therefore, this rule will revise the H–1B cap selection process to better align with the purpose of the H–1B program and Congressional intent, taking into account the pervasive oversubscription of demand for registrations and petitions.

*Comment:* An individual noted that Congress previously considered legislation called the I-Squared Act that sought to alter the selection process by ranking H–1Bs based on a number of factors rather than having a random lottery. That legislation has not passed, which is an indicator that Congress does not see the change as a priority. Conversely, an individual commenter wrote that Congress intended to delegate H–1B visa allocation to USCIS and that the I-Squared bill failed because of other provisions it contained.

*Response:* DHS disagrees with the assertion that the fate of the I-Squared bill is relevant to interpretation of the existing statute. While Congress has considered such legislation, the failure of such legislation (or any other proposed legislation) to be passed and signed into law does not change the existing authority DHS has under the INA. As explained in response to other comments, DHS believes that selection of registrations or petitions, as applicable, based on corresponding wage level is consistent with the discretion provided to DHS in the current statute to administer the annual H–1B numerical allocations.

*Comment:* A few commenters cited the Senate Report for The American Competitiveness Act as demonstrating Congressional opposition to granting H–1B visas on a preferential basis to the highest-paid aliens. The commenters argued that the language of the Senate Report contradicts E.O. 13788 and that E.O. 13788 does not establish Congressional purpose or policy, and its emphasis on highly paid beneficiaries as applied in this context would be inconsistent with Congress' direction.

*Response:* DHS disagrees with these comments because they ignore the fact that DHS has proposed to modify the registration requirement within the context of the annual demand for H–1B cap-subject petitions, including those filed for the advanced degree exemption, consistently exceeding annual statutory allocations.

Although Congress instructed that cap-subject H–1B visas (or H–1B nonimmigrant status) be allocated based on the order in which petitions are filed, it was silent with regard to the allocation of simultaneously submitted petitions. While the random lottery selection process is a reasonable solution, DHS believes that an allocation generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds better fulfills Congress' stated intent that the H–1B program help U.S. employers fill labor shortages in positions requiring highly skilled workers.[91]

[89] The O–1 nonimmigrant classification is for aliens with extraordinary ability in the sciences, arts, education, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture and television industry. *See* INA section 101(a)(15)(O), 8 U.S.C. 1101(a)(15)(O); 8 CFR 214.2(o).

[90] *See Walker Macy,* 243 F.Supp.3d at 1176.

[91] H.R. Rep. 101–723(I) (1990), as reprinted in 1990 U.S.C.C.A.N. 6710, 6721 (stating ''The U.S.

This legislative history, as cited in the proposed rule, is consistent with the Senate Report the commenters cite.[92] Both support the notion that Congress intended the H–1B program to fill labor shortages in positions requiring highly skilled workers. Contrary to the commenter's assertion that DHS only cited to E.O. 13788 to support this priority, DHS cited to the legislative history of the Immigration Act of 1990, the legislation that created the H–1B program, to support the priority to allocate generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds.[93] DHS cited to E.O. 13788 solely to note that a wage-level based selection was consistent with the administration's policy goals, not as legal authority for the proposed rule.

*Comment:* An individual commenter and a professional association argued that Presidential Proclamation 10052 is not authoritative to the extent that it conflicts with the INA, and that the proposal fails to explain how it ''is consistent with applicable law or is practicable at this point in time,'' especially in light of the forthcoming change in administration.

*Response:* DHS disagrees with the assertion that Presidential Proclamation 10052 conflicts with the INA.[94] In any event, the authority for this regulation stems not from that proclamation but from DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.

*Comment:* One commenter stated that salary also is a proxy variable for age, as, in most industries, more experienced individuals get paid higher wages. This commenter asked whether USCIS has the authority to apply ''salary'' as a secondary sorting mechanism for H–1B registrations, and if so, what would prevent USCIS also from using arbitrary sorting mechanisms such as age, geography, country of birth, race, religion, or gender.

*Response:* DHS disagrees that salary is a proxy for age. While salary is a reasonable proxy for skill, level of skill is not necessarily correlated to age. DHS also disagrees with the commenter's implied assertion that wage level is an arbitrary sorting mechanism. As explained in the NPRM and in response to other comments, corresponding wage level is an objective way to prioritize selection in a manner consistent with the general purpose of the H–1B classification. DHS has not proposed, and does not intend to propose, selecting registrations or petitions, as applicable, based on factors that are unreasonable, inappropriate, or inconsistent with the purpose of the H–1B classification.

2. Substantive Comments on the Need for the Rule/DHS Justification

*Comments:* An anonymous commenter wrote that the proposed rule's wage standard for H–1B visa eligibility is arbitrary and capricious. The commenter said that DHS does not explain the rationale behind making wages the sole indicator of a worker's eligibility for visa sponsorship. The commenter also argued that the rule's rationale is flawed because it would not protect U.S. workers, since the H–1B visa applies only to specialty occupations. Another commenter opined that this rule is an attempt to add a new wage requirement as a part of H–1B eligibility. This commenter stated that this attempt is inconsistent with Congressional intent and would be an abuse of discretion by the Department.

*Response:* DHS believes these commenters misstate the scope of this rule. This rule does not make ''wages the sole indicator of a worker's eligibility for [H–1B] visa sponsorship'' and does not otherwise change the substantive standards for H–1B eligibility. DHS stated in the NPRM that registration, when required, is merely an antecedent procedural step that must be completed by prospective petitioners *before they are eligible to file an H–1B cap-subject petition* (emphasis added).[95] Even if registration were suspended, the rule merely revises how USCIS would select H–1B cap-subject petitions toward the H–1B numerical allocations to determine which petitions are ''filed'' and thus eligible for further processing. But the rule does not change substantive eligibility requirements. DHS also disagrees with the commenter's assertion that the rule would not better protect U.S. workers. As explained in response to other comments, prioritizing the selection of H–1B registrations or petitions, as applicable, based generally on the highest OES prevailing wage level that the proffered wage equals or exceeds will incentivize employers to offer higher wages or higher-skilled positions to H–1B workers and disincentivize the existing widespread use of the H–1B program to fill relatively lower-paid or lower-skilled positions, for which there may be available and qualified U.S. workers. DHS, therefore, believes that this rule will benefit U.S. workers who compete against entry-level H–1B workers and will incentivize H–1B petitioners to offer higher wages, further benefiting U.S. workers whose wages might otherwise be depressed by an influx of relatively lower-paid, lower-skilled H–1B workers.

a. Support for the DHS Rationale

*Comments:* Many commenters expressed support for the proposed rule and DHS justification. Several commenters stated that the proposed rule is based on a true premise that salary equates with value. A research organization stated that there is no evidence to suggest that the H–1B program was designed to fill entry-level jobs at entry-level wages, and prioritizing H–1B petitions at high wage levels will safeguard U.S. wage standards and increase labor efficiency. The commenter went on to state that prioritizing higher H–1B wage levels will not undermine the program, but, rather, will incentivize recruitment and retention, while also helping U.S. workers in labor categories that have seen stagnant wage growth in recent history. The commenter reasoned that, because employers do not have to test the market before hiring H–1B workers, wages are a good indicator of the actual market need for workers in a given field.

*Response:* DHS agrees with these commenters and thanks them for their support.

b. Rule Is Based on False Premises/ Rationale

*Comment:* Many commenters, including those who participated in an orchestrated form letter campaign, stated that the proposal is based on the false premise that salary alone equates with value and that individuals who earn more in their profession contribute more to the economy. An individual commenter discussed the fundamental flaw in associating level I and level II workers with low-paying, low-skilled work, where in reality, entry-level doctors, lawyers, engineers, and

labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and the need for other workers to meet specific labor shortages'').

[92] 85 FR 69236, 69238.

[93] 85 FR 69236, 69238.

[94] *See* Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,* 85 FR 38263 (June 25, 2020).

[95] 85 FR 69236, 69243. *See also* H–1B Registration Final Rule, 84 FR 888, 900 (''submission of the registration is merely an antecedent procedural requirement to properly file the petition. It is not intended to replace the petition adjudication process or assess the eligibility of the beneficiary for the offered position.'').

architects are professionals performing specialty occupations. A professional association stated that the salaries associated with each wage level do not fully capture an individual's contribution to society; in fact, there often is an inverse correlation. A professional association said DHS has created a condition where employers would be able to buy their way into the proposed H–1B visa cap selection system by offering a higher wage to the beneficiary regardless of skill, which would negate the stated purpose of the proposed rule to garner more high-skilled workers in the U.S. workforce.

Some commenters said the proposed rule is based on the false premise that foreign workers depress wages and take away jobs from U.S. workers. A university stated that the foreign workers this rule targets fill critical needs in the U.S. labor market, bolster innovation, create jobs, and drive economic growth. The commenter, along with an individual commenter, stated that some studies show foreign workers have a positive impact on wages overall. Similarly, an advocacy group said limiting the amount of high-skilled foreign workers in the United States does not mean that there will be more jobs available to U.S. workers; rather, it would mean many companies would shift jobs overseas. The commenter stated that, if the H–1B program were expanded, it could result in up to 1.2 million new jobs for U.S. workers. The commenter went on to state that the program does not have a ''depressive effect'' on U.S. worker wages, and concluded by saying that, by restricting the H–1B program, the proposed rule would not have the intended effects of boosting American jobs and wages. An individual commenter stated that USCIS already has protected U.S. workers by increasing fees and updating the definition of ''specialized knowledge,'' and there is no need to distort the labor markets and harm U.S. competitiveness at a time when the U.S. can once again be a leader in technology development.

*Response:* DHS disagrees with these comments. DHS believes that salary generally is a reasonable proxy for skill level.[96] As stated in the NPRM, in most cases where the proffered wage equals or exceeds the prevailing wage, a prevailing wage rate reflecting a higher wage level is a reasonable proxy for the higher level of skill required for the position, based on the way prevailing wage determinations are made. DHS believes that an employer who offers a higher wage than required by the prevailing wage level does so because that higher wage is a clear reflection of the beneficiary's value to the employer, which, even if not related to the position's skill level *per se,* reflects the unique qualities the beneficiary possesses. While we believe that the rule may incentivize an employer to proffer a higher wage to increase their chances of selection, we also believe the employer only would do so if it was in their economic interest to do so based on the beneficiary's skill level and relative value to the employer.

DHS acknowledges that aliens may be offered salaries at level I or level II prevailing wages to work in specialty occupations and may be eligible for H–1B status. However, DHS also believes that, in years of excess demand exceeding annual limits for H–1B visas subject to the numerical allocations, the current process of random selection does not optimally serve Congress' purpose for the H–1B program. Instead, in years of excess demand, selection of H–1B cap-subject petitions on the basis of the highest OES prevailing wage level that the proffered wage equals or exceeds is more consistent with the purpose of the H–1B program and with the administration's goal of improving policies such that H–1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries.[97]

DHS does not agree that the rule will limit or restrict the number of H–1B workers, and that is not the rule's intent. DHS also does not agree that this rule will result in companies shifting jobs overseas or will harm U.S. competitiveness. Rather, DHS believes that the admission of higher-skilled workers would benefit the economy and increase the United States' competitive edge in the global labor market.

*Comment:* An individual commenter stated that the lowest paid H–1B worker makes more than H–2 workers, and yet, the administration has expanded the H–2 guest worker program and is presently seeking to *lower* prevailing wages for these workers, suggesting that ''increasing the wages paid to foreign workers is not actually a consistent policy or priority for the administration.'' The commenter also said the NPRM's reference to incidents of long-time U.S. employees being laid off in favor of younger workers are actually more complicated and show the declining enrollment in IT and STEM fields by U.S. students. The commenter went on to say that H–1B workers are more costly than U.S. workers, which demonstrates that there are not enough similarly situated U.S. workers.

*Response:* DHS disagrees with the commenter's assertions. Regarding the H–2 program, DHS disagrees that the administration's policies have been inconsistent, as these programs serve different purposes. As DHS has stated above and in the NPRM, the intent of the H–1B program is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. DHS believes that this rule reflects that intent more faithfully than a random selection process. DHS also disagrees that the instances cited in the NPRM of U.S. employers replacing qualified and skilled U.S. workers with relatively lower-skilled H–1B workers shows declining enrollment in STEM fields by U.S. students, and does not agree with the commenter's assessment regarding insufficient U.S. workers.[98] Actually,

[96] U.S. Department of Labor, *Education and Pay Level, https://www.dol.gov/general/topic/wages/educational* (''Generally speaking, jobs that require high levels of education and skill pay higher wages than jobs that require few skills and little education.'') (last visited Dec. 21, 2020). *See also* Ed Andrews, *Relationship between Skills and Wages,* Smart Solutions Group (Dec. 2015), *http://smartsolutionsgroup.net/wp-content/uploads/2015/12/Relationship-Between-Skills-and-Wages.pdf* (''There is a very strong correlation between Skills Levels and Wages—as expected, higher skills levels have higher wages and low skill levels have lower wages.); DOL IFR, 85 FR 63872 (it is a ''largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.'').

[97] *See* Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries,* University of Notre Dame (Feb. 2016), *https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf* (noting that ''additional H–1Bs lead to lower average employee earnings and higher firm profits'' and the authors' ''results are more supportive of the narrative about the effects of H–1Bs on firms in which H–1Bs crowd out alternative workers, are paid less than the alternative workers whom they crowd out, and thus increase the firm's profits despite no measurable effect on innovation''); John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* Working Paper 23153, National Bureau of Economic Research (Feb. 2017), *http://www.nber.org/papers/w23153* (''In the absence of immigration, wages for US computer scientists would have been 2.6% to 5.1% higher and employment in computer science for US workers would have been 6.1% to 10.8% higher in 2001.'').

[98] *See e.g.,* Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends,* Economic Policy Institute (Apr. 24, 2013), at 26, *https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf* (''In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce..''); Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program,* Atlantic Council (Jan. 2019), at 11, *https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf* (''By every

the fact that more than a third of recent American graduates with STEM degrees do not obtain work in a STEM field indicates that there is no shortage of qualified recent American graduates to fill STEM jobs.[99]

Finally, concerning the comment that H–1B workers are more costly than U.S. workers, DHS recognizes that employers often incur upfront costs to file H–1B petitions (including filing fees and preparation fees). However, DHS believes these upfront costs are offset by the employer's ability to legally pay their H–1B employees relatively low wages below the local median wage. Data show that the majority of H–1B cap-subject petitions have been filed for positions certified at the level I or level II prevailing wages, both of which are set below the local median wage.[100] Employers may realize additional cost savings over the span of several years as they continue to employ these H–1B workers at below-median wages without any statutory requirement to increase the workers' wage levels or wages beyond the minimum required wages. Unlike U.S. workers, H–1B workers are tied to their specific employer, and, therefore, may lack the negotiating power of similarly skilled U.S. workers to request wage increases.[101] DHS believes that the random selection process is not fair to U.S. workers whose wages may be adversely impacted by relatively lower-paid H–1B workers.

c. Lack of Evidence To Support Rulemaking

*Comments:* An advocacy group stated that the evidence provided in the NPRM is not robust enough to justify such a dramatic change in policy. According to the commenter, the agency failed to consider multiple sources that suggest the current H–1B program benefits U.S. workers and the economy. Similarly, a trade association said that the Agency ''selectively cherrypicked a small minority of studies'' from sources that regularly object to the use of temporary highly-skilled foreign talent, asserting that, had USCIS completed a more comprehensive review of literature, it would have been clear that the H–1B visa program and workers make significant contributions to the U.S. economy and society.

A joint submission from multiple organizations said that DHS even communicates its failure to gather sufficient evidence before publication, and that DHS appears to be operating under the misconception that anything can be published as an NPRM and the burden shifts to the public to analyze the potential impacts. The commenters said that DHS should gather more data before restarting the regulatory process. An individual commenter similarly said that the agency provides inadequate justifications for the proposed changes, while another individual commenter said that the proposed rule is ''half-baked and flawed in a number of ways'' and requires proper rule-making procedures. An individual commenter stated that the proposed rule does not explain how giving priority to higher wage levels is a more efficient allocation process than the current random lottery process. The commenter said the H–1B lottery is a fair solution to the issue of many petitions arriving on the same day or time, and the proposed rule would ''go beyond the principle of fairness.''

A trade association stated that the APA does not allow an agency to make significant change without completing an accurate cost-benefit analysis, which the agency did not do, nor did it allow sufficient time for stakeholders to conduct their own assessments. A company similarly stated that the Department's ''scant justification'' for wage-based selection of H–1B petitions violates the APA because a Level I or II prevailing wage does not mean that that the worker is not highly skilled or vital. The company said that the Department's reasoning for the proposed rule lacks a ''rational connection between the facts found and the choice made.'' An anonymous commenter wrote that the proposal is arbitrary and capricious, asserting that DHS does not explain the rationale behind making wages the sole indicator of a worker's eligibility for visa sponsorship.

*Response:* DHS disagrees with these comments. DHS conducted a comprehensive review of the issues, relying on both internal data and external studies and reports.[102] DHS acknowledges the articles, studies, and reports submitted by commenters that purport to show the overall benefits of H–1B workers.[103] DHS recognizes that some H–1B workers do fill gaps in the labor market and make contributions to the overall economy. However, while some studies show the benefits of H–1B workers overall, DHS also believes that sufficient evidence demonstrates that a prevalence of relatively lower-paid and lower-skilled H–1B workers is

objective measure, most H–1B workers have no more than ordinary skills, skills that are abundantly available in the US labor market. That means they are likely competing with (and substituting for) US workers, rather than complementing them as was the program's intention . . . H–1B workers are underpaid and placed in substandard working conditions, while US workers' wages are depressed, and they lose out on job opportunities'').

[99] *See* Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program,* Atlantic Council (Jan. 2019), at 7, *https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf* (''Further examining the career transitions of these graduates, we look at the reasons why a third of computer science graduates, and nearly half of engineering graduates, do not go into a job directly related to their degree (Figure E). For computer science graduates employed one year after graduation (*i.e.,* excluding those unemployed or in graduate school), about half of those who took a job outside of IT say they did so because the career prospects were better elsewhere, and roughly a third because they couldn't find a job in IT. For engineering graduates, it's about an even split, with approximately one-third each saying they did not enter an engineering job either because of career prospects or they couldn't find an engineering job. In short, of those graduates with the most IT-relevant education, a large share report they were unable to find an IT job while others found IT jobs to be paying lower wages or offering less attractive working conditions and career prospects than other, non-STEM jobs.'').

[100] *See* Daniel Costa and Ron Hira, *H–1B Visas and Prevailing Wage Level,* Economic Policy Institute (May 4, 2020), *https://www.epi.org/publication/h-1b-visas-and-prevailingwage-levels/* (explaining that the H–1B allows employers to use the H–1B program ''to pay [H–1B] workers well below market wages'' and ''undercut local wages'').

[101] *See* Ron Hira and Bharath Gopalaswamy, *Reforming US' High-Skilled Guestworker Program,* Atlantic Council (Jan. 2019), *https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf* (''The current system not only harms Americans; it also enables H–1B workers to be exploited. H–1B workers themselves are underpaid, vulnerable to abuse, and frequently placed in poor working conditions.'').

[102] *See, e.g.,* Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries,* University of Notre Dame (Feb. 2016), *https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf;* John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* Working Paper 23153, National Bureau of Economic Research (Feb. 2017), *http://www.nber.org/papers/w23153;* Daniel Costa and Ron Hira, *H–1B Visas and Prevailing Wage Level,* Economic Policy Institute (May 4, 2020), *https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/.*

[103] *See, e.g.,* Neil G. Ruiz and Jens Manuel Krogstad, *Salaries Have Risen for High-Skilled Foreign Workers in U.S. on H–1B Visas,* Pew Research Center (Aug. 16, 2017), *https://www.pewresearch.org/facttank/2017/08/16/salaries-have-risen-for-high-skilled-foreign-workers-in-u-s-on-h-1b-visas/;* A. Nicole Kreisberg, *H–1B Visas: No Impact on Wages,* American Institute for Economic Research (Sept. 2014), *https://www.aier.org/research/h-1b-visas-no-impact-on-wages/;* Jonathan Rothwell and Neil G. Ruiz, *H–1B Visas and the STEM Shortage,* The Brookings Institution (May 10, 2013), *https://www.brookings.edu/research/h-1b-visas-and-the-stem-shortage/;* Neil G. Ruiz *et al., The Search for Skills: Demand for H–1B Immigrant Workers in U.S. Metropolitan Areas,* The Brookings Institution (July 18, 2012), *https://www.brookings.edu/research/the-search-for-skills-demand-for-h-1b-immigrant-workers-in-u-s-metropolitan-areas/;* Madeline Zavodny, *The H–1B Program and Its Effects on Information Technology Workers,* Federal Reserve Bank of Atlanta (Sept. 2003), *https://www.frbatlanta.org/research/publications/economic-review/2003/q3/vol88no3_H-1B-program-and-effects-on-information-technology-workers.aspx.*

detrimental to U.S. workers.[104] As discussed in the NPRM and above, DHS further believes that the influx of relatively lower-skilled and lower-paid H–1B workers is not consistent with the dominant legislative purpose of the statute. Prioritizing registrations based on wage level likely would increase the average and median wage levels of H–1B beneficiaries who would be selected for further processing under the H–1B allocations. Moreover, it would maximize H–1B cap allocations, so that they more likely would go to the best and brightest workers.

Based on its comprehensive review of the submitted comments and available evidence, DHS has concluded that, by changing the selection process, in these years of excess demand, from a random lottery selection to selection generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds, DHS will implement the statute more faithfully to its dominant legislative purpose. DHS further believes that this will benefit the economy and increase the United States' competitive edge in attracting the best and the brightest in the global labor market, consistent with the goals of the H–1B program. It may also benefit U.S. workers as employers that might have petitioned for a cap-subject H–1B worker to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions. DHS believes that the available data and information support this rulemaking and that it is not necessary to gather more data or to restart the regulatory process.

*C. Proposed Changes to the Registration Process for H–1B Cap-Subject Petitions*

1. Proposed Wage-Based Selection (Selection Process for Regular Cap and Advanced Degree Exemption, Preservation of Random Selection Within a Prevailing Wage)

*Comment:* A business association commented that adding in a non-random variable to the H–1B cap selection process would open the door to pre-adjudication, which may add new burdens to the petitioners and USCIS. The commenter also said the addition of the wage factor may cause potential enforcement or audit actions if USCIS does not agree with a petitioner's assessment of ''corresponding wage level,'' either when adjudicating the petition or in the course of a post-adjudication audit. In addition, the commenter said the ''corresponding wage level'' listed on the lottery registration would not necessarily match the ''wage level'' designated on the Labor Condition Application (LCA) form, creating confusion.

*Response:* DHS disagrees that ranking according to the highest OES prevailing wage level that the proffered wage equals or exceeds will be a pre-adjudication, as submission of the electronic registration is merely an antecedent procedural requirement to properly file the petition. It is not intended to replace the petition adjudication process or assess substantive eligibility. With respect to new burdens resulting from the additional information provided, these are captured below in section V. Statutory and Regulatory Requirements. DHS believes that the additional burden, which is relatively small, is necessary to ensure that USCIS implements the registration system in a manner that realistically, effectively, efficiently, and more faithfully administers the cap selection process.

DHS acknowledges that the ''wage level'' listed by the petitioner on the registration form may not always match the ''wage level'' indicated on the LCA. However, DHS believes that the instructions provided in the registration system and on the H–1B petition are sufficiently clear to avoid confusion. Further, USCIS officers will be sufficiently trained on the reasons why the wage level on the registration form may not always match the LCA, and may request additional evidence from the petitioner, as appropriate, to resolve material discrepancies in this regard. However, DHS notes that USCIS may deny or revoke a petition if USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct.[105]

*Comment:* A professional association noted that DHS proposes to abruptly and unnecessarily change the selection process for H–1B cap-subject petitions by prioritizing registrants based on the highest OES prevailing wage level, and consider applicants solely based on the amount of money that they would be paid, rather than the utility that they would bring to the U.S. workforce.

*Response:* DHS believes that ranking and selecting by the highest OES prevailing wage level that the proffered wage equals or exceeds is a practical way to achieve the administration's goal of improving policies such that H–1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries. As stated previously, the new ranking system takes into account the wage level relative to the SOC code and area(s) of intended employment—as opposed to salary alone—when ranking registrations. While DHS agrees that the utility an H–1B beneficiary brings to the U.S. workforce is important, there is no practical, objective way to measure utility such that DHS could use this quality to rank and select H–1B registrations or petitions.

2. Required Information From Petitioners

a. OES Wage Level

i. Highest OES Wage Level That the Proffered Wage Would Equal or Exceed

*Comments:* Several commenters said DHS should rank registrations at OES prevailing wage level I separate from those falling below OES prevailing wage level I, so that registrations who meet wage level I are prioritized for H–1B selection over those falling below level I. Some commenters noted that the DOL IFR placed the level I wage at the 45th percentile (close to previous level III), creating vast differentiation within this large group. Therefore, the benefits of the rule of differentiating candidates would fail for at least 90 percent of registrations, as the DOL IFR would result in the prevailing wage level I and below group being much larger and DHS needing to select from that group completely at random. With that lack of differentiation, the new rule would not accomplish its purpose of retaining the best talent. Therefore, these commenters urged DHS to consider separating those registrations at or above level I wages from those falling below, as opposed to putting them into one giant group.

*Response:* DHS does not agree with the suggestions to separate OES wage level I from a wage below level I. DHS expects that all petitioners offering a wage lower than the OES wage level I wage will be using another legitimate source other than OES or an independent authoritative source, including a private wage survey. Therefore, such a change effectively could preclude petitioners that utilize one of those other sources from being selected for registration. By grouping OES wage level I and below together, those petitioners have a fair chance of selection and are not precluded from using a private wage survey as appropriate. Since the DOL IFR was set

[104] *See* The National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* 258 (Washington, DC: The National Academies Press 2017), *https://doi.org/10.17226/23550* (noting that differing results across certain studies ''may reflect immigrant heterogeneity generally and among H–1B workers in particular'').

[105] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*ii*).

aside on December 1, 2020, and is no longer being implemented, DHS will not be considering the impact of the DOL IFR in the context of this final rule.[106]

*Comments:* A professional association remarked that petitioners who use private survey data would be disadvantaged by the proposed rule and said that, even when private wage surveys provide an accurate prevailing wage, the proposed rule requires the employer to ''downgrade'' the H–1B registration to the lower OES prevailing wage level. The commenter concluded that, as a result, the proposed rule's artificial preference in the registration system to what is admittedly incomplete or possibly inaccurate OES wage data reduces the chance that employers intending to pay the H–1B required wage based on the statutory ''best information available''—in this case a private industry survey—will see their registration selection chances materially reduced. A law firm questioned which factors contributed to DHS's decision to use the OES wage levels as opposed to wage leveling from a permissible private wage survey.

*Response:* DHS appreciates the commenter's question. When determining how to rank and select registrations (or petitions) by wage level, DHS decided to use OES prevailing wage levels because they are the most comprehensive and objective source for comparing wages. The OES program produces employment and wage estimates annually for nearly 800 occupations.[107] Additionally, most petitioners are familiar with the OES wage levels since they are used by DOL and have been used in the foreign labor certification process since 1998.[108] OES wage level data is publicly available through the Foreign Labor Certification Data Center's Online Wage Library. Private wage surveys are not publicly available and do not always have four wage levels.

DHS disagrees with the commenter's assertion that petitioners who use private survey data would be disadvantaged by the rule. Petitioners may continue to use private wage surveys, if they choose to do so, to establish that they will be paying the beneficiary a required wage. This rule, however, will rank and select registrations or petitions, as applicable, based on the highest OES wage level that the proffered wage equals or exceeds as OES wage data is the most comprehensive and objective source for comparing wages.

*Comment:* An individual commenter stated that the requirement to designate the wage level is confusing because DHS is asking petitioners to designate not the wage level associated with the job opportunity, but the highest OES wage level for which the proffered wage exceeds the OES wage. The commenter said asking petitioners to determine two different wage levels makes the process deliberately complex and ripe for error, which could be fatal given the proposed increased authority of USCIS to deny petitions for discrepancies in wage levels. The commenter also expressed concern that the position, its substantive job duties, its occupational classification, the intended worksite, the prevailing wage, and the actual wage are now required at the registration stage in order to comply with the ''complicated ranking-wage-level calculation.''

*Response:* DHS does not agree with the comment stating that asking petitioners to specify the highest corresponding OES wage level that the proffered wage would equal or exceed on the registration is confusing or burdensome. Further, DHS disagrees with the comment stating that the position, its substantive job duties, its occupational classification, the intended worksite, the prevailing wage, and the actual wage are now required at the registration stage. In addition to the information required on the current electronic registration form (and on the H–1B petition) and for purposes of this selection process and to establish the ranking order, a registrant (or a petitioner if registration is suspended) would be required to provide only the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment. While the OES wage level assessment would be based on the SOC code, area of intended employment, and proffered wage, the registrant would not need to supply the SOC code, area of intended employment, and proffered wage at the registration stage.

*Comment:* A professional association asserted that the U.S. Bureau of Labor Statistics' (BLS) OES wage survey skews wage data higher for several professions, including physician specialties. The commenter suggested that wage survey data collected from employees has significant issues, including that the data is collected voluntarily, wage data is grouped rather than provided for individual employees, larger urban centers are overrepresented compared to smaller practices, and physicians in rural areas are underreported. The association added that, in situations where there is less wage data, DHS will be unable to accurately adjudicate cap slots, citing data from the American Immigration Council and the Foreign Labor Certification Data Center. The association also said the DOL IFR increases the prevailing wage requirements and exacerbates the issue by establishing a default wage for physicians of $208,000 where data is unavailable. The professional association stated that the BLS prevailing wage does not comply with DHS's claim that higher skill level positions must be paid higher wages. The association asserted that statistical analysis problems with the BLS OES survey would cause the population of H–1B physicians to be paid equally regardless of skill or experience. The commenter further stated that rural and other underserved areas will not meet the wage requirements and will lose access to critically needed physicians.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the DOL IFR, which took effect on October 8, 2020, and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H–1B, H–1B1, and E–3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. On December 3, 2020, DOL announced that it was taking necessary steps to comply with the courts' orders and will no longer implement the IFR. These steps include making required technical changes to the Foreign Labor Application Gateway (FLAG) system to replace the October 8, 2020, through June 30, 2021, wage source year data that was implemented under the DOL IFR with the OES prevailing wage data that was in effect on October 7, 2020, and reflecting such data updates in the Foreign Labor

[106] On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the DOL IFR, 85 FR 63872. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. Also, on December 3, 2020, DOL announced that it would no longer implement the IFR, consistent with the above referenced court orders.

[107] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics, https://www.bls.gov/oes/home.htm* (last visited Dec. 14, 2020).

[108] *See* U.S. Department of Labor, Employment and Training Administration, *Prevailing Wages (PERM, H–2B, H–1B, H–1B1, and E–3), https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage* (last visited Dec. 14, 2020).

Certification Data Center Online Wage Library [109] at *https://www.flcdatacenter.com/* with the correct prevailing wage data for each SOC and area of intended employment through June 30, 2021.[110]

While prevailing wage level data remains unavailable for some SOC codes in some areas of intended employment, DHS believes that its solution in that limited circumstance, as proposed in the NPRM and retained in this final rule, still will allow DHS to select registrations according to the metric of the registrant's self-identified prevailing wage level as calculated using DOL's prevailing wage level guidance.[111] DHS recognizes that this solution is imperfect as it does not provide a means for those registrants to proffer wages that equal or exceed higher prevailing wage levels than those commensurate with the position requirements. However, DHS concludes that it is the best available option to serve the overarching goal of revising the selection process to ensure that H–1B petitions are filed for positions requiring relatively higher skill levels or proffering wages commensurate with higher skill levels. The commenter's statements that limitations in OES data would cause the population of H–1B physicians to be paid equally regardless of skill or experience, or that such limitations undermine the premise that higher skill level positions must be paid higher wages, is beyond the scope of this rulemaking. This rule does not require an employer to pay a certain wage. This rule merely pertains to ranking and selection of registrations or petitions, as applicable, based on corresponding wage level. In the limited instance where OES data is unavailable, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration, notwithstanding the proffered salary.

[109] The Foreign Labor Certification Data Center, a component of the U.S. Department of Labor Office of Foreign Labor Certification, is the location of the Online Wage Library for prevailing wage determinations. U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, *https://www.flcdatacenter.com/* (last visited Dec. 15, 2020).

[110] DOL, Employment and Training Administration, Foreign Labor Certification, *Announcements https://www.dol.gov/agencies/eta/foreign-labor* (last visited Dec. 21, 2020).

[111] U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

ii. Highest OES Wage Level When There Is No Current OES Prevailing Wage Information

*Comment:* A business association commented that, although using the prevailing wage worksheet to determine wage level makes sense, there is no way to escalate to a higher corresponding wage level by paying more, unlike when an OES wage is used. The commenter added that the unavailability of an OES wage may be an indication that a job is new or novel, and therefore may be even more in need of H–1B workers to fulfill employment needs.

*Response:* DHS recognizes that some occupations do not have current OES prevailing wage information available on DOL's Online Wage Library. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant would follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration. While petitioners may not be able to increase their chance of selection by increasing the proffered wage, they can increase their chance of selection by petitioning for positions requiring higher skill, experience, or education levels.

DHS believes that, in the absence of current OES prevailing wage information, selecting according to wage level is the best way to ensure that registrations (or petitions) are selected consistent with the primary purpose of the H–1B program, which is to help U.S. employers fill labor shortages in positions requiring highly skilled or highly educated workers. DHS data shows a correlation between higher salaries and higher wage levels.[112] Thus, even in those limited instances where no OES prevailing wage information is available, DHS believes that selecting according to wage level is likely to result in selection of the highest-paid or highest-skilled beneficiaries, consistent with the goals of the H–1B program. DHS will not comment on whether the unavailability of OES wage indicates that a job is new, novel, or in more demand, as that is outside the scope of this rule.

*Comment:* One commenter asked, where the OES wage levels are missing, what penalties, if any, will be applied to petitioners or beneficiaries if USCIS disagrees with the wage level selected by the petitioner after selection has occurred.

*Response:* DHS expects each registrant would be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and established DOL guidance, all prospective petitioners would be able to determine the appropriate OES wage level for purposes of completing the registration or petition, as applicable, regardless of whether they were to specify an OES wage level or utilize the OES program as the prevailing wage source on an LCA.

During the adjudication process, if USCIS disagrees with the wage level selected by the petitioner, USCIS will comply with 8 CFR 103.2(b)(8) and may provide the petitioner an opportunity to explain the selected wage level, as applicable. If USCIS determines that the petitioner failed to meet its burden of proof in establishing that it selected the appropriate SOC code for the position, or if USCIS determines that the petition was not based on a valid registration (*e.g.,* if there is a discrepancy in wage levels between the registration and the petition), USCIS may deny the petition. If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.[113] If USCIS determines that the statement of facts contained in the petition or on the LCA was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, USCIS may revoke the approval of that petition.[114]

*Comment:* A professional association stated that, because the registration system does not contemplate a real-time adjudication of whether occupations lacking current OES prevailing wage information are correctly slotted under USCIS' selection system, there would be no fail-safe mechanism for employers to confirm that the wage-preference selection process in fact operated as USCIS predicted in the proposed rule. The commenter stated that, before any further rule is published, DHS, DOL and OMB should investigate and determine whether any proposed wage-preference H–1B selection process relying upon

[112] For example, in Computer and Mathematical Occupations, the 2019 national median salary for level I was $78,000; for level II was $90,000; for level III was $115,000; and for level IV was $136,000. Department of Homeland Security, USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, VIBE, DOL OFLC TLC Disclosure Data queried 9/2020 TRK 6446.

[113] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*ii*).

[114] *See* 8 CFR 214.2(h)(11)(iii)(A)(*2*).

incomplete OES data can be established, notwithstanding these apparent data gaps and deficiencies. The commenter concluded that, despite the inadequacy or unavailability of OES data, the proposed rule ignores the requirement that wage data be sourced from ''the best information available,'' placing unwarranted and artificial reliance on OES data despite its faults or lack of availability.

*Response:* DHS recognizes that prevailing wage level data remains unavailable for some SOC codes in some areas of intended employment. However, DHS still believes that OES provides the most comprehensive and objective publicly available source for obtaining prevailing wage information and, thus, is still the best available option to serve the overarching goal of improving policies such that H–1B classification is more likely to be awarded to petitioners seeking to employ higher-skilled and higher-paid beneficiaries.[115]

iii. Lowest OES Wage Level That the Proffered Wage Would Equal or Exceed When Beneficiary Would Work in Multiple Locations or Positions

*Comment:* A commenter said employers may relocate an employee to temporarily work remotely in a location where average salary is low to keep wages low while increasing the H–1B wage level and the chance of being selected. The commenter suggested that the area code used for the selection of H–1B registrations only should be the registered official address of the company, instead of anywhere where the employee will work, concluding that employers should be fined for misrepresenting work locations to take advantage of lower wages.

*Response:* DHS appreciates this commenter's concern, but believes the commenter misunderstood how the new H–1B cap selection process will work and the limitations contained in the proposed rule to limit the potential for abuse or gaming of the selection process. If the H–1B beneficiary will work in multiple locations or multiple positions, the registrant or petitioner must specify on the registration or petition, as applicable, the *lowest* corresponding OES wage level that the proffered wage will equal or exceed for the relevant SOC code in the area of intended employment, and USCIS will rank and select based on the *lowest* corresponding OES wage level.

DHS provides the following example for illustrative purposes only. A prospective employer intends to employ an H–1B beneficiary as a level I ''Civil Engineer'' position (SOC code 17–2051) at two locations: San Francisco, California and Montgomery, Alabama. The Alabama location was specifically chosen because of that locality's generally lower prevailing wages. The required level I prevailing wage for each area of intended employment is $77,147 per year[116] and $62,858 per year,[117] respectively. In this scenario, to meet the level I prevailing wage for the San Francisco area of intended employment, the minimum annual wage the prospective petitioner must offer to the beneficiary is $77,147. While an annual salary of $77,147 would exceed the level II prevailing wage for the Montgomery, Alabama, area of intended employment,[118] the prospective petitioner still must select Level I for purposes of the registration because that is the *lowest* corresponding OES wage level that the proffered wage will equal or exceed for the relevant SOC code in all areas of intended employment. This rule also includes provisions authorizing USCIS to deny an H–1B petition if USCIS determines that the statements on the registration or petition were inaccurate, fraudulent or misrepresented a material fact.[119] USCIS also may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition.[120]

*Comment:* A professional association expressed concern with the proposed rule's language stating, ''if the beneficiary will work in multiple locations, or in multiple positions if the registrant is an agent, USCIS will rank and select the registration for the lowest corresponding OES wage level that the proffered wage will equal or exceed.''[121] The commenter stated that, basing the chance for selection on the lower wage figure is an ''arbitrary'' protocol without explanation. Likewise, an individual commenter said the provision is unfairly discriminatory and lacks adequate justification, adding that it is ''unconscionable to use an inverted system'' for ranking.

*Response:* DHS chose to use the lowest corresponding OES wage level that the proffered wage will equal or exceed in the case of multiple locations or multiple positions to prevent gaming of the registration process. If DHS were to invert the process and rank based on the highest corresponding OES wage level that the proffered wage were to equal or exceed, then petitioners could place the beneficiary in a lower-paying position for most of the time and a higher-paying position for only a small percent of the time, but use that higher-paying position to rank higher in the selection process and increase their chances of being selected in the registration process. Similarly, in the case of multiple locations, petitioners could place the beneficiary in a higher-paying locality for only a small percent of time, but use that higher-paying locality to rank higher in the selection process and increase their chances of being selected in the registration process.

iv. Other Comments on OES Wage Level

*Comment:* Several commenters said that the proposed rule's changes to prevailing wage levels are in direct opposition to established guidance set forth in the DOL Employment and

[115] *See* Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries,* University of Notre Dame (Feb. 2016), *https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf* (noting that ''additional H–1Bs lead to lower average employee earnings and higher firm profits'' and the authors' ''results are more supportive of the narrative about the effects of H–1Bs on firms in which H–1Bs crowd out alternative workers, are paid less than the alternative workers whom they crowd out, and thus increase the firm's profits despite no measurable effect on innovation''); John Bound et al., *Understanding the Economic Impact of the H–1B Program on the U.S.,* Working Paper 23153, National Bureau of Economic Research (Feb. 2017), *http://www.nber.org/papers/w23153* (''In the absence of immigration, wages for US computer scientists would have been 2.6% to 5.1% higher and employment in computer science for US workers would have been 6.1% to 10.8% higher in 2001.'').

[116] U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, *https://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2051&area=41860&year=21&source=1* (last visited Dec. 21, 2020) (providing prevailing wage level values for SOC code 17–2051 in San Francisco-Oakland-Hayward, CA, in the All Industries database for 7/2020–6/2021).

[117] U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, *https://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2051&area=33860&year=21&source=1* (last visited Dec. 21, 2020) (providing prevailing wage level values for SOC code 17–2051 in Montgomery, AL, in the All Industries database for 7/2020–6/2021).

[118] U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, *https://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2051&area=33860&year=21&source=1* (last visited Dec. 21, 2020) (showing *that a* level II wage = $74,901).

[119] *See* new 8 CFR 214.2(h)(10)(ii).

[120] *See* new 8 CFR 214.2(h)(10)(ii).

[121] 85 FR 69236, 69263.

Training Administration Prevailing Wage Determination Policy Guidance.[122]

*Response:* This rule does not conflict with or change established DOL guidance. DHS clearly stated in the NPRM that this ranking and selection process will not alter the prevailing wage levels associated with a given position for DOL purposes, which are informed by a comparison of the requirements for the proffered position to the normal requirements for the occupational classification.[123]

*Comment:* A professional association wrote that the OES wage data has various shortcomings, and there are advantages to using a variety of wage data. Prevailing wage data can originate from multiple sources, including wage surveys published by private organizations and employer-conducted surveys. The association said that BLS OES survey data used to calculate prevailing wages is not designed for foreign labor certification, and OES survey data captures no information about differences based on skills, training, experience or responsibility levels of the workers, all of which are factors the INA requires DHS to consider. The association said that the OES survey is the best available source of wage data for the Department's purposes, but it is not perfectly suited to the H–1B, H–1B1, and E–3 classifications, nor to the Permanent Labor Certification Program (PERM). The professional association also commented that the proposed rule does not describe the cases when OES prevailing wage data would be unavailable or how USCIS officials would be trained to interpret DOL guidance, and petitioners who cannot use Online Wage Library data would have no way to know whether USCIS officials misinterpreted the DOL guidance and mistakenly disagreed with an employer's wage level selection.

*Response:* When determining how to rank and select registrations (or petitions, as applicable) by the highest OES prevailing wage level that the proffered wage equals or exceeds, DHS decided to use OES prevailing wage levels because OES is the most comprehensive and objective source for comparing wages. The OES program produces employment and wage estimates annually for nearly 800 occupations.[124] Additionally, most petitioners are familiar with the OES wage levels since they are used by DOL and have been used in the foreign labor certification process since 1998.[125] During the adjudication process, if USCIS disagrees with the wage level selected by the petitioner, USCIS will comply with 8 CFR 103.2(b)(8) and may provide the petitioner an opportunity to explain the wage level, as applicable. If USCIS determines that the petitioner failed to meet its burden of proof in establishing that it selected the appropriate SOC code for the position, or if USCIS determines that the petition was not based on a valid registration (*e.g.,* if there is a discrepancy in wage levels between the registration and the petition), USCIS may deny the petition.[126] If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.[127] If USCIS determines that the statement of facts contained in the petition or on the LCA was not true and correct, inaccurate, fraudulent, or misrepresented a material fact, USCIS may revoke the approval of that petition.[128]

b. Attestation to the Veracity of the Contents of the Registration and Petition (Including Comments on Rejections, Denials, and Revocations)

*Comments:* One commenter noted the need to ensure that ranking and selection as described would not enable attempts to increase the chance of selection by representing one wage level at the registration stage and a lower wage level at the H–1B petition filing stage.

*Response:* DHS appreciates and shares the commenter's concern. New 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*iii*), (h)(10)(ii), and (h)(11)(iii)(A)(*2*) address the concern that registrants could misrepresent wage levels at the registration stage to increase chances of selection. Specifically, this final rule empowers USCIS to deny a petition if USCIS determines that the statements on the registration or petition were inaccurate, fraudulent, or misrepresented a material fact. The rule also authorizes USCIS to deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection. The ability to deny or revoke approval of an H–1B petition in such a context will defend against registrants and petitioners attempting to abuse the H–1B cap selection process by misrepresenting wage levels.

*Comment:* One commenter asked what factors DHS will use to determine if a petitioner attempted to circumvent the proposed rule by filing a subsequent new petition with a lower wage under a related entity, and whether DHS will consider that related entities may have different compensation ranges for similar positions in making this determination.

*Response:* DHS thanks this commenter for the question. Under new 8 CFR 214.2(h)(10)(ii), USCIS may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition. Whether the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process is an issue of fact that USCIS will determine based on the totality of the record. As such, DHS cannot provide an exclusive list of factors that USCIS will consider in such adjudications. In general, however, the petitioner or a related entity bears the burden of proof to demonstrate that: the new or amended petition is not part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process; the initial H–1B petition and the underlying registration, when applicable, was based on a legitimate

[122] U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.*

[123] 85 FR 69236, 69237.

[124] U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Occupational Employment Statistics, https://www.bls.gov/oes/home.htm* (last visited on Dec. 11, 2020).

[125] U.S. Department of Labor, Employment and Training Administration, *Prevailing Wages (PERM, H–2B, H–1B, H–1B1, and E–3), https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage* (last visited Dec. 11, 2020).

[126] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*i*).

[127] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*ii*).

[128] *See* new 8 CFR 214.2(h)(11)(iii)(A)(2).

job offer;[129] and the new or amended petition is nonfrivolous.[130]

Further, DHS notes that, under the current registration system, the petitioner identified at the registration stage must match the petitioner of the subsequently filed petition. 8 CFR 214.2(h)(8)(iii)(D) states that a petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner. This rule has not changed this requirement. Accordingly, USCIS may deny an H–1B cap-subject petition if an entity other than the petitioner identified at the registration stage, including a related entity, files the petition.

*Comment:* An individual suggested allowing future H–1B extensions or renewals only with a wage level that is equal or greater than the wage level selected in the lottery for the first time.

*Response:* H–1B extensions or renewals are not impacted by this rule, and DHS declines to impose a universal requirement that all extension or renewal requests must be for a position at the equal or greater wage level. Employers are permitted to file an extension petition requesting continuation of previously approved employment without change with the same employer, which most likely involves a position at the same wage level. Furthermore, employers are permitted to file extension or amended petitions requesting new employment, change in previously approved employment, new concurrent employment, change of employer, or amended employment. All of these petition types could involve positions with different SOC codes, which makes a straight comparison of wage levels impractical.

However, under new 8 CFR 214.2(h)(10)(ii), USCIS may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition.

*Comment:* An individual commenter said that the formal certification requirement, whereby the petitioner's authorized signatory certifies ''that the proffered wage on the petition will equal or exceed the wage level on the applicable registration,'' does not recognize that registrations are submitted in March for a fiscal year beginning the following October. Therefore, particularly in years such as FY 2021 where there is a second round of selections, H–1B cap petitions may be filed after OES wages have changed. The commenter said the new question added to the registration seems to address this concern, by specifying ''[a]s of the date of this submission . . . ,'' but the formal certification that is binding on the employer does not make this distinction, which could lead to unnecessary and inappropriate liability. The commenter said that the certification should be revised to reflect only an attestation that the wage ''will equal or exceed the prevailing wage, in effect at the time of submission, that is associated with the wage level selected in the registration.''

*Response:* DHS thanks the commenter, but declines to adopt the suggestion. As the commenter notes, the registration form makes sufficiently clear that the information provided on the registration is ''as of the date of submission of this registration.'' DHS believes that further changes to the form are unnecessary and could potentially lead to gaming of the registration system.

3. Requests for Comments on Alternatives

*Comment:* A research organization and a labor union recommended having staggered filing deadlines for petitions by wage levels as an alternative in case the proposed rule is met with legal challenges. Under this alternative, USCIS could have a first filing period, where only petitions with jobs paying level IV are considered. Once all the level IV petitions are submitted and approved, then a second filing period at a later date could be set to receive only petitions with jobs paying level III wages. After those are collected and approved, if there are any visas remaining under the H–1B cap, then a filing period for level II wages would be next, and finally a filing period for level I. This way, all of the petitions would not be submitted at once, thereby still allowing DHS to adjudicate and allocate petitions ''in the order in which'' they were filed, as the statute requires. If there were more petitions than available H–1B slots at a particular wage level, there could be a ''mini-lottery'' within that wage level.

*Response:* DHS appreciates the commenters' suggestions to use staggered filing deadlines. However, DHS believes it is not necessary to create staggered filing deadlines since, as stated in the NPRM and as explained above, this rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112.[131] Further, DHS believes that staggered filing deadlines may create operational challenges for managing the cap and adjudicating petitions in a timely manner. Staggered filing periods could also have unintended consequences for petitioners filing H–1B cap-subject petitions for beneficiaries who are in F–1 status and seeking a change of status.[132] Therefore, DHS declines to adopt this suggestion.

*Comment:* One commenter suggested using only the beneficiary's annual wage to prioritize the selection of registrations.

*Response:* DHS appreciates the commenter's suggestion to prioritize selection based on annual wage. However, DHS believes that selecting registrations or petitions, as applicable, solely based on the highest salary would unfairly favor certain professions, industries, or geographic locations. Therefore, DHS believes that prioritizing generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment is the better alternative.

*Comment:* Several commenters were concerned about the possibility of abuse by companies who would offer part-time positions at greater hourly wages, but would reduce overall working hours, to increase their chance of selection. Other commenters expressed similar concerns about potential abuse of part-time positions, indicating that review should be stricter for part-time H–1B applicants.

*Response:* This final rule authorizes USCIS to reject or deny a petition or, if approved, revoke the approval of a petition, if the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct.[133] Similarly, this final rule authorizes USCIS to deny or revoke approval of a subsequent new or

[129] *See* new 8 CFR 214.2(h)(10)(ii) (''A valid registration must represent a legitimate job offer.''); U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Policy Memorandum PM–602–0114, *Rescission of Policy Memoranda* (June 17, 2020), *https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf* (''A bona fide job offer must exist at the time of filing [the H–1B petition].'').

[130] *See* 8 CFR 214.2(h)(2)(i)(H).

[131] 85 FR 69236, 69242.

[132] *See* 8 CFR 214.2(f)(5)(vi).

[133] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*ii*).

amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection.[134] Thus, if USCIS finds that an employer misrepresented the part-time or full-time nature of a position, the number of hours the beneficiary would work, or the proffered salary, then USCIS could deny or revoke the petition. The ability to deny or revoke approval of an H–1B petition in this context will militate against registrants and petitioners attempting to abuse the H–1B cap selection process through misrepresentation.

*Comment:* One commenter suggested that, if USCIS were to receive and rank more registrations (or petitions, in any year in which the registration process is suspended) at a particular prevailing wage level than the projected number needed to meet the numerical limitation, then USCIS should rank and choose registrations by the highest prevailing wage within that wage level. Another commenter stated that visas should be allocated by the prevailing wage, even within each level.

*Response:* DHS does not believe that selecting the highest prevailing wage within a wage level is a better alternative to randomly selecting within a single wage level when USCIS receives more registrations (or petitions, in any year in which the registration process is suspended) at a particular prevailing wage level than the projected number needed to meet the numerical limitation. DHS prefers to give all registrations ranked at the particular wage level the same chance of selection because those registrations generally would represent workers at the same skill level. If DHS were to select the highest prevailing wage within a wage level, that could unfairly advantage registrations or petitions for positions in higher-paying metropolitan areas or occupations.

*Comment:* One commenter suggested giving preference to beneficiaries with U.S. degrees. Another commenter stated that DHS should consider adding an advantage to candidates who receive a U.S. education as this will benefit U.S. institutions of higher education.

*Response:* DHS declines to adopt the commenters' suggestions. Registrations or petitions, as applicable, submitted for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education already have a higher chance of selection through the administration of the selection process. DHS reversed the order in which USCIS selects registrations or petitions, as applicable, which was expected to result in an increase in the number of H–1B beneficiaries with a master's degree or higher from a U.S. institution of higher education selected by up to 16 percent each year[135] and resulted in an 11 percent increase in FY 2020.[136]

*Comment:* Some commenters said that DHS should consider ranking by years of experience, rather than by wage. One commenter asked DHS to give an advantage to candidates who have work experience in the United States.

*Response:* DHS declines to adopt these alternatives, as ranking by years of experience would not best accomplish the goal of attracting the most highly skilled workers. DHS believes that salary, relative to others in the same occupational classification and area of intended employment, rather than years of experience, is generally more indicative of skill level and the relative value of the worker to the United States.

*Comment:* A few commenters said that DHS should consider providing quotas for each wage level, rather than simply ranking and selecting in descending order by wage levels. Other commenters suggested setting a limit or quota on the number of registrations submitted by certain types of employers, such as staffing agencies or H–1B dependent companies. Another commenter supported measures to prevent staffing companies from filing multiple registrations for offshore workers and stated that companies should not be able to submit more than one registration per beneficiary. Another commenter stated that it is ''crucial'' to regulate consulting companies and staffing agencies.

*Response:* DHS declines to pursue the alternative of setting quotas for each wage level or for certain types of companies as this alternative would not best accomplish the goal of attracting the most highly skilled workers. With respect to comments about prohibiting staffing companies from filing multiple registrations, DHS declines to adopt the commenters' suggestions as DHS regulations already prohibit an employer from submitting more than one registration per beneficiary in any fiscal year.[137] Comments about the need to further regulate consulting and staffing companies are outside the scope of this final rule.

*Comment:* A few commenters suggested that DHS prohibit multiple H–1B petitions for the same beneficiary by different employers.

*Response:* DHS regulations already prohibit a petitioner, or related entities, from submitting more than one H–1B cap-subject petition for the same beneficiary in the same fiscal year, absent a legitimate business need.[138] Because registration is not intended to replace the petition adjudication process or to assess eligibility, USCIS cannot feasibly determine at the registration stage whether different entities that submit registrations on behalf of the same beneficiary are ''related'' or have a ''legitimate business need.'' Further, INA section 214(g)(7), 8 U.S.C. 1184(g)(7), allows for ''multiple petitions [to be] approved for 1 alien.'' For these reasons, DHS declines to adopt the commenters' suggestion.

*Comment:* One commenter stated that DHS should consider increasing the numerical cap exemption for beneficiaries who have earned a master's or higher degree from a U.S. institution of higher education as most of the highly skilled positions do not depend entirely on the number of years of experience, but on the higher education degree requirements.

*Response:* This rule does not affect either the statutorily mandated annual H–1B numerical limitation of 65,000 on the number of aliens who may be issued initial cap-subject H–1B visas or otherwise provided initial H–1B status, or the annual cap exemption for 20,000 aliens who have earned a master's or higher degree from a U.S. institution of higher education.[139] As the numerical allocations are set by statute, DHS lacks the authority to adopt the commenter's suggestion.

*Comment:* An individual suggested DHS implement a ''market based cap and selection system'' by first identifying areas of the job market, like medical workers, that are most in need at the moment and, from there, ranking by wage or wage level.

*Response:* DHS believes that identifying areas of the job market that are most in need is not feasible, as it is subjective and would be subject to constant change. This rule is not a

[134] *See* new 8 CFR 214.2(h)(8)(iii)(D)(*1*)(*iii*).

[135] H–1B Registration Final Rule, 84 FR 888, 890.

[136] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *DHS Proposes Minimal Registration Fee for Petitioners Seeking to File H–1B Cap-Subject Petitions* (Sept. 3, 2019), *https://www.uscis.gov/news/alerts/dhs-proposes-minimal-registration-fee-for-petitioners-seeking-to-file-h-1b-cap-subject-petitions.*

[137] *See* 8 CFR 214.2(h)(8)(iii)(A)(*2*).

[138] *See* 8 CFR 214.2(h)(2)(i)(G).

[139] *See* INA section 214(g)(1)(A) and (5)(C), 8 U.S.C. 1184(g)(1)(A) and (5)(C).

temporary rule that is limited in duration to the COVID–19 pandemic, and regularly adjusting selection criteria based on the needs of the job market would be administratively burdensome. Therefore, DHS declines to adopt the commenter's suggestion.

*Comments:* A few commenters proposed that DHS prioritize selection based on multiple factors, including the prospective beneficiary's degree from a U.S. institution, the length of time legally studying or working in the United States, skills, wages, and other qualifications. Other commenters stated that the DHS should weigh other desirable factors, such as whether H–1B employees are U.S. university graduates and whether the petitioner is a small business contributing a significant amount of their income to wages. This would allow small businesses to compete for H–1B visas and prevent larger corporations from being the only employers to benefit from the H–1B program. Another comment urged DHS to create a prioritization system that incentivizes employers to petition for permanence for H–1B workers, among other desirable employer behavior in addition to fair compensation.

*Response:* DHS believes that identifying and weighing multiple factors is not feasible, as such an approach could be overly complicated, unpredictable, and subjective. Therefore, DHS declines to adopt the commenters' suggestions.

*Comment:* A professional association requested that DHS exempt physicians from this rule. An individual suggested providing exceptions or waivers for certain industries, such as the healthcare/pharmaceutical fields, due to the different experience requirements in those fields.

*Response:* DHS declines to exempt physicians or other specific occupations or fields from the rule. While DHS certainly appreciates the significant challenges faced by healthcare professionals, especially during the current COVID–19 pandemic, DHS recognizes that there are many other occupations that can be considered critical now and at various times in the future. Carving out exceptions for some occupations would be highly problematic, particularly as this rule is not a temporary rule that is limited in duration to the COVID–19 pandemic.

*Comment:* An individual commented on the alternative proposal of weighting registrations such that ''a level IV position would have four times greater chance of selection than a level I position, a level III position would have three times greater chance of selection than a level I position, and so on.'' The commenter questioned why DHS set the multiples at 4 times, 3 times, and 2 times.

*Response:* The multiples of 4 times, 3 times, and 2 times, correspond to wage levels IV, III, and II, respectively. As this commenter did not provide additional rationale in support of or against this alternative, DHS will not further consider this alternative.

*D. Other Issues Relating to Rule*

1. Requests To Extend the Comment Period

*Comments:* A few commenters and a professional association stated that the public has not been given sufficient time to comment on the proposed rule. One commenter said that there is no substantiated reason to limit the comment period and that doing so degrades the rulemaking process. An individual commenter stated that implementing these changes for the FY 2022 H–1B cap filing season would cause even more uncertainty for international students who already have faced enough uncertainty over the past year due to COVID–19, the Student and Exchange Visitor Program proposed rule,[140] and USCIS processing times.

An individual commenter and a university requested that the comment period be extended to 60 days because of the proposed rule's magnitude and the impacts of COVID–19 on employers' resources. A professional association requested the same extension to allow for meaningful public comment, citing the language of E.O. 12866 and E.O. 13563, explaining that those executive orders recommend a comment period of no less than 60 days. The association listed six issues for which the proposed rule requests feedback and asserted that a 30-day comment period does not allow adequate time to address these issues. The association also said that, since this rule was published during the Thanksgiving season, the comment period was effectively shortened even further, undercutting the purpose of the notice and comment process. An individual commenter questioned why DHS was ''rushing'' the proposed rule during the holiday season as opposed to providing more time for public comment.

*Response:* While DHS acknowledges that E.O. 12866 and 13563 indicate that agencies generally should provide 60 days for public comment, DHS believes that the 30-day comment period was sufficient and declines to extend the comment period. This rule is narrow in scope, and 30 days was sufficient time for the public to determine the impacts of the proposed rule, if any, and to prepare and submit comments. The sufficiency of the 30-day comment period is demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. Given the narrow scope of the rule, the quantity and quality of comments received in response to the proposed rule, and other publicly available information regarding the rule, DHS believes that the 30-day comment period has been sufficient.

2. Rulemaking Process

a. Multiple H–1B Rulemakings

*Comments:* An anonymous commenter stated that the proposed rule does not discuss the DOL IFR,[141] or explain whether DHS and DOL consulted with each other in drafting the rules. The commenter added that Congress has given DOL the primary authority in protecting U.S. labor, and the proposed rule does not address how it would interact with the DOL rule, or why the proposed rule was necessary given the DOL IFR.

An advocacy group stated that the proposed rule should not be implemented while the DOL IFR and the DHS IFR, *Strengthening the H–1B Nonimmigrant Visa Classification Program* (H–1B Strengthening IFR),[142] were pending and being challenged in court. The commenter said it would be impossible to comment on the proposed rule without considering the impacts of the other two rules that will affect the H–1B process as well. Similarly, a research organization wrote that recently proposed rules by Federal agencies with respect to wages for foreign workers in work visa programs have been inconsistent and confusing. An anonymous commenter stated that their workplace has been overworked for months responding to the multiple regulatory changes to the H–1B program.

*Response:* On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the DOL IFR and the DHS IFR. Similarly, on December 3, 2020, the U.S. District

[140] DHS, U.S. Immigration and Customs Enforcement, *Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media,* 85 FR 60526 (Sept. 25, 2020).

[141] 85 FR 63872.

[142] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Strengthening the H–1B Nonimmigrant Visa Classification Program,* 85 FR 63918 (Oct. 8, 2020).

Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and is no longer implementing the DOL IFR. DHS also took necessary steps to comply with the order in *Chamber of Commerce, et al.* v. *DHS, et al.,* and is not implementing the DHS IFR. DHS, therefore, disagrees with the commenter's assertions that DHS must consider the DOL and DHS IFRs in the context of this final rule as both IFRs were set aside and are no longer being implemented.

b. Other Rulemaking Process Comments

*Comments:* A joint submission from multiple organizations opposed the proposed rule and said that they were willing to participate in an informal dialogue with DHS or formally participate in an Advance Notice of Proposed Rulemaking process to help DHS determine whether a rule is needed, what regulation to develop, and viable alternative suggestions. A trade association also opposed the rule and advised USCIS to pursue a formal rulemaking effort that provides stakeholders with more input before the formal rulemaking process begins.

*Response:* DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. Given the narrow scope of the rule, the quantity and quality of comments received in response to the proposed rule, and other publicly available information regarding the rule, DHS believes that the public has had sufficient opportunity to participate in the rulemaking process.

*Comment:* A professional association commented that the public had no advance notice that the proposed rule was forthcoming because it was never listed on the Unified Agenda. The association also said USCIS had previously concluded that the policy now being proposed was not a permissible agency action, and therefore stakeholders were not prepared to conduct the sophisticated analysis necessary to assess the policy now being proposed in this rule.

*Response:* DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. Further, DHS explained in the NPRM that this rule is consistent with and permissible under DHS's general statutory authority provided in INA sections 103(a), 214(a) and (c), 8 U.S.C. 1103(a), 1184(a) and (c), and HSA section 102, 6 U.S.C. 112, and DHS believes that the comment period provided sufficient time to assess the rule.

*Comment:* A research organization wrote that the administration waited until the 2020 election to take substantive action on the H–1B program, and while DOL and USCIS have legal authority to make the regulatory changes, the timing and regulatory process have made them susceptible to legal challenges. An individual commenter said that the administration will change in a few weeks and suggested that the proposed rule is being rushed into implementation before that happens. An individual commenter said USCIS should wait to promulgate the rule until the new presidential administration takes over and the Senate confirms a new head of both USCIS and DHS.

*Response:* DHS agrees that it has the legal authority to amend its regulations governing the selection of registrations submitted by prospective petitioners seeking to file H–1B cap-subject petitions (or the selection of petitions, if the registration process is suspended). DHS believes that the public has had sufficient opportunity to review and comment on this rule, as demonstrated by the number of high-quality comments received from the public, including individuals, attorneys, employers, and organizations. DHS believes that the public has had sufficient opportunity to participate in the rulemaking process.

3. Effective Date and Implementation

*Comments:* A few individual commenters supported the proposed rule's immediate implementation to protect U.S. jobs. Another individual commenter contradicted claims that it is too late in the year for employers to accommodate changes in the registration system, saying that many companies wait until the new year to reach out to employees anyway, and recent changes to the H–1B process have made it easier to petition.

*Response:* DHS agrees that this rule is being published with sufficient time to implement it for the FY 2022 registration period.

*Comments:* Many commenters, including a form letter campaign, said that, if USCIS were to finalize the proposed rule, it should not implement the proposed rule for the FY 2022 H–1B cap filing season (set to begin in March 2021) because changes so close to the beginning of that season would adversely impact U.S. employers, immigration lawyers, and individuals. Multiple commenters said companies have already made hiring decisions based on the existing registration system, so delaying implementation until the FY 2023 cap filing season (set to begin in March 2022) would give the regulated community time to adjust. A company commented that implementing the rule for the upcoming H–1B cap filing season would create uncertainty and confusion. A few commenters added that stakeholders have had to adapt to the new online registration system, which has ongoing issues, so it is unlikely that further modifications to the registration system will be implemented to run smoothly for the upcoming H–1B season. An individual commenter opposed implementing the proposed rule at this time because the U.S. economy needs time and stability to recover.

*Response:* DHS believes that this rule is being published with sufficient time to allow employers to plan appropriately prior to the start of the registration period for FY 2022. DHS does not believe that petitioners will face significant adverse impacts with the implementation of this change in the selection process and believes that employers have sufficient time to make any decisions they believe are needed as a result of this rule, such as increasing proffered wages to increase the odds of selection. Further, DHS believes that there is sufficient time to allow for testing and modification and that delaying implementation at this time is not necessary.

*E. Statutory and Regulatory Requirements*

1. Impacts and Benefits (E.O. 12866, 13563, and 13771)

a. Methodology and Adequacy of the Cost-Benefit Analysis

*Comments:* Multiple commenters provided input on the wage data DHS used to analyze the impact of the proposed rule. A couple of commenters referenced that the economic analysis conducted in the proposed rule was based on previous OES wage levels, rather than the new ones implemented as a result of the DOL IFR. One of these commenters stated that, with the huge changes in the wage levels resulting from the DOL IFR, the H–1B data would be much more skewed, and the economic impact analysis in the proposed rule was completely invalid. Another commenter explained that all of the analysis done in the proposed rule was based on previous OES wage

levels and there has not been any economic impact analysis based on the new wage rules. One commenter expressed that this rule must be read in concert with the DOL IFR, which reset how prevailing wage levels were calculated for H–1Bs. To get selected in the H–1B registration process under the proposed rule, the employer would have to pay a level III or IV prevailing wage, but those wages would be so artificially high that employers would not be able to pay them. The commenter concluded that DHS should push the proposed rule back at least one year to allow time for next year's H–1B data to become available. Another commenter said 96 percent of total applicants still would fall into the new OES wage ''level 1 below'' and would be eligible for random selection, so the proposed rule would not have an impact. A commenter echoed concerns about the use of previous OES wage levels, writing that DHS's analysis in the proposed rule was invalid.

*Response:* The NPRM analysis was written using the appropriate baseline and the best information that was available to DHS at that time, which was prior to the publication of the DOL IFR.[143] On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al.* v. *DHS, et al.,* No. 20–cv–7331, setting aside the DOL IFR. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al.* v. *Scalia, et al.,* No. 20–cv–14604, applying to the plaintiffs in that case. DOL has taken necessary steps to comply with the courts' orders and no longer is implementing the DOL IFR. DHS, therefore, disagrees with the commenter's assertion that DHS must analyze the DOL IFR in the context of this final rule. This final rule does not require employers pay a higher wage, instead it prioritizes selection of registrations or petitions, as applicable, generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. The selection of H–1B registrations or petitions, as applicable, will be based on the existing OES wage levels at the time of submission, and the economic analysis in the proposed rule properly accounted for OES prevailing wage levels that were in effect at the time the analysis was conducted and remain in effect at this time.

*Comments:* An anonymous commenter stated that Table 13 of the NPRM is inconsistent with the proposed rule's language. The commenter questioned why there would be level III and IV registrations selected in the advanced degree exemption if level III and IV registrations would be ''100% selected'' in the regular cap, and the proposed rule would not affect the order of selection between the regular cap and advanced degree exemption.

*Response:* This final rule will not affect the order of selection between the regular cap and advanced degree exemption or the number of registrations that will be selected for each allocation. USCIS first selects registrations toward the number projected as needed to reach the regular cap, from among all registrations properly submitted, including those indicating that the beneficiary will be eligible for the advance degree exemption. USCIS then selects registrations indicating eligibility for the advanced degree exemption using the same process. With the revised selection method based on corresponding OES wage level and ranking shown in Table 13, the approximated average indicates that all registrations with a proffered wage that corresponds to OES wage level IV or level III would be selected and 58,999, or 75 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected toward the regular cap projections. None of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected toward the regular cap projections. For the advanced degree exemption, DHS estimates all registrations with a proffered wage that corresponds to OES wage levels IV and III would be selected and 12,744, or 20 percent, of the registrations with a proffered wage that corresponds to OES wage level II would be selected. DHS estimates that none of the registrations with a proffered wage that corresponds to OES wage level I or below would be selected.

*Comments:* A couple of commenters wrote that DHS took wage levels specified as ''N/A'' and consolidated them with level I wages in its Table 7 calculations even though there is no evidentiary basis for assuming that characterization or correlation to be accurate or appropriate. Wages negotiated under a collective bargaining agreement often exceed market rates, and private wage surveys frequently have more than 4 wage levels, which makes direct analogy to OES impractical, if not impossible. Since there was no way to determine the true ranking of the N/A petitions, they should have been excluded from the allocation rather than arbitrarily added to the level I share. Consolidating them had the prejudicial effect of attributing 31.5 percent of regular cap and 37 percent of advanced degree cap to level I, when, in fact, those numbers would have been 22.8 percent and 27.5 percent, respectively, had level I counts not included the petitions whose wage level was N/A. An individual commenter similarly wrote that DHS's analysis incorrectly claims that a number of petitions are categorized as having a wage level of N/A due to modifications to DOL's SOC structure in 2018. The commenter stated that all FY 2019 and FY 2020 petitions were filed using the 2010 SOC structure and thus the 2018 SOC structure would not impact those petitions. The commenter said that the N/A designations are likely because Question 13 on Form 9035 only requires a designation of OES wage levels when relying on a prevailing wage and is left blank when petitions rely on a permissible alternative. This commenter also stated that, according to DHS's analysis in Table 6, the OES Wage Level was unavailable about 12 percent of the time for cap-subject H–1B petitions selected for adjudication in FYs 2019 and 2020. DHS labels these petitions as ones where the OES Wage Level is ''N/A'' and then, curiously, includes all such ''N/A'' OES Wage Level petitions as level I petitions for purposes of its analysis when they are not particularly likely to be all or mostly level I jobs.

*Response:* DHS understands and agrees with the commenter that N/A designations are likely when registrants rely on a permissible alternative private wage source that is not based on the OES survey. For these registrants choosing to rely on a prevailing wage that is not based on the OES survey, if the proffered wage is less than the corresponding level I OES wage, the registrant would select the ''Wage Level I and below'' box on the registration form. DHS deliberately chose to group these registrations together with level I registrations so that petitioners relying on non-OES sources would have a fairer chance of selection than if they were ranked below level I registrations, and to avoid penalizing prospective petitioners who properly rely on a private wage survey to determine the required wage for the proffered position.

As explained in response to other comments, DHS does not agree with the suggestions to separate OES prevailing wage level I from those falling below level I. DHS expects that all petitioners offering a wage lower than the OES wage level I wage will be using a legitimate source other than OES or an

[143] *See* DOL IFR, 85 FR 63872.

independent authoritative source, including a private wage survey. Therefore, such a change effectively could preclude petitioners that utilize one of those other sources from being selected for registration. By grouping OES wage level I and below OES wage level I together, those petitioners have a fairer chance of selection. DHS was unable to estimate how many registrations, initially classified as N/A, would end up in each wage level classification as a result of this rule. Due to data limitations and missing data, DHS may have included some N/A wage information into OES wage level I and below that could be classified as a wage higher than level I in the future. If DHS did not incorporate the petitions that fell into the N/A category, then the overall total of petitions would have been understated. DHS analysis used estimates in the Unquantified Costs & Benefits section to show a possible outcome and distribution of registrations once this rule is implemented.

*Comments:* A trade association wrote that DHS conducted insufficient data collection to assess the impact of the proposed rule, given that it has OES skill wage level data for only 56 percent of registered H–1B petitions selected in the lottery. The commenter wrote that DHS should review data on all H–1B adjudications to better assess the relative distribution of H–1B petitions by OES level, or conduct a survey of H–1B employers to better quantify the impact of the proposed rule by OES level.

*Response:* USCIS analyzed the impacts of this rule in an objective manner using the best available data at the time the analysis was written. DHS has OES wage level data only on the 56 percent of petitions that were selected toward the numerical allocations from FY 2019 and FY 2020. DHS does not have the wage level break down for the 44 percent of petitions that were not selected since those petitions were returned to petitioners without entering data into DHS databases. The wage level break downs for the 56 percent that were selected for adjudication had a similar distribution for both FY 2019 and FY 2020. DHS used this distribution as an estimate of what the future registrations split out by wage levels may look like for the missing 44 percent of petitions.

*Comments:* An individual commenter said the proposed rule does not analyze the indirect impact the rule will have on the wages of employees, only those directly impacted by the rule. The commenter also wrote that the proposed rule does not consider its impact on employers whose higher marginal costs cause them to forego expansion or close down. An individual commenter said that DHS does not provide evidence to support its statement that the proposed rule will have no effect on wages or growth, writing that it is unlikely that the rule will not depress wages and growth.

*Response:* DHS acknowledges that some petitioners might be impacted in terms of employment, productivity loss, search and hire costs, and profits resulting from labor turnover. The current random lottery system does not guarantee registrants that they will be able to petition for H–1B workers, and it could have the same effects and cause companies to search for alternative options. In cases where companies cannot find reasonable substitutes for the labor the H–1B beneficiaries would have provided, if selected under the random lottery process, affected petitioners also could lose profits from the lost productivity. In such cases, employers would incur opportunity costs by having to choose the next best alternative to immediately fill the job the prospective H–1B worker would have filled. The commenter provided neither an explanation nor a basis to support the claim that wages would be depressed. DHS acknowledges that some employers' growth (profit) could be affected; however, asserting that economic growth would be harmed fails to account for the fact that this rule will not reduce or otherwise affect the statutorily authorized number of initial H–1B visas granted per year. USCIS analyzed the impacts of this rule in an objective manner using the best available data at the time the analysis was written and does not have quantifiable data on the effect on wages or growth.

*Comment:* A law firm stated that the DHS does not sufficiently quantify the impact of costs to petitioners, including training, labor for substitute workers, loss of productivity, and loss of revenue. The commenter wrote that, to meet the requirements of E.O. 12866, DHS should explain its justification for proposing changes recognized to have a negative impact on productivity and revenue of petitioners. The commenter also asked DHS to explain how the proposed rule was tailored to ensure it imposed the least possible burden on society as required under E.O. 12866.

*Response:* Executive Orders 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available 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). DHS analyzed all potential costs, benefits, and transfers of this rule. While DHS understands there are costs to some populations, there also are benefits to other populations.

*Comment:* An advocacy group wrote that DHS states that an increase in H–1B recipients with higher salaries will compensate for any loss in international students and early career professionals under the proposed rule. However, the commenter states that DHS does not provide any analysis to this effect and should provide a more precise estimate of the costs associated with changes, particularly whether the rule would have an impact on the ability of employers to attract talented employees.

*Response:* DHS does not believe that this rule will negatively impact the ability of employers to attract talented employees. Rather, DHS believes that this rule will allow employers to attract the best and the brightest employees.

*Comment:* A law firm said the costs of the proposal are inconsistent with the aggregate cost savings the agency expected unselected petitions and the government to realize from registration. OMB designated the proposed rule as an ''economically significant'' regulatory action. In the NPRM, DHS estimated that, for a ten-year implementation period, the costs to the public would be more than $15.9 million annualized at 3-percent, and more than $16 million annualized at 7-percent. DHS also acknowledged the possibility that the proposed regulation ''could result in private sector expenditures exceeding $100 million, adjusted for inflation to $168 million in 2019 dollars, in any 1 year.'' The costs likely are higher, as the agency has grossly underestimated the time-burden of this proposed regulation, such as suggesting that it will take a mere 20 minutes more to prepare the registration.

*Response:* DHS acknowledges that this final rule has been designated an economically significant regulatory action by the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget. However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A). DHS disagrees that it will take more than 20 minutes to complete the additional information collection associated with the registration tool. Registrants or petitioners, as applicable, only will be required to provide, in addition to the information already to be collected, the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended

employment. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant will follow DOL guidance on prevailing wage determinations to determine which OES wage level to select on the registration, and USCIS will rank and select based on the highest OES wage level.

b. Costs

*Comments:* An individual commenter stated that, under the proposed rule, USCIS would incur additional costs related to maintaining records detailing how USCIS processed each H–1B petition to document the correct handling and prioritization of all petitions. The commenter also wrote that USCIS's cost for processing petitions will increase significantly, as it will have to review each petition for salary, location, and job code to determine sorting order. Another commenter wrote that the proposed rule indicates that DHS would not incur additional costs to the government because the agency could increase filing fees to cover costs, but that, itself, indicates the proposed rule would result in costs to DHS that should have been fully analyzed.

*Response:* The INA provides for the collection of fees through USCIS's biannual fee schedule review, at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS. This includes administrative costs and services provided without charge to certain applicants and petitioners.[144] DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners. DHS accounts for familiarization cost and additional costs due to the increased burden per response for the petitioners, which is shown as costs in the Regulatory Impact Analysis. Other form applications and petition fees will cover the increased adjudication costs until the fee rule is reassessed

*Comment:* One commenter wrote that the proposed rule likely would require technical changes to USCIS's registration system that the agency has already implemented for the FY 2021 H–1B cap season. The commenter added that it is noteworthy that the proposed rule follows a recent announcement that USCIS must furlough 70 percent of its workforce. Another commenter said that, if this rule is put in place, companies will stop hiring foreign workers and USCIS will lose the revenue from this program as it is already in a fiscal crisis.

*Response:* The President of the United States signed into law the Continuing Appropriations Act, 2021 and Other Extensions Act, H.R. 8337,[145] which became Public Law 116–159, on October 1, 2020. This public law includes language from the Emergency Stopgap USCIS Stabilization Act, which allows USCIS to establish and collect additional premium processing fees, and to use those additional funds for expanded purposes. Because of the authorization to increase premium processing fees, and cost-savings measures taken by the agency, USCIS is in a better place financially. As a result, USCIS was able to avoid all potential furloughs, and, barring unforeseen changes in circumstances, any potential furloughs in FY 2021.[146]

c. Benefits

*Comment:* An individual commenter wrote that the proposed rule has been criticized for favoring larger firms over smaller businesses and startups, but it is unlikely that these types of businesses would immediately need the types of high salaried workers who would qualify for an H–1B visa. Instead, the commenter said there should be sufficient domestic talent under this rule to meet those labor needs. An individual commenter wrote that the proposed rule would have the benefit of curbing the practice of employers underpaying H–1B petitioners by offering level I wages to those with sufficient experience for higher wages. As a result, employers will not be able to favor cheaper international labor and would consider domestic labor.

*Response:* DHS agrees with this commenter that there should be sufficient replacement labor available in the U.S. workforce that can meet domestic labor needs. This rule will help the U.S. workforce, as employers that might have petitioned for cap-subject H–1B workers to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions.

*Comment:* Referencing DHS's suggestion that one of the proposed rule's unquantified benefits is increased opportunities for lower-skilled U.S. workers in the labor market, an individual commenter stated that low-skilled workers cannot replace H–1B specialty occupation workers.

*Response:* DHS disagrees. If an employer is hiring an entry-level employee at a level I prevailing wage, then an available and qualified U.S. worker can be a substitute.

2. Paperwork Reduction Act

*Comments:* A commenter stated that requiring an employer to provide a wage level at the time of electronic registration for the H–1B cap seems to violate the Paperwork Reduction Act (PRA), which generally only permits the collection of information needed to meet a legally supported objective. The commenter indicated DHS has not adequately explained how collecting the OES prevailing wage level at the time of electronic registration is consistent with the PRA, as employers are not required to obtain an LCA at the time of the electronic registration for the H–1B cap.

*Response:* DHS disagrees that requiring the registrant to provide the wage level that the proffered wage corresponds to for the relevant SOC and area of employment, or that corresponds to the position requirements when OES wage data is unavailable, at the time of electronic registration for the H–1B cap would violate the PRA. Once this rule becomes effective, collection of such information would be needed to implement the rule and to select registrations in accordance with this rule, and thus would be a legally supported objective. As noted in the NPRM, an LCA is not a requirement for registration. However, consistent with the registrant's attestation that the registration is submitted for a valid offer of employment, DHS expects each registrant (*i.e.,* the prospective petitioner or the attorney or accredited representative submitting the registration for the prospective petitioner) to know and be able to provide the relevant corresponding wage level when submitting a registration, regardless of whether they have a certified LCA at that time.

*F. Out of Scope*

An individual commenter called for relief for those who need housing and food, ''instead of bringing in foreigners.'' Another individual commenter said that the increase in H–1B visas and outsourcing to foreign contractors caused their spouse's wages to stagnate despite increased responsibility, and

[144] *See* INA section 286(m), 8 U.S.C. 1356(m).

[145] Continuing Appropriations Act, 2021 and Other Extensions Act, Public Law 116–159, 134 Stat. 709 (Oct 1, 2020).

[146] *See* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *USCIS Averts Furlough of Nearly 70% of Workforce* (Aug. 25, 2020), *https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce.*

fewer U.S. born entry-level employees were hired. Yet another individual commenter wrote that the agency should make it easier to report visa fraud, and that stricter, more comprehensive punishments should be in place for visa fraud. A few anonymous commenters said that the H–1B visa is a ''scam.'' A trade association wrote in opposition to two other rules related to the H–1B visa published by DOL and DHS, the latter of which revised the definition of ''specialty occupations'' eligible for H–1B visas, limited visas to one year for third party worksites, and expanded DHS worksite oversight.[147] Another trade association also wrote in opposition to the DOL and DHS IFRs, objecting specifically to the DHS IFR's revisions to the definitions of ''specialty occupations'' and ''U.S. employer,'' the requirements for corroborating evidence for specialty occupations, and the amended validity period for third-party placement at worksites.[148] The commenter provided background information and a summary of the DHS IFR. One commenter said the lottery system is unfair, and USCIS should instead focus on limiting fraud and abuse of the lottery system. Yet another trade association opposed the proposed rule and suggested that the Agency implement reforms as discussed in the National Association of Manufacturer's ''A Way Forward'' plan, including statutory changes to the H–1B program, border security measures, asylum, and other immigration programs. A union argued that due to the ''timing and rushed nature'' of the DOL IFR and this proposed rule, any changes are vulnerable to procedural challenge and are likely politically motivated. The commenter went on to provide extensive feedback on the DOL and DHS IFRs and the H–1B program at large, calling for immigration reform and urging the Departments of Labor and Homeland Security to make structural changes to the H–1B program that protect workers' rights. A research organization wrote about the H–1B program in general, saying that allowing outsourcing companies to hire H–1B workers lets employers use the immigration system to ''degrade labor standards for skilled workers'' and exploit H–1B employees. Additionally, the commenter argued that outsourcing companies are using the H–1B program to underpay H–1B workers, replace U.S. workers, and send tech jobs abroad. A submission on behalf of U.S. citizen medical graduates urged expanding the H–1B and J–1 visa ban to include the healthcare sector, prioritizing U.S. citizens for placement in residency programs, or that the Accreditation Council for Graduate Medical Education (ACGME) consider opening up more residency spots and new residency programs. A professional association recommended that USCIS modify its regulation at 8 CFR 214.2(h)(8)(iii)(A)(*4*) (''*Limitation on requested start date*'') permitting a requested start date on or after the first day for the applicable fiscal year.

*Response:* DHS appreciates these comments; however, DHS did not propose to address these issues in the proposed rule, so these comments fall outside of the scope of this rulemaking. DHS is finalizing this rule as proposed.

## V. Statutory and Regulatory Requirements

### *A. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)*

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs, benefits, and transfers of available 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.

Pursuant to Executive Order 12866 (Regulatory Planning and Review), the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget, has determined that this final rule is an economically significant regulatory action. However, OIRA has waived review of this regulation under section 6(a)(3)(A) of Executive Order 12866.

1. Summary of Economic Effects

DHS is amending its regulations governing the selection of registrants eligible to file H–1B cap-subject petitions, which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on OES wage levels corresponding to their SOC codes. USCIS will rank and select the registrations properly submitted (or petitions in any year in which the registration process is suspended) generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment. USCIS will begin with OES wage level IV and proceed in descending order with OES wage levels III, II, and I. DHS is amending the relevant sections of DHS regulations to reflect these changes.

The described change in selection is expected to result in a different allocation of H–1B visas (or grants of initial H–1B status) favoring petitioners that proffer relatively higher wages. In the analysis that follows, DHS presents its best estimate for how H–1B petitioners will be affected by and will respond to the increased probability of selection of registrations of petitions proffering the highest wages for a given occupation and area of employment. DHS estimates the net costs that will result from this final rule compared to the baseline of the H–1B visa program. For the 10-year implementation period of the rule, DHS estimates the annualized costs to the public would be $15,968,792 annualized at 3-percent, $16,089,770 annualized at 7-percent.

Table 1 provides a more detailed summary of the final rule provisions and their impacts.

[147] DOL IFR, 85 FR 63872; H–1B Strengthening IFR, 85 FR 63918.

[148] H–1B Strengthening IFR, 85 FR 63918.

TABLE 1—SUMMARY OF PROVISIONS AND ECONOMIC IMPACTS OF THE FINAL RULE

| Provision | Description of changes to provision | Estimated costs of provisions | Estimated benefits of provisions |
|---|---|---|---|
| Currently, USCIS randomly selects H–1B registrations or cap-subject petitions, as applicable. USCIS will change the selection process to prioritize selection of registrations or cap-subject petitions, as applicable, based on corresponding OES wage level.<br>DHS regulations currently address H–1B cap allocation in various contexts:<br>1. Fewer registrations than needed to meet the H–1B regular cap.<br>2. Sufficient registrations to meet the H–1B regular cap during the initial registration period.<br>3. Fewer registrations than needed to meet the H–1B advanced degree exemption numerical limitation.<br>4. Sufficient registrations to meet the H–1B advanced degree exemption numerical limitation during the initial registration period.<br>5. Increase to the number of registrations projected to meet the H–1B regular cap or advanced degree exemption allocations in a FY.<br>6. H–1B cap-subject petition filing following registration—(1) Filing procedures.<br>7. Petition-based cap-subject selections in event of suspended registration process.<br>8. Denial of petition.<br>9. Revocation of approval of petition. | USCIS will rank and select H–1B registrations (or H–1B petitions if the registration requirement is suspended) generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. This final rule will add instructions and a question to the registration form to select the appropriate wage level. This final rule also will add instructions and questions to the H–1B petition seeking the same wage level information and other information concerning the proffered position to assess the prevailing wage level. This final rule will not affect the order of selection as between the regular cap and the advanced degree exemption.<br>If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.<br>USCIS is authorized to deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary for a lower wage level if USCIS determines that the new or amended petition was filed to reduce the wage level listed on the original petition to unfairly increase the odds of selection during the registration selection process.<br>In any year in which USCIS suspends the H–1B electronic registration process for cap-subject petitions, USCIS will, instead, allow for the submission of H–1B cap-subject petitions. After USCIS receives a sufficient number of petitions to meet the H–1B regular cap and were to complete the selection process of petitions for the H–1B regular cap following the same method of ranking and selection based on corresponding OES wage level, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H–1B advanced degree exemption numerical limitation. | *Quantitative:*<br>Petitioners—<br>• $3,457,401 costs annually for petitioners completing and filing Form I–129 petitions with an additional time burden of 15 minutes.<br>• $11,795,997 costs annually for prospective petitioners submitting electronic registrations with an additional time burden of 20 minutes.<br>DHS/USCIS—<br>• None.<br>*Qualitative:*<br>Petitioners—<br>• Petitioners may incur costs to seek out and train other workers, or to induce workers with similar qualifications to consider changing industry or occupation.<br>• Petitioners that would have hired relatively low-paid H–1B workers, but were unable to do so because of non-selection (and ineligibility to file petitions), may incur reduced labor productivity and revenue.<br>• Petitioners may incur costs from offering beneficiaries higher wages for the same work to achieve greater chances of selection.<br>DHS/USCIS—<br>• None. | *Quantitative:*<br>Petitioners—<br>• None.<br>DHS/USCIS—<br>• None.<br>*Qualitative:*<br>U.S. Workers—<br>• A possible increase in employment opportunities for similarly skilled unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H–1B cap-subject beneficiaries at wage levels corresponding to lower wage positions.<br>H–1B Workers—<br>• A possible increase in productivity, measured in increased H–1B wages, resulting from the reallocation of a fixed number of visas from positions classified as lower-level work to employers able to pay the highest wages for the most highly skilled workers.<br>• A possible increase in wages for positions offered to H–1B cap-subject beneficiaries for the same work to improve the prospective petitioner's chance of selection.<br>Petitioners—<br>• Level I and level II beneficiaries may see increased wages. Companies who have historically paid level I wages may be incentivized to offer their H–1B employees higher wages, so that they could have a greater chance of selection at a level II or higher.<br>• Employers who offer H–1B workers wages that corresponds with level III or level IV OES wages may have higher chances of selection.<br>DHS/USCIS—<br>• Submitting additional wage level information on both an electronic registration and on Form I–129 will allow USCIS to maintain the integrity of the H–1B cap selection and adjudication processes.<br>• Registrations or petitions, as applicable, will be more likely to be selected under the numerical allocations for the highest paid, and presumably highest skilled or highest-valued, beneficiaries. |
| Familiarization Cost | Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule to fully comply with the new regulation(s). | *Quantitative:*<br>Petitioners—<br>• One-time cost of $6,285,527 in FY 2022.<br>DHS/USCIS—<br>• None.<br>*Qualitative:*<br>Petitioners—<br>• None.<br>DHS/USCIS—<br>None. | *Quantitative:*<br>Petitioners—<br>• None.<br>DHS/USCIS—<br>• None.<br>*Qualitative:*<br>Petitioners—<br>• None.<br>DHS/USCIS—<br>• None. |

In addition to the impacts summarized here, Table 2 presents the accounting statement as required by OMB Circular A–4.[149]

TABLE 2—OMB A–4 ACCOUNTING STATEMENT

[$, 2019 for FY 2022–FY 2032]

| Category | Primary estimate | Minimum estimate | Maximum estimate | Source citation |
|---|---|---|---|---|
| Benefits:<br>Annualized Monetized Benefits over 10 years (discount rate in parenthesis). | N/A<br>N/A | N/A<br>N/A | N/A<br>N/A | |

[149] White House, Office of Management and Budget, *Circular A–4* (Sept. 17, 2003), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf* (last visited Aug. 11, 2020).

TABLE 2—OMB A–4 ACCOUNTING STATEMENT—Continued
[$, 2019 for FY 2022–FY 2032]

| Category | Primary estimate | Minimum estimate | Maximum estimate | Source citation |
|---|---|---|---|---|
| Annualized quantified, but un-monetized, benefits | 0 | 0 | 0 | |
| Unquantified Benefits | This final rule will benefit petitioners agreeing to pay H–1B workers a proffered wage corresponding to OES wage level III or IV, by increasing their chance of selection in the H–1B cap selection process. These changes align with the Administration's goals of improving policies such that the H–1B classification more likely will be awarded to the highest paid or highest skilled beneficiaries. These changes will also better align the administration of the H–1B program with the dominant Congressional intent.<br>This final rule may provide increased opportunities for similarly skilled U.S. workers in the labor market to compete for work as there will be fewer H–1B workers paid at the lower wage levels to compete with U.S. workers.[150]<br>Further, assuming demand outpaces the 85,000 visas currently available for annual allocation, DHS believes that the potential reallocation of visas to favor those petitioners able to offer the highest wages to recruit the most highly skilled workers will result in increased marginal productivity of all H–1B workers.<br>This final rule may provide increased wages for positions offered to H–1B cap-subject beneficiaries. | | | RIA. |
| Costs:<br>Annualized monetized costs over 10 years (discount rate in parenthesis). | (3 percent) $15,968,792<br>(7 percent) $16,089,770 | N/A<br>N/A | N/A<br>N/A | RIA. |
| Annualized quantified, but un-monetized, costs | N/A | | | |
| Qualitative (unquantified) costs | This final rule is expected to reduce the number of petitions for lower wage H–1B workers. This may result in increased recruitment or training costs for petitioners that seek new pools of talent. Additionally, petitioners' labor costs or training costs for substitute workers may increase. DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire cost per employer of $4,398, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutions for the labor the H–1B beneficiary would have provided, affected petitioners will also lose profits from the lost productivity. In such cases, employers will incur opportunity costs by having to choose the next best alternative to immediately filling the job the prospective H–1B worker would have filled. There may be additional opportunity costs to employers such as search costs and training.<br>Such possible disruptions to companies will depend on the interaction of a number of complex variables that are constantly in flux, including national, state, and local labor market conditions, economic and business factors, the type of occupations and skills involved, and the substitutability between H–1B workers and U.S. workers.<br>Petitioners that would have hired relatively lower-paid H–1B workers, but were unable to do so because of non-selection (and ineligibility to file a petition), may incur reduced labor productivity and revenue. | | | RIA. |
| Transfers:<br>Annualized monetized transfers: "on budget" | N/A | N/A | N/A | |
| From whom to whom? | | | | |
| Annualized monetized transfers: "off-budget" | N/A | N/A | N/A | |
| From whom to whom? | N/A | N/A | N/A | |
| Miscellaneous analyses/category | Effects | | | Source citation |
| Effects on state, local, and/or tribal governments | N/A | | | RFA. |
| Effects on small businesses | N/A | | | RFA. |
| Effects on wages | N/A | | | None. |
| Effects on growth | N/A | | | None. |

2. Background and Purpose of the Final Rule

The H–1B visa program allows U.S. employers to temporarily hire foreign workers to perform services in a specialty occupation, services related to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services of distinguished merit and ability in the field of fashion modeling.[151] A specialty occupation is defined as an occupation that requires the (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum qualification for entry into the occupation in the United States.[152]

The number of aliens who may be issued initial H–1B visas or otherwise provided initial H–1B nonimmigrant status during any FY has been capped at various levels by Congress over time, with the current numerical limit generally being 65,000 per FY.[153] Congress has also provided for various exemptions from the annual numerical allocations, including an exemption for

[150] DHS acknowledges, however, that some employers may increase the wages of existing H–1B workers without changing job requirements or requiring higher levels of education, skills, training, and experience. In those cases, there may not be anticipated vacancies at wage levels I and II for U.S. workers to fill.

[151] *See* INA section 101(a)(15)(H)(i)(b), 8 U.S.C. 1101(a)(15)(H)(i)(b); Public Law 101–649, section 222(a)(2), 104 Stat. 4978 (Nov. 29, 1990); 8 CFR 214.2(h).

[152] *See* INA section 214(i)(l), 8 U.S.C. 1184(i)(l).

[153] *See* INA section 214(g)(1)(A), 8 U.S.C. 1184(g)(1)(A).

20,000 aliens who have earned a master's or higher degree from a U.S. institution of higher education.[154]

Under the current regulation, all petitioners seeking to file an H–1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H–1B cap-subject petition, unless USCIS suspends the registration requirement.[155] USCIS monitors the number of H–1B registrations submitted during the announced registration period of at least 14 days and, at the conclusion of that period, if more registrations are submitted than projected as needed to reach the numerical allocations, randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H–1B numerical allocations.[156] Under this random H–1B registration selection process, USCIS first selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. A prospective petitioner whose registration is selected is notified of the selection and instructed that the petitioner is eligible to file an H–1B cap-subject petition for the beneficiary named in the selected registration within a filing period that is at least 90 days in duration and begins no earlier than 6 months ahead of the actual date of need (commonly referred to as the employment start date).[157] When registration is required, a petitioner seeking to file an H–1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition.[158]

Prior to filing an H–1B petition, the employer is required to obtain a certified Labor Condition Application (LCA) from the Department of Labor (DOL).[159] The LCA form collects information about the employer and the occupation for the H–1B worker(s). The LCA requires certain attestations from the employer, including, among others, that the employer will pay the H–1B worker(s) at least the required wage.[160] This final rule amends DHS regulations concerning the selection of electronic registrations submitted by or on behalf of prospective petitioners seeking to file H–1B cap-subject petitions (or the selection of petitions, if the registration process is suspended), which includes petitions subject to the regular cap and those asserting eligibility for the advanced degree exemption, to allow for ranking and selection based on OES wage levels. When applicable, USCIS will rank and select the registrations received generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area(s) of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below.[161] For registrants relying on a private wage survey, if the proffered wage is less than the corresponding level I OES wage, the registrant will select the ''Wage Level I and below'' box on the registration form.[162] If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS will randomly select from all registrations within that wage level a sufficient number of registrations needed to reach the applicable numerical limitation.[163]

3. Historic Population

The historic population consists of petitioners who file on behalf of H–1B cap-subject beneficiaries (in other words, beneficiaries who are subject to the annual numerical limitation, including those eligible for the advanced degree exemption). DHS uses the 5-year average of H–1B cap-subject petitions received for FYs 2016 to 2020 (211,797) as the historic estimate of H–1B cap-subject petitions that were submitted annually.[164] Prior to publication of *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements* (Fee Schedule Final Rule),[165] H–1B petitioners submit Form I–129 with applicable supplements for H–1B petitions. Through the Fee Schedule Final Rule, DHS created a new Form I–129 for H–1B petitioners.[166] Form I–129 does not include separate supplements as relevant data collection fields have been incorporated into Form I–129. DHS assumes that the number of petitioners who previously filled out the Form I–129 and H–1B supplements is the same as the number of petitioners who will complete the new Form I–129H1.

TABLE 3—H–1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS FOR FY 2016—FY 2020

| Fiscal year | Total number of H-1B cap-subject petitions submitted | Total number of H-1B petitions selected | Number of petitions filed with Form G–28 |
|---|---|---|---|
| 2016 | 232,973 | 97,711 | 72,292 |
| 2017 | 236,444 | 95,818 | 68,743 |
| 2018 | 198,460 | 95,923 | 78,900 |

[154] *See* INA section 214(g)(5) and (7), 8 U.S.C. 1184(g)(5) and (7).

[155] *See* 8 CFR 214.2(h)(8)(iii)(A).

[156] *See* 8 CFR 214.2(h)(8)(iii)(A)(*5*)–(*6*).

[157] *See* 8 CFR 214.2(h)(8)(iii)(D)(*2*).

[158] *See* 8 CFR 214.2(h)(8)(iii)(A)(*1*).

[159] *See* 8 CFR 214.2(h)(4)(i)(B).

[160] *See* 20 CFR 655.731 through 655.735.

[161] *See* new 8 CFR 214.2(h)(8)(iii)(A)(*1*)(*i*).

[162] *See* new 8 CFR 214.2(h)(8)(iii)(A)(*1*)(*i*).

[163] *See* new 8 CFR 214.2(h)(8)(iii)(A)(*5*)–(*6*).

[164] In FY 2018, 198,460 H–1B petitions were submitted in the first five days that cap-subject petitions could be submitted, a 16 percent decline in H–1B cap-subject petitions from FY 2017. Though the receipt of H–1B cap-subject petitions fell in FY 2018, the petitions received still far exceeded the numerical limitations, continuing a trend of excess demand since FY 2011. For H–1B filing petitions data prior to FY 2014, *see* U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Reports and Studies, https://www.uscis.gov/tools/reports-studies/reports-and-studies* (last visited Sept. 2, 2020).

[165] DHS estimates the costs and benefits of this final rule using the newly published *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* final rule (Fee Schedule Final Rule), and associated form changes, as the baseline. 85 FR 46788 (Aug. 3, 2020). The Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. On September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *See Immigrant Legal Resource Center* v. *Wolf,* No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). In addition, on October 8, 2020, DHS was also preliminarily enjoined from implementing and enforcing the Fee Schedule Final Rule by the U.S. District Court for the District of Columbia, including by adopting any form changes associated with the rule. *See Northwest Immigrant Rights Project* v. *U.S. Citizenship and Immigration Servs.,* 1:19-cv-03283–RDM (D.D.C. Oct. 8, 2020). DHS intends to vigorously defend these lawsuits and is not changing the baseline for this final rule as a result of the litigation. Should DHS not prevail in the Fee Schedule Final Rule litigation, this final rule may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I–129.

[166] *See* Fee Schedule Final Rule, 85 FR 46788.

TABLE 3—H–1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS FOR FY 2016—FY 2020—Continued

| Fiscal year | Total number of H-1B cap-subject petitions submitted | Total number of H-1B petitions selected | Number of petitions filed with Form G–28 |
|---|---|---|---|
| 2019 | 190,098 | 110,376 | 93,495 |
| 2020 | 201,011 | 109,283 | 92,396 |
| Total | 1,058,986 | 509,111 | 405,826 |
| 5-year average | 211,797 | 101,822 | 81,165 |

Source: Total Number of H–1B Cap-Subject Petitions Submitted FYs 2016–2020, USCIS Service Center Operations (SCOPS), June 2019. Total Number of Selected Petitions data, USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), July 2020.

Table 3 also shows historical Form G–28 filings by attorneys or accredited representatives accompanying selected H–1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the 5-year average, DHS estimates 79.7 percent [167] of selected petitions will be filed with a Form G–28. Table 3 does not include data for FY 2021 as the registration requirement was first implemented for the FY 2021 H–1B cap selection process, and petition submission was ongoing at the time of this analysis.

The H–1B selection process changed significantly after the publication of the H–1B Registration Final Rule.[168] That rule established a mandatory electronic registration requirement that requires petitioners seeking to file cap-subject H–1B petitions, including those eligible for the advanced degree exemption, to first electronically register with USCIS during a designated registration period. That rule also reversed the order by which USCIS counts H–1B registrations (or petitions, for any year in which the registration requirement is suspended) toward the number projected to meet the H–1B numerical allocations, such that USCIS first selects registrations submitted on behalf of all beneficiaries, including those eligible for the advanced degree exemption. USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. The registration requirement was first implemented for the FY 2021 H–1B cap. During the initial registration period for the FY 2021 H–1B cap selection process, DHS received 274,237 registrations.

4. Cost-Benefit Analysis

Through these changes, petitioners will incur costs associated with additional time burden in completing the registration process and, if selected for filing, the petition process. In this analysis, DHS estimates the opportunity cost of time for these occupations using average hourly wage rates of $32.58 for HR specialists and $69.86 for lawyers.[169] However, average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent DOL, BLS report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.46.[170] For purposes of this final rule, DHS calculates the average total rate of compensation as $47.57 per hour for an HR specialist, where the average hourly wage is $32.58 per hour worked and average benefits are $14.99 per hour.[171] Additionally, DHS calculates the average total rate of compensation as $102.00 per hour for an in-house lawyer, where the average hourly wage is $69.86 per hour worked and average benefits are $32.14 per hour.[172] Moreover, DHS recognizes that a firm may choose, but is not required, to outsource the preparation and submission of registrations and filing of H–1B petitions to outsourced lawyers.[173] Therefore, DHS calculates the average total rate of compensation as $174.65, which is the average hourly U.S. wage rate for lawyers multiplied by 2.5 to approximate an hourly billing rate for an outsourced lawyer.[174] Table 4 summarizes the compensation rates used in this analysis.

TABLE 4—SUMMARY OF ESTIMATED WAGES FOR FORM I–129 FILERS BY TYPE OF FILER

| | Hourly compensation rate |
|---|---|
| Human Resources (HR) Specialist | $47.57 |
| In-house lawyer | 102.00 |
| Outsourced lawyer | 174.65 |

Source: USCIS analysis.

a. Costs and Cost Savings of Regulatory Changes to Petitioners

i. Methodology Based on Historic FYs 2019–2020

This final rule primarily will change the manner in which USCIS selects H–1B registrations (or H–1B petitions for any year in which the registration requirement is suspended), by first

[167] Calculation: 81,165 Forms G–28/101,822 Form I–129 petitions = 79.7 percent

[168] *See* H–1B Registration Final Rule, 84 FR 888.

[169] *See* U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2019 National Occupational Employment and Wage Estimates-National, *SOC 13–1071—Human Resources Specialist* and *SOC 23–1011—Lawyers, https://www.bls.gov/oes/2019/may/oes_nat.htm* (last visited Sept. 2, 2020).

[170] The benefits-to-wage multiplier is calculated as follows: ($37.10 Total Employee Compensation per hour) ÷ ($25.47 Wages and Salaries per hour) = 1.457 = 1.46 (rounded). *See* U.S. Department of Labor, Bureau of Labor Statistics, Economic News Release, *Employer Cost for Employee Compensation (December 2019), Table 1. Employer Costs for Employee Compensation by ownership* (Dec. 2019), *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (last visited Sept. 2, 2020).

[171] Calculation of the weighted mean hourly wage for HR specialists: $32.58 per hour × 1.46 = $47.5668 = $47.57 (rounded) per hour.

[172] Calculation of weighted mean hourly wage for in-house lawyers: $102.00 average hourly total rate of compensation for in-house lawyer = $69.86 average hourly wage rate for lawyer (in-house) × 1.46 benefits-to-wage multiplier.

[173] DHS uses the terms ''in-house lawyer'' and ''outsourced lawyer'' to differentiate between the types of lawyers that may file Form I–129 on behalf of an employer petitioning for an H–1B beneficiary.

[174] Calculation of weighted mean hourly wage for outside counsel: $174.65 average hourly total rate of compensation for outsourced lawyer = $69.86 average hourly wage rate for lawyer (in-house) × 2.5 conversion multiplier. DHS uses a conversion multiplier of 2.5 to estimate the average hourly wage rate for outsourced lawyer based on the hourly wage rate for an in-house lawyer. DHS has used this conversion multiplier in various previous rulemakings. The DHS analysis in *Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 83 FR 24905 (May 31, 2018), used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney wages.

selecting registrations generally based on the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area(s) of intended employment. In April 2019, DHS added an electronic registration requirement for petitioners seeking to file H–1B petitions on behalf of cap-subject aliens.[175] Under the current regulation, all petitioners seeking to file an H–1B cap-subject petition must first electronically submit a registration for each beneficiary on whose behalf they seek to file an H–1B cap-subject petition, unless the registration requirement is suspended. If the registration is selected, the petitioner is eligible to file an H–1B cap-subject petition for the beneficiary named in the selected registration during the associated filing period. The registration requirement was suspended for the FY 2020 H–1B cap and first implemented for the FY 2021 H–1B cap. The initial H–1B registration period for the FY 2021 H–1B cap was March 1, 2020, through March 20, 2020. A total of 274,237 registrations were submitted during the initial registration period, of which 123,244 [176] registrations were for beneficiaries eligible for the advanced degree exemption and 145,950 were for beneficiaries under the regular cap.[177]

Prior to implementing the registration requirement, USCIS administered the H–1B cap by projecting the number of petitions needed to reach the numerical allocations. H–1B cap-subject petitions were randomly selected when the number of petitions received on the final receipt date exceeded the number projected as needed to reach the numerical allocations. All petitions eligible for the advanced degree exemption had an equal chance of being selected toward the advanced degree exemption, and all remaining petitions had an equal chance of being selected toward the regular cap. In FY 2019, USCIS first selected petitions toward the number of petitions projected as needed to reach the advanced degree exemption. If the petition was not selected under the advanced degree exemption, those cases then were added back to the pool and had a second chance of selection under the regular cap. In FY 2020, the selection order was reversed, such that USCIS first selected petitions toward the number projected as needed to reach the regular cap from among all petitions received. USCIS then selected toward the number of petitions projected as needed to reach the advanced degree exemption from among those petitions eligible for the advanced degree exemption, but that were not selected toward the number projected as needed to reach the regular cap.

Table 5 shows the number of petitions submitted and selected in FYs 2019 and 2020. It also displays the approximated 2-year averages of the petitions that were submitted and selected for the H–1B regular cap or advanced degree exemption. On average, DHS selected 56 percent [178] of the H–1B cap-subject petitions submitted, with 82,900 toward the regular cap and 26,930 toward the advanced degree exemption.

TABLE 5—H–1B CAP-SUBJECT PETITIONS SUBMITTED TO USCIS, FOR FY 2019–FY 2020

| Fiscal year | Total number of H–1B cap-subject petitions submitted | Total petitions selected | Regular cap | Advanced degree exemption |
|---|---|---|---|---|
| 2019 | 190,098 | 110,376 | 82,956 | 27,420 |
| 2020 | 201,011 | 109,283 | 82,843 | 26,440 |
| Total | 391,109 | 219,659 | 165,799 | 53,860 |
| 2-Year Average | 195,555 | 109,830 | 82,900 | 26,930 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis

DHS does not have data on the OES wage levels for selected petitions prior to FY 2019.[179] While there are some challenges to using OES wage data as a timeseries, DHS uses the wage data to provide some insight.[180] Table 6 shows the petitions that were selected for FYs 2019 and 2020, categorized by OES wage level. The main difference between the FY 2019 and FY 2020 data sets is that there are more petitions classified as not applicable (N/A) in the FY 2019 data compared to the FY 2020 data. Since DOL's Standard Occupational Classification (SOC) [181] structure was modified in 2018, some petitions were categorized as N/A in FY 2019. In 2019, DOL started to use a hybrid OES [182] occupational structure for classifying the petitions for FY 2020.

Another data limitation was that some of the FY 2020 data was incomplete with missing fields, and could not be classified into the specific wage levels; therefore, the petitions were categorized as N/A. DHS expects each registrant that is classified as N/A will be able to identify the appropriate SOC code for the proffered position because all petitioners are required to identify the appropriate SOC code for the proffered position on the LCA, even when there is no applicable wage level on the LCA. Using the SOC code and the above-mentioned DOL guidance, all registrants will be able to determine the appropriate OES wage level for purposes of completing the registration, regardless of whether they specify an

[175] *See* H–1B Registration Final Rule, 84 FR 888.

[176] The total number of registrations for the advanced degree exemption and the regular cap do not equal the total 274,237 submitted registrations because the remaining 5,043 submitted registrations were invalid (*e.g.,* as prohibited duplicate registrations).

[177] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division (PRD), Form I–129 H–1B, FY 2021 Data, Claims 3 (Aug. 31, 2020) & USCIS Analysis.

[178] Calculation: 109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020/ 195,555 2- year average of Total Number of H–1B Cap-Subject Petitions Filed in FYs 2019–2020 = 56%

[179] USCIS created the tool to link USCIS H–1B data to the DOL data for FY 2019.

[180] U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Frequently Asked Questions, https://www.bls.gov/oes/oes_ques.htm* (last visited Sept. 2, 2020) (Can OES data be used to compare changes in employment or wages over time? Although the OES survey methodology is designed to create detailed cross-sectional employment and wage estimates for the U.S., States, metropolitan and nonmetropolitan areas, across industry and by industry, it is less useful for comparisons of two or more points in time. Challenges in using OES data as a time series include changes in the occupational, industrial, and geographical classification systems, changes in the way data are collected, changes in the survey reference period, and changes in mean wage estimation methodology, as well as permanent features of the methodology).

[181] U.S. Department of Labor, Bureau of Labor Statistics, Standard Occupational Classification *https://www.bls.gov/soc/2018/home.htm* (last visited Oct. 27, 2020).

[182] U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, *Implementing the 2018 SOC in the OES program—May 2019 and May 2020 Hybrid Occupations, https://www.bls.gov/oes/soc_2018.htm* (last visited Sept. 2, 2020).

OES wage level or utilize the OES program as the prevailing wage source on an LCA. While there are limitations to the data used, DHS believes that the estimates are helpful to see the current wage levels and estimate the future populations in each wage level.

TABLE 6—SELECTED PETITIONS BY WAGE LEVEL FY 2019–FY 2020

| | Level I | Level II | Level III | Level IV | N/A | Total |
|---|---|---|---|---|---|---|
| Advanced Degree Exemption: | | | | | | |
| FY 2019 | 7,363 | 13,895 | 2,016 | 553 | 3,593 | 27,420 |
| FY 2020 | 7,453 | 14,467 | 2,311 | 694 | 1,515 | 26,440 |
| Total | 14,816 | 28,362 | 4,327 | 1,247 | 5,108 | 53,860 |
| 2-Year Average | 7,408 | 14,181 | 2,164 | 623 | 2,554 | 26,930 |
| Regular Cap: | ..... | ..... | ..... | ..... | ..... | ..... |
| FY 2019 | 18,557 | 42,621 | 8,447 | 3,540 | 9,791 | 82,956 |
| FY 2020 | 19,232 | 46,439 | 8,796 | 3,677 | 4,699 | 82,843 |
| Total | 37,789 | 89,060 | 17,243 | 7,217 | 14,490 | 165,799 |
| 2-Year Average | 18,895 | 44,530 | 8,622 | 3,608 | 7,245 | 82,900 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis.

DHS has OES wage level data only on the petitions that were selected toward the numerical allocations and does not have the wage level break down for the 85,725 [183] (44 percent) of petitions that were not selected since those petitions were returned to petitioners without entering data into DHS databases. Due to data limitations, DHS estimated the wage level break down for the 44 percent of petitions that were not selected because wage levels vary significantly between occupations and localities. Table 7 shows the 2-year approximated average of H–1B cap-subject petitions that were selected, separated by OES wage level, and percentages of accepted petitions by each wage category. The wage category with the most petitions, as estimated, is OES wage level II.

TABLE 7—CURRENT ESTIMATED NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE FY 2019–FY 2020

| Level | Regular cap | | Advanced degree exemption | |
|---|---|---|---|---|
| | Selected | % of total | Selected | % of total |
| Level I & N/A | 26,140 | 31.50 | 9,962 | 36.99 |
| Level II | 44,530 | 53.70 | 14,181 | 52.66 |
| Level III | 8,622 | 10.40 | 2,164 | 8.04 |
| Level IV | 3,608 | 4.40 | 623 | 2.31 |
| Total | 82,900 | 100 | 26,930 | 100 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis

ii. FY 2021 Data [184]

The population affected by this final rule consists of prospective petitioners seeking to file H–1B cap-subject petitions, including those eligible for the advanced degree exemption. DHS regulations require all petitioners seeking to file H–1B cap-subject petitions to first electronically submit a registration for each beneficiary on whose behalf they seek to file an H–1B cap-subject petition, unless USCIS suspends the registration requirement.[185] A prospective petitioner whose registration is selected is eligible to file an H–1B cap-subject petition for the beneficiary named in the selected registration during the associated filing period.[186] Under the current H–1B registration selection process, USCIS first randomly selects registrations submitted on behalf of *all* beneficiaries, including those eligible for the advanced degree exemption.[187] USCIS then randomly selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption.[188] Prior to the implementation of the H–1B registration requirement for the FY 2021 H–1B cap selection process, petitioners submitted an annual average of 211,797 cap-subject H–1B petitions over FYs 2016 through 2020. The number of registrations submitted for the FY 2021 H–1B cap selection process, however, was 274,237. Because the number of registrations submitted for the FY 2021 H–1B cap selection process was significantly higher than the number of petitions submitted in prior years, DHS will use the total number of registrations submitted for the FY 2021 H–1B cap selection process as the population to estimate certain costs for this final rule.[189] There were many factors that led to an increased number of registrations for FY 2021; one possible factor is that the cost and burden to submit the registration is less than the

[183] Calculation: 195,555 2-year average of Total Number of H–1B Cap-Subject Petitions received in FYs 2019–2020 − 109,830 2-year average of Petitions Randomly Selected in FYs 2019–2020 = 85,725

[184] FY 2021 data pertains to the registrations received during FY 2020 for the FY 2021 H–1B cap season.

[185] *See* 8 CFR 214.2(h)(8)(iii)(A).

[186] *See* 8 CFR 214.2(h)(8)(iii)(D).

[187] *See* 8 CFR 214.2(h)(8)(iii)(A)(*5*).

[188] *See* 8 CFR 214.2(h)(8)(iii)(A)(*6*).

[189] DHS uses FY 2021 H–1B cap selection data as the population to estimate certain costs for this final rule because FY 2021 is the first year that registration was required. As explained above, DHS added the registration requirement on April 19, 2019, but the registration requirement was suspended for the FY 2020 H–1B cap.

cost and burden to submit complete Form I–129 packages.

For the FY 2021 H–1B cap selection process, 106,100 registrations initially were selected to submit a petition. Prospective petitioners with selected registrations only were eligible to file H–1B petitions based on the selected registrations during a 90-day filing window. USCIS did not receive enough H–1B petitions during the initial filing period to meet the number of petitions projected as needed to reach the H–1B numerical allocations, so the selection process was run again in August 2020. An additional 18,315 registrations were selected in August 2020 for a total of 124,415 selected registrations for FY 2021. While the current number of registrations selected toward the FY 2021 numerical allocations is 124,415, DHS estimates certain costs for this final rule using the number of registrations initially selected (106,100) as the best estimate of the number of petitions needed to reach the numerical allocations.

TABLE 8—H–1B CAP-SUBJECT REGISTRATIONS SUBMITTED, FOR FY 2021

| Fiscal year | Total number of H–1B registrations submitted | Round 1 number of H–1B registrations selected | Round 2 number of H–1B registrations selected | Total number of H–1B registrations selected * | Number of registrations submitted with form G–28 ** |
|---|---|---|---|---|---|
| 2021 ..... | 274,237 | 106,100 | 18,315 | 124,415 | N/A |
| Total ..... | 274,237 | 106,100 | 18,315 | 124,415 | N/A |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 USCIS Analysis.

* **Note:** USCIS administered the selection process twice because an insufficient number of petitions were filed following initial registration selection to reach the number of petitions projected as needed to reach the numerical allocations. USCIS has not finished processing H–1B cap-subject petitions for FY 2021.

** **Note:** Complete data is still unavailable for FY 2021. USCIS used FYs 2019–2020 from Table 3 to estimate the percentage of submitted G–28s below.

Table 3 shows historical Form G–28 filings by attorneys or accredited representatives accompanying selected H–1B cap-subject petitions. DHS notes that these forms are not mutually exclusive. Based on the historical 5-year average from earlier in this analysis, DHS estimates 79.7 percent [190] of selected registrations will include Form G–28. DHS applies those percentages to the number of total registrations and estimates 218,567 [191] Form G–28 were submitted with total registrations received. DHS uses the total registrations received for the FY 2021 H–1B cap selection process (274,237) as the estimate of registrations that will be received annually.

Additionally, DHS assumes that petitioners may use human resources (HR) specialists (or entities that provide equivalent services) (hereafter HR specialist) or use lawyers or accredited representatives [192] to complete and file H–1B petitions. A lawyer or accredited representative appearing before DHS must file Form G–28 to establish their eligibility and authorization to represent a client (applicant, petitioner, requestor, beneficiary or derivative, or respondent) in an immigration matter before DHS. DHS estimates that approximately 80 percent [193] of H–1B petitions typically will be completed and filed by a lawyer or other accredited representative (hereafter lawyer). DHS assumes the remaining 20 percent of H–1B petitions will be completed and filed by HR specialists.

Petitioners who use lawyers to complete and file H–1B petitions may either use an in-house lawyer or hire an outsourced lawyer. Of the total number of H–1B petitions filed in FY 2021, DHS estimates that 26 percent were filed by in-house lawyers, while the remaining 54 percent were filed by outsourced lawyers.[194]

TABLE 9—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS/REGISTRATIONS SUBMITTED ANNUALLY BY TYPE OF FILER

| Affected population | Estimated average population affected | Number of petitions/ registrations submitted by HR specialists | Number of petitions/ registrations submitted by in-house lawyers | Number of petitions/ registrations submitted by outsourced lawyers |
|---|---|---|---|---|
| | A | B = A × 20% | C = A × 26% | D = A × 54% |
| Estimated number of H–1B registrations submitted annually ..... | 274,237 | 54,847 | 71,302 | 148,088 |

[190] Calculation: 81,165 Forms G–28/101,822 Form I–129 petitions = 79.7 percent = 80 percent (rounded).

[191] Calculation: 274,237 * 79.7 percent = 218,567 Form G–28.

[192] 8 CFR 292.1(a)(4) (defining an accredited representative as ''a person representing an organization described in § 292.2 of this chapter who has been accredited by the Board'').

[193] Calculation: 81,165 petitions filed with Form G–28/101,822 average petitions selected = 79.7 percent petitions completed and filed by a lawyer or other accredited representative (hereafter lawyer)

[194] DHS uses data from the longitudinal study conducted in 2003 and 2007 on legal career and placement of lawyers, which found that 18.6, 55, and 26.2 percent of lawyers practice law at government (federal and local) institutions, private law firms, and private businesses (as inside counsel), respectively. *See* Dinovitzer et al, *After the JD II: Second Results from a National Study of Legal Careers,* The American Bar Foundation and the National Association for Law Placemen (NALP) Foundation for Law Career Research and Education (2009), Table 3.1, p. 27, *https://www.law.du.edu/documents/directory/publications/sterling/AJD2.pdf.* Among those working in private law firms and private businesses (54 and 26 percent, respectively), DHS estimates that, while 67.7 percent of lawyers practice law in private law firms, the remaining 32.3 percent practice in private businesses (54 percent + 25.7 percent = 79.7 percent, 67.7 percent = 54/79.7*100, 32.2 percent = 25.7/79.7*100). Because 79.7 percent of the H–1B petitions are filed by lawyers or accredited representatives, DHS multiplies 79.7 percent by 32.3 and 67.7 percent to estimate the proportion of petitions filed by in-house lawyers (working in private businesses) and outsourced lawyer (working in private law firms), respectively.

26 (rounded) percent of petitions filed by in-house lawyers = 80 percent of petitions filed by lawyers or accredited representatives × 32.3 percent of lawyers work in private businesses.

54 (rounded) percent of petitions filed by outsourced lawyer = 80 percent of petitions filed by lawyers or accredited representatives × 67.7 percent of lawyers work in private law firms.

TABLE 9—SUMMARY OF ESTIMATED AVERAGE NUMBER OF PETITIONS/REGISTRATIONS SUBMITTED ANNUALLY BY TYPE OF FILER—Continued

| Affected population | Estimated average population affected<br>A | Number of petitions/ registrations submitted by HR specialists<br>B = A × 20% | Number of petitions/ registrations submitted by in-house lawyers<br>C = A × 26% | Number of petitions/ registrations submitted by outsourced lawyers<br>D = A × 54% |
|---|---|---|---|---|
| Estimated number of H–1B registrations selected to file H–1B cap petitions annually ... | 106,100 | 21,220 | 27,586 | 57,294 |

Source: USCIS analysis.

Based on the total estimated number of affected populations shown in Table 9, DHS further estimates the number of entities that will be affected by each requirement of this final rule to estimate the costs arising from the regulatory changes in the cost-benefit analysis section. Additionally, DHS uses the same proportion of HR specialists, in-house lawyers, and outsourced lawyers (20, 26, and 54 percent, respectively) to estimate the population that will be affected by the various requirements of this final rule.

iii. Unquantified Costs & Benefits

Given that the demand for H–1B cap-subject visas, including those filed for the advanced degree exemption, frequently has exceeded the annual H–1B numerical allocations, this final rule will increase the chance of selection for registrations (or petitions, if registration were suspended) seeking to employ beneficiaries at level IV or level III wages. DHS believes this incentive for petitioners to offer wages that maximize their probability of selection is necessary to address the risk that greater numbers of U.S. employers could rely on the program to access relatively lower-cost labor, precluding other employers from benefitting from the H–1B program's intended purpose of providing high-skilled nonimmigrant labor to supplement domestic labor. This final rule could result in higher proffered wages or a reduction in the downward pressure on wages in industries and occupations with concentrations of relatively lower-paid H–1B workers. Additionally, this final rule may lead to an increase in employment opportunities for unemployed or underemployed U.S. workers seeking employment in positions otherwise offered to H–1B cap-subject beneficiaries at wage levels corresponding to lower wage positions. Employers that offer H–1B workers wages that correspond with level IV or level III OES wages will have higher chances of selection.

For the FY 2021 H–1B cap selection process, USCIS initially selected 106,100 (39 percent) [195] of H–1B registrations submitted toward the numerical allocations; of those 80,600 were selected toward the number projected as needed to reach the regular cap, and 25,500 were selected toward the number projected as needed to reach the advanced degree exemption. The total number of H–1B registrations submitted was 274,237; however, 5,043 were invalid. Of the 269,194 valid registrations, 145,950 were submitted toward the regular cap and 123,244 were eligible for selection under the advanced degree exemption.

TABLE 10—H–1B CAP-SUBJECT REGISTRATIONS SUBMITTED FOR FY 2021

| Fiscal year | Total number of valid H–1B registrations submitted | Regular cap | Advanced degree exemption |
|---|---|---|---|
| 2021 | 269,194 | 145,950 | 123,244 |
| Total | 269,194 | 145,950 | 123,244 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS & Analysis.
* **Note:** The total number of registrations in this table does not equal 274,237 because 5,043 of the registrations were invalid.

DHS estimated the wage level distribution for FY 2021 based on the average distribution observed in FYs 2019 and 2020. At the time of analysis, the wage level data was unavailable for FY 2021 because the petition filing process was ongoing. Table 11 displays the historic 2-year (FY 2019 and FY 2020) approximated average of H–1B cap-subject petitions that were selected, separated by OES wage level, and percentages of selected petitions by each wage category.

TABLE 11—HISTORIC NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE

| Level | Regular cap | | Advanced degree exemption | |
|---|---|---|---|---|
| | Selected | % of total | Selected | % of total |
| Level I & Below | 26,140 | 31.50 | 9,962 | 36.99 |
| Level II | 44,530 | 53.70 | 14,181 | 52.66 |
| Level III | 8,622 | 10.40 | 2,164 | 8.04 |

[195] Calculation: 106,100 Registrations Randomly Selected/274,237 Total Number of H–1B Cap-Subject registrations Filed in 2020 = 39%.

TABLE 11—HISTORIC NUMBER OF SELECTED PETITIONS BY WAGE LEVEL AND CAP TYPE—Continued

| Level | Regular cap | | Advanced degree exemption | |
|---|---|---|---|---|
| | Selected | % of total | Selected | % of total |
| Level IV | 3,608 | 4.40 | 623 | 2.31 |
| Total | 82,900 | 100 | 26,930 | 100 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. July 21, 2020 & USCIS Analysis.
* **Note:** Totals are based on 2-year averages of petitions randomly selected in FYs 2019–2020, Table 11 is replicated from Table 7.

DHS assumes that FY 2021 wage level distribution of registrations will equal the wage level distribution observed in FYs 2019 through 2020 data. DHS multiplied the percentage of selected petitions by level from Table 11 to estimate the breakdown of registrations by wage level. For example, DHS multiplied 145,950 by 4.4 percent to estimate that a total of 6,422 registrations would have been categorized as wage level IV under the regular cap.

TABLE 12—CURRENT ESTIMATED NUMBER OF REGISTRATIONS BY WAGE LEVEL AND CAP TYPE

| Level | Regular cap | | Advanced degree exemption | |
|---|---|---|---|---|
| | Estimated registrations | % of registrations | Estimated registrations | % of registrations |
| Level I & Below | 45,974 | 31.50 | 45,588 | 36.99 |
| Level II | 78,375 | 53.70 | 64,900 | 52.66 |
| Level III | 15,179 | 10.40 | 9,909 | 8.04 |
| Level IV | 6,422 | 4.40 | 2,847 | 2.31 |
| Total | 145,950 | 100 | 123,244 | 100 |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS Analysis
* **Note:** Totals are based on FY 2021 data

This final rule will change the H–1B cap selection process, but will leave in place selecting first toward the regular cap and second toward the advanced degree exemption. USCIS now will rank and select the registrations received (or petitions, as applicable) generally on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below. As a result of the approximated 2-year average from above, DHS displays the projected selection percentages for registrations under the regular cap and advanced degree exemption in Table 13. With the revised selection method based on corresponding OES wage level and ranking, the approximated average indicates that all registrations with a proffered wage that corresponds to OES wage level IV or level III will be selected and 58,999, or 75 percent, of the registrations with a proffered wage that corresponds to OES wage level II will be selected toward the regular cap projections. None of the registrations with a proffered wage that corresponds to OES wage level I or below will be selected toward the regular cap projections. For the advanced degree exemption, DHS estimates all registrations with a proffered wage that corresponds to OES wage levels IV and III will be selected and 12,744, or 20 percent, of the registrations with a proffered wage that corresponds to OES wage level II will be selected. DHS estimates that none of the registrations with a proffered wage that corresponds to OES wage level I or below will be selected.

DHS is using the approximated 2-year average from above to illustrate the expected distribution of future selected registration percentages by corresponding wage level. However, DHS is unable to quantify the actual outcome because DHS cannot predict the actual number of registrations that will be received at each wage level because employers may change the number of registrations they choose to submit and the wages they offer in response to the changes in this rule.

TABLE 13—NEW ESTIMATED NUMBER OF SELECTED REGISTRATIONS BY WAGE LEVEL AND CAP TYPE

| Level | Regular cap | | | Advanced degree exemption | | |
|---|---|---|---|---|---|---|
| | Total registrations | Selected registrations | % Selected | Total registrations | Selected registrations | % Selected |
| Level I & Below | 45,974 | 0 | 0 | 45,588 | 0 | 0 |
| Level II | 78,375 | 58,999 | 75 | 64,900 | 12,744 | 20 |
| Level III | 15,179 | 15,179 | 100 | 9,909 | 9,909 | 100 |
| Level IV | 6,422 | 6,422 | 100 | 2,847 | 2,847 | 100 |
| Total | 145,950 | 80,600 | ..... | 123,244 | 25,500 | ..... |

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 3. August 31, 2020 & USCIS Analysis.
* **Note:** Totals are based on FY 2021 data.

This final rule may primarily affect prospective petitioners seeking to file H–1B cap-subject petitions with a proffered wage that corresponds to OES wage level II, I, and below.[196] As Table 13 shows, this final rule is expected to result in a reduced likelihood that registrations for level II will be selected, as well as the likelihood that registrations for level I and below wages will not be selected. A prospective petitioner, however, could choose to increase the proffered wage, so that it corresponds to a higher wage level. Another possible effect is that employers will not fill vacant positions that would have been filled by H–1B workers. These employers may be unable to find qualified U.S. workers, or may leave those positions vacant because they cannot justify raising the wage to stand greater chances of selection in the H–1B cap selection process. That, in turn, could result in fewer registrations and H–1B cap-subject petitions with a proffered wage that corresponds to OES wage level II and below.

DHS acknowledges that this final rule might result in more registrations (or petitions, if registration is suspended) with a proffered wage that corresponds to level IV and level III OES wages for H–1B cap-subject beneficiaries. DHS believes a benefit of this final rule may be that some petitioners may choose to increase proffered wages for H–1B cap-subject beneficiaries, so that the petitioners may have greater chances of selection. This change will, in turn, benefit H–1B beneficiaries who ultimately will receive a higher rate of pay than they otherwise would have in the absence of this rule. However, DHS is not able to estimate the magnitude of such benefits. DHS acknowledges the change in the selection procedure resulting from this final rule will create distributional effects and costs. DHS is unable to quantify the extent or determine the probability of H–1B petitioner behavioral changes. Therefore, DHS does not know the portion of overall impacts of this rule that will be benefits or costs.

As a result of this final rule, costs will be borne by prospective petitioners that would hire lower wage level H–1B cap-subject beneficiaries, but are unable to do so because of a reduced chance of selection in the H–1B selection process compared to the random lottery process. Such employers also may incur additional costs to find available replacement workers. DHS estimates costs incurred associated with loss of productivity from not being able to hire H–1B workers, or the need to search for and hire U.S. workers to replace H–1B workers. Although DHS does not have data to estimate the costs resulting from productivity loss for these employers, DHS provides an estimate of the search and hiring costs for the replacement workers. Accordingly, based on the result of the study conducted by the Society for Human Resource Management (SHRM) in 2016, DHS assumes that an entity whose H–1B petition is denied will incur an average cost of $4,398 per worker (in 2019 dollars)[197] to search for and hire a U.S. worker in place of an H–1B worker during the period of this economic analysis. If petitioners cannot find suitable replacements for the labor H–1B cap-subject beneficiaries would have provided if selected and, ultimately, granted H–1B status, this final rule primarily will be a cost to these petitioners through lost productivity and profits.

DHS also acknowledges that some petitioners might be impacted in terms of the employment, productivity loss, search and hire costs, and profits resulting from labor turnover. In cases where companies cannot find reasonable substitutes for the labor H–1B beneficiaries would have provided, affected petitioners also will lose profits from the lost productivity. In such cases, employers will incur opportunity costs by having to choose the next best alternative to fill the job prospective H–1B workers would have filled. There may be additional opportunity costs to employers such as search costs and training.

Such possible disruptions to companies will depend on the interaction of a number of complex variables that constantly are in flux, including national, state, and local labor market conditions, economic and business factors, the type of occupations and skills involved, and the substitutability between H–1B workers and U.S. workers. These costs to petitioners are expected to be offset by increased productivity and reduced costs to find available workers for petitioners of higher wage level H–1B beneficiaries.

DHS uses the compensation to H–1B employees as a measure of the overall impact of the provisions. While DHS expects wages paid to H–1B beneficiaries to be higher in light of this final rule, DHS is unable to quantify the benefit of increased compensation because not all of the wage increases will correspond with productivity increases. This final rule may indirectly benefit prospective petitioners submitting registrations with a proffered wage that corresponds to OES wage Level I and II registrations. The indirect benefit will be present during the COVID–19 pandemic and the ensuing economic recovery if the prospective petitioners are able to find replacement workers accepting a lower wage and factoring in the replacement cost of $4,398 per worker in the United States. Similarly, prospective petitioners that will be submitting registrations with a proffered wage that will correspond to OES wage level I and II and that substitute toward unemployed or underemployed individuals in the U.S. labor force will create an additional indirect benefit from this rule. This will benefit those in the U.S. labor force if petitioners decide to select a U.S. worker rather than a prevailing wage level I or II H–1B worker. DHS notes that, although the COVID–19 pandemic is widespread, the severity of its impacts varies by locality and industry, and there may be structural impediments to the national and local labor market. Accordingly, DHS cannot quantify with confidence, the net benefit of the redistribution of H–1B cap selections detailed in this analysis.

DHS also is changing the filing procedures to allow USCIS to deny or revoke approval of a subsequent new or amended petition filed by the petitioner,

[196] DOL uses wage levels to determine the prevailing wage based on the level of education, experience (including special skills and other requirements), or supervisory duties required for a position; however, USCIS would use wage levels to rank and select registrations (or petitions, as applicable) based on the rate of pay for the wage level that the proffered wage were to equal or exceed. More information about DOL wage level determinations can be found at U.S. Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Revised Nov. 2009), *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf;* and at U.S. Department of Labor, Foreign Labor Certification Data Center, Online Wage Library, *https://www.flcdatacenter.com/* (last visited Dec. 15, 2020). DHS acknowledges that varying wage levels correspond to varying skill levels. In analyzing the economic effects of this final rule, DHS recognizes that prospective petitioners may offer wages exceeding the wage levels associated with the skills required for given positions to increase their chances of selection under the ranked selection process.

[197] Society for Human Resource Management (SHRM), *2016 Human Capital Benchmarking Report,* at 16, *https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2016-Human-Capital-Report.pdf* (last visited Oct. 21, 2020). The study was based on data collected from 2,048 randomly selected human resource professionals who participated in the 2016 SHRM Human Capital Benchmarking Survey. The hiring cost is reported as $4,129 per worker in 2016 dollars and converted to 2019 dollars in this analysis. The hiring cost includes third-party agency fees, advertising agency fees, job fairs, online job board fees, employee referrals, travel costs of applicants and staff, relocation costs, recruiter pay and benefits, and talent acquisition system costs.

or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that is equivalent to a lower wage level, after listing a higher wage level on the registration (or petition, if registration is suspended) to increase the odds of selection. DHS is unable to quantify the cost of these changes to petitioners.

iv. Costs of Filing Form I–129 Petitions

DHS is amending Form I–129, which must be filed by petitioners on behalf of H–1B beneficiaries, to align with the regulatory changes DHS is making in this final rule. The changes to Form I–129 will result in an increased time burden to complete and submit the form.

Absent the changes implemented through this final rule, the current estimated time burden to complete and file Form I–129 is 2.84 hours per petition. As a result of the changes in this final rule, DHS estimates the total time burden to complete and file Form I–129 will be 3.09 hours per petition, to account for the additional time petitioners will spend reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation, and submitting the petition. DHS estimates the time burden will increase by a total of 15 minutes (0.25 hours) per petition for completing a Form I–129 petition.[198]

To estimate the additional cost of filing Form I–129, DHS applies the additional estimated time burden to complete and file Form 1–129 (0.25 hours) to the respective total population and compensation rate of who may file, including an HR specialist, in-house lawyer, or outsourced lawyer. As shown in Table 14, DHS estimates, the total additional annual opportunity cost of time to petitioners completing and filing Form I–129 petitions will be approximately $3,457,401.

TABLE 14—ADDITIONAL OPPORTUNITY COSTS OF TIME TO PETITIONERS FOR FILING FORM I–129 PETITIONS FROM AN INCREASE IN TIME BURDEN

| Cost items | Total affected population<br>A | Additional time burden to complete Form I–129 (hours)<br>B | Compensation rate<br>C | Total cost<br>D = A × B × C |
|---|---|---|---|---|
| Opportunity cost of time to complete Form I–129 for H–1B petitions by: | | | | |
| HR specialist | 21,220 | 0.25 | $47.57 | $252,359 |
| In-house lawyer | 27,586 | 0.25 | 102.00 | 703,443 |
| Outsourced lawyer | 57,294 | 0.25 | 174.65 | 2,501,599 |
| Total | 106,100 | | | 3,457,401 |

Source: USCIS analysis.

v. Costs of Submitting Registrations as Modified by This Final Rule

DHS is amending the required information on the H–1B Registration Tool. In addition to the information required on the current registration tool, a registrant will be required to provide the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment, if such data is available. The proffered wage is the wage that the employer intends to pay the beneficiary. The SOC code and area of intended employment would be indicated on the LCA filed with the petition. For registrants relying on a private wage survey, if the proffered wage is less than the corresponding level I OES wage, the registrant will select the ''Wage Level I and below'' box on the registration tool. If the registration indicates that the H–1B beneficiary will work in multiple locations, or in multiple positions if the prospective petitioner is an agent, USCIS will rank and select the registration based on the lowest corresponding OES wage level that the proffered wage equals or exceeds. In the limited instance where there is no current OES prevailing wage information for the proffered position, the registrant will follow DOL guidance on prevailing wage determinations to select the OES wage level on the registration, and USCIS will rank and select based on the highest OES wage level. The changes to this registration requirement will impose increased opportunity costs of time to registrants, by adding additional information to their registration.

The current estimated time burden to complete and file an electronic registration is 30 minutes (0.5 hours) per registration.[199] DHS estimates the total time burden to complete and file a registration in light of this final rule will be 50 minutes (0.83 hours) per registration, which amounts to an additional time burden of 20 minutes (0.33 hours) per registration. The additional time burden accounts for the additional time a registrant will spend reviewing instructions, completing the registration, and submitting the registration.

To estimate the additional cost of submitting a registration, DHS applies the additional estimated time burden to complete and submit the registration (0.33 hours) to the respective total population and total rate of compensation of who may file, including HR specialists, in-house lawyers, or outsourced lawyers. As shown in Table 15, DHS estimates the total additional annual opportunity cost of time to the prospective petitioners of completing and submitting registrations will be approximately $11,795,997.

[198] 0.25 hours additional time to complete and file Form I–129 = (3.09 hours to complete and file the new Form I–129) – (2.84 hours to complete and file the current Form I–129 and its supplements)

[199] *Agency Information Collection Activities; Revision of a Currently Approved Collection: H–1B Registration Tool,* 84 FR 54159 (Oct. 9, 2019).

TABLE 15—ADDITIONAL COST OF SUBMITTING REGISTRATIONS

| Cost items | Total affected population<br>A | Additional time burden to submit registrations (hours)<br>B | Compensation rate<br>C | Total cost<br>D = A × B × C |
|---|---|---|---|---|
| Opportunity cost of time to complete registrations by: | | | | |
| HR specialist | 54,847 | 0.33 | $47.57 | $860,994 |
| In-house lawyer | 71,302 | 0.33 | 102.00 | 2,400,025 |
| Outsourced lawyer | 148,088 | 0.33 | 174.65 | 8,534,978 |
| Total | 274,237 | | | 11,795,997 |

Source: USCIS analysis.

While the expectation is that the registration process will be run on an annual basis, USCIS may suspend the H–1B registration requirement, in its discretion, if it determines that the registration process is inoperable for any reason. The selection process also allows for selection based solely on the submission of petitions in any year in which the registration process is suspended due to technical or other issues. In years when registration is suspended, DHS estimates, based on the 5-year average of H–1B cap-subject petitions received for FYs 2016 to 2020, that 211,797 H–1B cap-subject petitions will be submitted annually. In the event registration is suspended and 211,797 H–1B cap-subject petitions are submitted, DHS estimates that 106,100 petitions will be selected for adjudication to meet the numerical allocations and 105,697 petitions will be rejected. For FY 2021, DHS selected 124,415 registrations to generate the 106,100 petitions projected to meet the numerical allocations. Therefore, DHS estimates that the additional cost to petitioners for preparing and submitting H–1B cap-subject petitions in light of this final rule will be significantly higher in the event registration is suspended because more petitions will be prepared and submitted in this scenario. However, if registration is suspended there will be no costs associated with registration, so the overall additional cost of this final rule to petitioners will be less (stated another way, the estimated added cost for submitting approximately 212,000 petitions if registration is suspended will be less than the added costs based on approximately 274,000 registrations and 106,000 petitions for those with selected registrations). Since the expectation is that registration will be run on an annual basis, and because the estimated additional costs resulting from this final rule will be less if registration is suspended, DHS is not separately estimating the costs for years when registration will be suspended and, instead, is relying on the additional costs created by this final rule when registration will be required to estimate total costs of this final rule to petitioners seeking to file H–1B cap-subject petitions.

vi. Familiarization Cost

Familiarization costs comprise the opportunity cost of the time spent reading and understanding the details of a rule to fully comply with the new regulation(s). To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. The entities directly regulated by this rule are the employers who file H–1B petitions. Using FY 2020 internal data on actual filings of Form I–129 H–1B petitions, DHS identified 24,111 [200] unique entities. DHS assumes that the petitioners require approximately two hours to familiarize themselves with the rule. Using the average total rate of compensation of HR specialists, In-house lawyers, and Outsourced lawyers from Table 4, and assuming one person at each entity familiarizes themself with the rule, DHS estimates a one-time total familiarization cost of $6,285,527 in FY 2022.

TABLE 16—FAMILIARIZATION COSTS TO THE PETITIONERS

| Cost items | Total affected population<br>A | Additional time burden to familiarize (hours)<br>B | Compensation rate<br>C | Total cost<br>D = A × B × C |
|---|---|---|---|---|
| Opportunity cost of time to familiarize the rule by: | | | | |
| HR specialist | 4,822 | 2 | $47.57 | $458,765 |
| In-house lawyer | 6,269 | 2 | 102.00 | 1,278,876 |
| Outsourced lawyer | 13,020 | 2 | 174.65 | 4,547,886 |
| Total | 24,111 | | | 6,285,527 |

Source: USCIS analysis.

[200] Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Form I–129H–1B, Claims 3, IRFA data (Aug. 18, 2020) & USCIS Analysis.

b. Total Estimated Costs of Regulatory Changes

In this section, DHS presents the total annual costs of this final rule annualized over a 10-year implementation period. Table 17 details the total annual costs of this final rule to petitioners will be $21,538,925 in FY 2022 and $15,253,398 in FY 2023 through 2032.

TABLE 17—SUMMARY OF ESTIMATED ANNUAL COSTS TO PETITIONERS IN THIS FINAL RULE

| Costs | Total estimated annual cost |
|---|---|
| Petitioners' additional opportunity cost of time in filing Form I–129 petitions | $3,457,401 |
| Petitioners' additional opportunity cost of time in submitting information on the registration | 11,795,997 |
| Familiarization Cost (Year 1 only FY 2022) | 6,285,527 |
| Total Annual Costs (undiscounted) = FY 2022 | 21,538,925 |
| Total Annual Cost (undiscounted) = FY 2023–FY 2032 | 15,253,398 |

Table 18 shows costs over the 10-year implementation period of this final rule. DHS estimates the 10-year total net cost of the rule to petitioners to be approximately $158,819,507 undiscounted, $136,217,032 discounted at 3-percent, and $113,007,809 discounted at 7-percent. Over the 10-year implementation period of the rule, DHS estimates the annualized costs of the rule to be $15,968,792 annualized at 3-percent, $16,089,770 annualized at 7-percent.

TABLE 18—TOTAL COSTS OF THIS FINAL RULE

| Year | Total estimated costs | |
|---|---|---|
| | $21,538,925 (year 1); $15,253,398 (year 2–10) | |
| | Discounted at 3-percent | Discounted at 7-percent |
| 1 | $20,911,578 | $20,129,836 |
| 2 | 14,377,791 | 13,322,909 |
| 3 | 13,959,020 | 12,451,316 |
| 4 | 13,552,447 | 11,636,744 |
| 5 | 13,157,715 | 10,875,462 |
| 6 | 12,774,481 | 10,163,983 |
| 7 | 12,402,408 | 9,499,050 |
| 8 | 12,041,173 | 8,877,617 |
| 9 | 11,690,459 | 8,296,838 |
| 10 | 11,349,961 | 7,754,054 |
| Total | 136,217,032 | 113,007,809 |
| Annualized | 15,968,792 | 16,089,770 |

E.O. 13771 directs agencies to reduced regulation and control regulatory costs. This final rule is expected to be an E.O. 13771 regulatory action. DHS estimates the total cost of this rule will be $10,515,740 annualized using a 7- percent discount rate over a perpetual time horizon, in 2016 dollars, and discounted back to 2016.

c. Costs to the Federal Government

DHS is revising the process and system by which H–1B registrations or petitions, as applicable, will be selected toward the annual numerical allocations. This final rule will require updates to USCIS IT systems and additional time spent by USCIS on H–1B registrations or petitions.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services by DHS, including administrative costs and services provided without charge to certain applicants and petitioners.[201] DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as salaries and benefits of clerical staff, officers, and managers, plus an amount to recover unassigned overhead (such as facility rent, IT equipment and systems, or other expenses) and immigration services provided without charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS notes the time necessary for USCIS to review the information submitted with the forms relevant to this final rule includes the time to adjudicate the benefit request. These costs are captured in the fees collected for the benefit request from petitioners.

[201] *See* INA section 286(m), 8 U.S.C. 1356(m).

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on

small entities during the development of their rules. ''Small entities'' are small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An ''individual'' is not considered a small entity, and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis (IRFA) of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes.

Although individuals, rather than small entities, submit the majority of immigration and naturalization benefit applications and petitions, this final rule will affect entities that file and pay fees for H–1B non-immigrant benefit requests. The USCIS forms that are subject to an RFA analysis for this final rule are Form I–129, Petition for a Nonimmigrant Worker and the Registration H–1B Tool.

DHS does not believe that the changes in this final rule will have a significant economic impact on a substantial number of small entities that will file H–1B petitions. A Final Regulatory Flexibility Analysis (FRFA) follows.

1. A Statement of Need for, and Objectives of, This Final Rule

DHS's objectives and legal authority for this final rule are discussed earlier in the preamble. DHS is amending its regulations governing H–1B specialty occupation workers. The purpose of this final rule is to better ensure that H–1B classification is more likely to be awarded to petitioners seeking to employ relatively higher-skilled and higher-paid beneficiaries. DHS believes these changes will disincentivize use of the H–1B program to fill relatively lower-paid, lower-skilled positions.

2. A Statement of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of Assessment of Any Changes Made in the Proposed Rule as a Result of Such Comments

*Comments:* A professional association wrote that DHS claimed that no small entities would be significantly impacted by the proposed rule, but DHS also estimated that 80.1 percent of those that filed Form I–129 were small entities. An individual commenter wrote that DHS incorrectly concluded that the proposed rule would not have a significant impact on small entities because small businesses would be unlikely to have the legal expertise or institutional knowledge to navigate the H–1B system.

*Response:* DHS estimates the economic impact for each small entity, based on the additional cost and time associated with the changes to the form, in percentages, is the sum of the impacts of the final rule divided by the entity's sales revenue.[202] DHS constructed the distribution of economic impact of the final rule based on a sample of 312 small entities. Across all 312 small entities, the increase in cost to a small entity will range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0 small entities) will experience a cost increase that is greater than 5 percent of revenues.

*Comments:* Some commenters generally stated that the proposed rule would harm small businesses. Multiple commenters, including a trade association, employer, and individuals, wrote that the proposed rule would harm small and emerging businesses who, often, could not offer higher salaries compared to larger firms. Other commenters said the proposed rule would favor larger firms at the expense of small and medium sized businesses. An individual commenter wrote that the proposed rule would harm small technology companies and start-ups that are dependent on recruiting young talent, as they would be required to offer such employees level III and level IV wages when level I and level II wages would be more appropriate. Another individual commenter said companies would suffer because many small information technology or financial companies could not provide as high of salaries to their foreign workers as big companies could. An individual commenter wrote that the proposed rule would harm small businesses that often could not find the appropriate talent domestically and would have a legitimate need to hire H–1B workers, while another commenter argued the proposed rule would shrink the hiring talent pool for small businesses. An individual commenter wrote that, under the proposed rule, small businesses would not be able to operate due to an inability to find suitable employees. Similarly, an individual commenter wrote that the proposed rule would ensure that H–1B visas would go to ''the highest bidders'' and would discriminate against smaller businesses with a genuine need for H–1B employees. An individual commenter wrote that the proposed rule would encourage larger employers who could afford to pay higher wages to employees to artificially inflate their job requirements and increase their chance of selection through the ranked selection process. Another commenter asserted that smaller companies in non-metropolitan areas, who might have difficulty finding domestic candidates for positions, would be negatively impacted by the proposed rule.

*Response:* DHS acknowledges that an employer offering a level I or below wage under the regular cap, and an employer offering a level II, I, or below wage under the advanced degree exemption, may have a lesser chance of selection than under the current random selection process. DHS does not believe that the changes in this final rule will have a significant economic impact on a substantial number of small businesses. As explained in the NPRM, DHS conducted an RFA and found that the changes in this rule would not have a significant economic impact on a substantial number of small entities.

Additionally, this rule does not treat people who work for small-sized entities differently than those who work for large companies. While DHS recognizes that some small businesses may operate on smaller margins than larger companies, if an employer values a beneficiary's work and the unique qualities the beneficiary possesses, the employer can offer a higher wage than required by the prevailing wage level to reflect that value. If a small company is unable to pay an employee at wage level III or IV for a greater chance of selection, they could then try to find a substitute U.S. worker.

*Comments:* An individual commenter wrote that rural areas and smaller towns depend on entry-level H–1B workers at a level I wage, but those communities would not be able to justify hiring such H–1B workers at level III and level IV wages. Another individual commenter said the rule would harm employers in rural areas where wages, often, would be lower. A professional association wrote that small and medium sized medical practices, often serving rural or

[202] The economic impact, in percent, for each small entity $i$ = (Cost of one petition for entity $i$ × Number of petitions for entity $i$) × 100. The cost of one petition for entity $i$ ($75.60) is estimated by adding the two cost components per petition of this final rule ($75.60 = $32.59 + $43.01). The first component ($32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions ($32.59 = $3,457,401/106,100) from Table 13. The second component ($43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions ($43.01 = $11,795,997/274,237) from Table 14. The number of petitions for entity $i$ is taken from USCIS internal data on actual filings of I–129 H–1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

low-income areas, depend on new or inexperienced physicians at the level I or level II wage rate and would be unable to compete for H–1B cap slots for these employees under the proposed rule. An employer wrote that rural healthcare providers would not be able to meet the wage rates necessary to attract workers on H–1B visas, and, as a result, the proposed rule would decrease the supply of healthcare labor to rural communities.

*Response:* The rule takes the geographic area into account when ranking registrations or petitions, and, therefore, DHS does not agree that this rule will harm employers in rural or other areas where wages often are lower. Particularly, as stated in the proposed rule, USCIS will select H–1B registrations or petitions, as applicable, based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and *area(s) of intended employment* (emphasis added). The prevailing wage already accounts for wage variations by location. Additionally, this rule does not treat foreign workers who work for small-sized entities differently than those who work for large companies.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Rule, and a Detailed Statement of Any Change Made to the Final Rule as a Result of the Comments

DHS did not receive comments on this rule from the Chief Counsel for Advocacy of the Small Business Administration.

4. A Description of and an Estimate of the Number of Small Entities to Which This Final Rule Will Apply or an Explanation of Why No Such Estimate Is Available

For this analysis, DHS conducted a sample analysis of historical Form I–129 H–1B petitions to estimate the number of small entities impacted by this final rule. DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code,[203] revenue, and employee count for each entity in the sample. To determine whether an entity is small for purposes of the RFA, DHS first classified the entity by its NAICS code and, then, used SBA size standards guidelines [204] to classify the revenue or employee count threshold for each entity. Based on the NAICS codes, some entities were classified as small based on their annual revenue, and some by their numbers of employees. Once as many entities as possible were matched, those that had relevant data were compared to the size standards provided by the SBA to determine whether they were small or not. Those that could not be matched or compared were assumed to be small under the presumption that non-small entities would have been identified by one of the databases at some point in their existence.

Using FY 2020 internal data on actual filings of Form I–129 H–1B petitions, DHS identified 24,111 [205] unique entities. DHS devised a methodology to conduct the small entity analysis based on a representative, random sample of the potentially impacted population. DHS first determined the minimum sample size necessary to achieve a 95 percent confidence level estimation for the impacted population of entities using the standard statistical formula at a 5 percent margin of error. Then, DHS created a sample size greater than the minimum necessary to increase the likelihood that our matches would meet or exceed the minimum required sample.

DHS randomly selected a sample of 473 entities from the population of 24,111 entities that filed Form I–129 for H–1B petitions in FY 2020. Of the 473 entities, 406 entities returned a successful match of a filing entity in the ReferenceUSA, Manta, Cortera, and Guidestar databases; 67 entities did not return a match. Using these databases' revenue or employee count and their assigned North American Industry Classification System (NAICS) code, DHS determined 312 of the 406 matches to be small entities, 94 to be non-small entities. Based on previous experience conducting RFAs, DHS assumes filing entities without database matches or missing revenue/employee count data are likely to be small entities. As a result, to prevent underestimating the number of small entities this rule will affect, DHS conservatively considers all the non-matched and missing entities as small entities for the purpose of this analysis. Therefore, DHS conservatively classifies 379 of 473 entities as small entities, including combined non-matches (67), and small entity matches (312). Thus, DHS estimates that 80.1% (379 of 473) of the entities filing Form I–129 H–1B petitions are small entities.

In this analysis DHS assumes that the distribution of firm size for our sample is the same as the entire population of Form I–129. Thus, DHS estimates the number of small entities to be 80.1% of the population of 24,111 entities that filed Form I–129 under the H–1B classification, as summarized in Table 19 below. The annual numeric estimate of the small entities impacted by this final rule is 19,319 entities.[206]

TABLE 19—NUMBER OF SMALL ENTITIES FOR FORM I–129 FOR H–1B, FY 2020

| Population | Number of small entities | Proportion of population (percent) |
|---|---|---|
| 24,111 ..... | 19,319 | 80.1 |

Following the distributional assumptions above, DHS uses the set of 312 small entities with matched revenue data to estimate the economic impact of this final rule on each small entity. The economic impact on each small entity, in percentages, is the sum of the impacts of the final rule divided by the entity's sales revenue.[207] DHS constructed the distribution of economic impact of the final rule based on the sample of 312 small entities. Across all 312 small

[203] U.S. Census Bureau, North American Industry Classification System, *http://www.census.gov/eos/www/naics/* (last visited Oct. 21, 2020).

[204] DHS utilized a subscription-based online database of U.S. entities, ReferenceUSA, as well as three other open-access, free databases of public and private entities, Manta, Cortera, and Guidestar, to determine the North American Industry Classification System (NAICS) code, revenue, and employee count for each entity. Guidelines suggested by the SBA Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act* (Aug. 2017), at 19, *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

[205] Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Form I–129H–1B, Claims 3, IRFA data (Aug. 18, 2020) & USCIS Analysis.

[206] The annual numeric estimate of the small entities (19,319) = Population (24,111) * Percentage of small entities (80.1%).

[207] The economic impact, in percent, for each small entity $i$ = (Cost of one petition for entity $i$ × Number of petitions for entity $i$) × 100. The cost of one petition for entity $i$ ($75.60) is estimated by adding the two cost components per petition of this final rule ($75.60 = $32.59 + $43.01). The first component ($32.59) is the weighted average additional cost of filing a petition, and is calculated by dividing total cost by the number of petitions ($32.59 = $3,457,401/106,100) from Table 14. The second component ($43.01) is the weighted average cost of submitting information on the registration and is calculated by dividing total cost by the number of baseline petitions ($43.01 = $11,795,997/274,237) from Table 15. The number of petitions for entity $i$ is taken from USCIS internal data on actual filings of I–129 H–1B petition. The entity's sales revenue is taken from ReferenceUSA, Manta, Cortera, and Guidestar databases.

entities, the increase in cost to a small entity will range from 0.00000026 percent to 2.5 percent of that entity's FY 2020 revenue. Of the 312 small entities, 0 percent (0 small entities) will experience a cost increase that is greater than 5 percent of revenues. Extrapolating to the population of 19,319 small entities and assuming an economic impact significance threshold of 5 percent of annual revenues, DHS estimates no small entities will be significantly affected by this final rule.

Based on this analysis, DHS does not believe that this final rule will have a significant economic impact on a substantial number of small entities that file H–1B petitions.

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

As stated above in the preamble, this final rule will impose additional reporting, recordkeeping, or other compliance requirements on entities that could be small entities.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of the Applicable Statues, Including a Statement of Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

DHS requested comments on, including potential alternatives to, the proposed ranking and selection of registrations based on the OES prevailing wage level that corresponds to the requirements of the proffered position in situations where there is no current OES prevailing wage information. In the RFA context, DHS sought comments on alternatives that would accomplish the objectives of the proposed rule without unduly burdening small entities. DHS also welcomed any public comments or data on the number of small entities that would be petitioning for an H–1B employee and any direct impacts on those small entities.

*Comment:* Some commenters said that DHS should consider ranking by years of experience, rather than by wage. One commenter asked DHS to give an advantage to candidates who have work experience in the United States.

*Response:* DHS declines to adopt these alternatives, as ranking and selection by years of experience would not best accomplish the goal of attracting the best and brightest workers. DHS believes that the salary, relative to others in the same occupational classification and area of intended employment, rather than years of experience, is generally more indicative of skill level and relative value/productivity of the worker to the United States. *See* section 3.3 *Requests for comments on alternatives* for additional suggested alternatives.

*C. Congressional Review Act*

The Office of Information and Regulatory Affairs has determined that this final rule is a major rule, as defined in 5 U.S.C. 804, also known as the ''Congressional Review Act'' (CRA), as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, sec. 251, 110 Stat. 868, 873, and codified at 5 U.S.C. 801 *et seq.* Therefore, the rule requires at least a 60-day delayed effective date. DHS has complied with the CRA's reporting requirements and has sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

*D. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded federal mandates on State, local, and tribal governments. Title II of the UMRA requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. Based on the Consumer Price Index for All Urban Consumers (CPI–U), the value equivalent of $100 million in 1995 adjusted for inflation to 2019 levels is approximately $168 million.[208]

This rule does not contain a ''Federal mandate'' as defined in UMRA that may result in $100 million or more expenditures (adjusted annually for inflation—$168 million in 2019 dollars) in any one year by State, local and tribal governments or the private sector. This rule also does not uniquely affect small governments. Accordingly, Title II of UMRA requires no further agency action or analysis.

*E. Executive Order 13132 (Federalism)*

This final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Executive Order 12988 (Civil Justice Reform)*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

*G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This final rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

*H. National Environmental Policy Act (NEPA)*

DHS analyzes actions to determine whether the National Environmental Policy Act, Public Law 91–190, 42 U.S.C. 4321 through 4347 (NEPA), applies to them and, if so, what degree of analysis is required. DHS Directive 023–01 Rev. 01 (Directive) and Instruction Manual 023–01–001–01 Rev. 01, *Implementation of the National Environmental Policy Act* (Instruction Manual) establish the policies and procedures that DHS and its

[208] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf (last visited* Sept. *2, 2020).*

Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2019); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2019 – Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(255.657 – 152.383)/152.383] * 100 = (103.274/152.383) *100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded)

Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.68 = $168 million in 2019 dollars.

components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS).[209] Categorical exclusions established by DHS are set forth in Appendix A of the Instruction Manual. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.[210]

As discussed in more detail throughout this final rule, DHS is amending regulations governing the selection of registrations or petitions, as applicable, toward the annual H–1B numerical allocations. This final rule establishes that, if more registrations are received during the annual initial registration period (or petition filing period, if applicable) than necessary to reach the applicable numerical allocation, USCIS will rank and select the registrations (or petitions, if the registration process is suspended) received on the basis of the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I and below. If a proffered wage falls below an OES wage level I, because the proffered wage is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration in the same category as OES wage level I.[211]

Generally, DHS believes NEPA does not apply to a rule intended to change a discrete aspect of a visa program because any attempt to analyze its potential impacts would be largely speculative, if not completely so. This final rule does not propose to alter the statutory limitations on the numbers of nonimmigrants who: May be issued initial H–1B visas or granted initial H–1B nonimmigrant status, consequently will be admitted into the United States as H–1B nonimmigrants, will be allowed to change their status to H–1B, or will extend their stay in H–1B status. DHS cannot reasonably estimate whether the wage level-based ranking approach to select H–1B registrations (or petitions in any year in which the registration requirement were suspended) that DHS is implementing will affect how many petitions will be filed for workers to be employed in specialty occupations or whether the regulatory amendments herein will result in an overall change in the number of H–1B petitions that ultimately will be approved, and the number of H–1B workers who will be employed in the United States in any FY. DHS has no reason to believe that these amendments to H–1B regulations will change the environmental effect, if any, of the existing regulations. Therefore, DHS has determined that, even if NEPA applied to this action, this final rule clearly fits within categorical exclusion A3(d) in the Instruction Manual, which provides an exclusion for ''promulgation of rules . . . that amend an existing regulation without changing its environmental effect.'' This final rule will maintain the current human environment by proposing improvements to the H–1B program that will take effect during the economic crisis caused by COVID–19 in a way that more effectively will prevent an adverse impact from the employment of H–1B workers on the wages and working conditions of similarly employed U.S. workers. This final rule is not a part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

*I. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA) Public Law 104–13, 44 U.S.C. 3501, *et seq.,* all Departments are required to submit to the Office of Management and Budget, for review and approval, any reporting requirements inherent in a rule. In compliance with the PRA, DHS published a notice of proposed rulemaking on November 2, 2020, in which it requested comments on the revisions to the information collections associated with this rulemaking.[212] DHS responded to those comments in Section IV.E.2. of this final rule.

The following is an overview of the information collections associated with this final rule:

1. USCIS H–1B Registration Tool

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–1B Registration Tool.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* OMB–64; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS will use the data collected through the H–1B Registration Tool to select a sufficient number of registrations projected as needed to meet the applicable H–1B cap allocations and to notify registrants whether their registrations were selected.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–1B Registration Tool is 275,000, and the estimated hour burden per response is 0.833 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 229,075 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0.

2. USCIS Form I–129

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for an alien to

[209] *See* 40 CFR 1507.3(b)(2)(ii), 1508.4.

[210] Instruction Manual section V.B(2)(a)–(c).

[211] If the proffered wage is expressed as a range, USCIS would make the comparison using the lowest wage in the range.

[212] *See* 85 FR 69236, 69261–2.

temporarily enter as a nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for nonimmigrant workers and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

USCIS also uses the data to determine continued eligibility. For example, the data collected is used in compliance reviews and other inspections to ensure that all program requirements are being met.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* I–129 is 294,751 and the estimated hour burden per response is 3.09 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129 is 4,760 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I–129 is 3,057 and the estimated hour burden per response is 0.67 hours; the estimated total number of respondents for the information collection H Classification Supplement to Form I–129 is 96,291 and the estimated hour burden per response is 2 hours; the estimated total number of respondents for the information collection H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement is 96,291 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection L Classification Supplement to Form I–129 is 37,831 and the estimated hour burden per response is 1.34 hours; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I–129 is 22,710 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Q–1 Classification Supplement to Form I–129 is 155 and the estimated hour burden per response is 0.34 hours; the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129 is 6,635 and the estimated hour burden per response is 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection of information is 1,293,873 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $70,681,290.

*J. Signature*

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, is delegating the authority to electronically sign this document to Ian J. Brekke, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

**List of Subjects in 8 CFR Part 214**

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

Accordingly, DHS amends part 214 of chapter I of title 8 of the Code of Federal Regulations as follows:

## PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218.

■ 2. Section 214.2 is amended by:
■ a. Revising the first sentence of paragraph (h)(8)(iii)(A)(*1*) introductory text;
■ b. Adding paragraphs (h)(8)(iii)(A)(*1*)(*i*) and (*ii*);
■ c. In paragraph (h)(8)(iii)(A)(*5*)(*i*), revising the last two sentences and adding a sentence at the end;
■ d. In paragraph (h)(8)(iii)(A)(*5*)(*ii*), revising the last two sentences and adding a sentence at the end;
■ e. In paragraph (h)(8)(iii)(A)(*6*)(*i*), revising the last two sentences and adding a sentence at the end;
■ f. In paragraph (h)(8)(iii)(A)(*6*)(*ii*), revising the last two sentences and adding a sentence at the end;
■ g. Revising paragraphs (h)(8)(iii)(A)(*7*) and (h)(8)(iii)(D)(*1*);
■ h. In paragraph (h)(8)(iv)(B)(*1*), revising the last three sentences and adding three sentences at the end;
■ i. Revising paragraph (h)(8)(iv)(B)(*2*);
■ j. Removing and reserving paragraph (h)(8)(v);
■ k. Revising paragraph (h)(10)(ii);
■ l. Revising paragraph (h)(11)(iii)(A)(*2*);
■ m. Redesignating paragraphs (h)(11)(iii)(A)(*3*) through (*5*) as (h)(11)(iii)(A)(*4*) through (*6*); and
■ n. Adding a new paragraph (h)(11)(iii)(A)(*3*) and paragraph (h)(24)(i).

The revisions and additions read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

* * * * *

(h) * * *

(8) * * *

(iii) * * *

(A) * * *

(*1*) * * * Except as provided in paragraph (h)(8)(iv) of this section, before a petitioner is eligible to file an H–1B cap-subject petition for a beneficiary who may be counted under section 214(g)(1)(A) of the Act (''H–1B regular cap'') or eligible for exemption under section 214(g)(5)(C) of the Act (''H–1B advanced degree exemption''), the prospective petitioner or its attorney or accredited representative must register to file a petition on behalf of an alien beneficiary electronically through the USCIS website (*www.uscis.gov*).

* * *

(*i*) *Ranking by wage levels.* USCIS will rank and select registrations as set forth in paragraphs (h)(8)(iii)(A)(*5*) and (*6*) of this section. For purposes of the ranking and selection process, USCIS will use the highest corresponding Occupational Employment Statistics (OES) wage level that the proffered wage will equal or exceed for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. If the proffered wage is lower than the OES wage level I, because it is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration in the same category as OES wage level I. If the H–1B beneficiary will work in multiple locations, or in multiple positions if the registrant is an agent, USCIS will rank and select the registration based on the lowest corresponding OES wage level that the proffered wage will equal or exceed. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and

select the registration based on the OES wage level that corresponds to the requirements of the proffered position.

(*ii*) [Reserved]

* * * * *

(*5*) * * *

(*i*) * * * If USCIS has received more registrations on the final registration date than necessary to meet the H–1B regular cap under Section 214(g)(1)(A) of the Act, USCIS will rank and select from among all registrations properly submitted on the final registration date on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.

(*ii*) * * * If USCIS has received more than a sufficient number of registrations to meet the H–1B regular cap under Section 214(g)(1)(A) of the Act, USCIS will rank and select from among all registrations properly submitted during the initial registration period on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation.

(*6*) * * *

(*i*) * * * If on the final registration date, USCIS has received more registrations than necessary to meet the H–1B advanced degree exemption limitation under Section 214(g)(5)(C) of the Act, USCIS will rank and select, from among the registrations properly submitted on the final registration date that may be counted against the advanced degree exemption, the number of registrations necessary to reach the H–1B advanced degree exemption on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations necessary to reach the H–1B advanced degree exemption.

(*ii*) * * * USCIS will rank and select, from among the remaining registrations properly submitted during the initial registration period that may be counted against the advanced degree exemption numerical limitation, the number of registrations necessary to reach the H–1B advanced degree exemption on the basis of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations necessary to reach the H–1B advanced degree exemption.

(*7*) *Increase to the number of registrations projected to meet the H–1B regular cap or advanced degree exemption allocations in a fiscal year.* Unselected registrations will remain on reserve for the applicable fiscal year. If USCIS determines that it needs to select additional registrations to receive the number of petitions projected to meet the numerical limitations, USCIS will select from among the registrations that are on reserve a sufficient number to meet the H–1B regular cap or advanced degree exemption numerical limitation, as applicable. If all of the registrations on reserve are selected and there are still fewer registrations than needed to reach the H–1B regular cap or advanced degree exemption numerical limitation, as applicable, USCIS may reopen the applicable registration period until USCIS determines that it has received a sufficient number of registrations projected to meet the H–1B regular cap or advanced degree exemption numerical limitation. USCIS will monitor the number of registrations received and will notify the public of the date that USCIS has received the necessary number of registrations (the new ''final registration date''). The day the public is notified will not control the applicable final registration date. When selecting additional registrations under this paragraph, USCIS will rank and select properly submitted registrations in accordance with paragraphs (h)(8)(iii)(A)(*1*), (*5*), and (*6*) of this section. If the registration period will be re-opened, USCIS will announce the start of the re-opened registration period on the USCIS website at *www.uscis.gov.*

* * * * *

(D) * * * (*1*) *Filing procedures.* In addition to any other applicable requirements, a petitioner may file an H–1B petition for a beneficiary that may be counted under section 214(g)(1)(A) or eligible for exemption under section 214(g)(5)(C) of the Act only if the petition is based on a valid registration submitted by the petitioner, or its designated representative, on behalf of the beneficiary that was selected beforehand by USCIS. The petition must be filed within the filing period indicated in the selection notice. A petitioner may not substitute the beneficiary named in the original registration or transfer the registration to another petitioner.

(*i*) If a petitioner files an H–1B cap-subject petition based on a registration that was not selected beforehand by USCIS, based on a registration for a different beneficiary than the beneficiary named in the petition, or based on a registration considered by USCIS to be invalid, the H–1B cap-subject petition will be rejected or denied. USCIS will consider a registration to be invalid if the registration fee associated with the registration is declined, rejected, or canceled after submission as the registration fee is non-refundable and

due at the time the registration is submitted.

(*ii*) If USCIS determines that the statement of facts contained on the registration form is inaccurate, fraudulent, misrepresents any material fact, or is not true and correct, USCIS may reject or deny the petition or, if approved, may revoke the approval of a petition that was filed based on that registration.

(*iii*) USCIS also may deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection. USCIS will not deny or revoke approval of such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration selection was based.

* * * * *

(iv) * * *

(B) * * *

(*1*) * * * If the final receipt date is any of the first five business days on which petitions subject to the H–1B regular cap may be received, USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H–1B regular cap. If USCIS has received more petitions than necessary to meet the numerical limitation for the H–1B regular cap, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the wage falls below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

(*2*) *Advanced degree exemption selection in event of suspended registration process.* After USCIS has received a sufficient number of petitions to meet the H–1B regular cap and, as applicable, completed the selection process of petitions for the H–1B regular cap, USCIS will determine whether there is a sufficient number of remaining petitions to meet the H–1B advanced degree exemption numerical limitation. When calculating the number of petitions needed to meet the H–1B advanced degree exemption numerical limitation USCIS will take into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received and will announce on its website the date that it receives the number of petitions projected as needed to meet the H–1B advanced degree exemption numerical limitation (the ''final receipt date''). The date the announcement is posted will not control the final receipt date. If the final receipt date is any of the first five business days on which petitions subject to the H–1B advanced degree exemption may be received (in other words, if the numerical limitation is reached on any one of the first five business days that filings can be made), USCIS will select from among all the petitions properly submitted during the first five business days the number of petitions deemed necessary to meet the H–1B advanced degree exemption numerical limitation. If USCIS has received more petitions than necessary to meet the numerical limitation for the H–1B advanced degree exemption, USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding with OES wage levels III, II, and I. Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select petitions based on the appropriate wage level that corresponds to the requirements of the proffered position. If the proffered wage is below an OES wage level I, USCIS will rank the petition in the same category as OES wage level I. USCIS will rank the petition in the same manner even if, instead of obtaining an OES prevailing wage, a petitioner elects to obtain a prevailing wage using another legitimate source (other than OES) or an independent authoritative source. If USCIS receives and ranks more petitions at a particular wage level than necessary to meet the numerical limitation for the H–1B advanced degree exemption, USCIS will randomly select from among all eligible petitions within that particular wage level a sufficient number of petitions needed to reach the numerical limitation.

* * * * *

(10) * * *

(ii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition may be denied if it is determined that the statements on the registration or petition were inaccurate. The petition will be denied if it is determined that the statements on the registration or petition were fraudulent or misrepresented a material fact. A petition also may be denied if it is not based on a valid registration submitted by the petitioner (or its designated representative), or a successor in interest, for the beneficiary named in the petition. A valid registration must represent a legitimate job offer. USCIS also may deny a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the original petition. USCIS will not deny such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based. There is no appeal from a decision to deny an extension of stay to the alien.

(11) * * *

(iii) * * *

(A) * * *

(*2*) The statement of facts contained in the petition; the registration, if applicable; or on the temporary labor certification or labor condition application; was not true and correct,

inaccurate, fraudulent, or misrepresented a material fact; or

(*3*) The petitioner, or a related entity, filed a new or amended petition on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly increase the odds of selection during the registration or petition selection process, as applicable, such as by reducing the proffered wage to an amount that would be equivalent to a lower wage level than that indicated on the registration, or the original petition if the registration process was suspended. USCIS will not revoke approval of such an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration or petition selection, as applicable, was based; or

* * * * *

(24) * * * (i) The requirement to submit a registration for an H–1B cap-subject petition and the selection process based on properly submitted registrations under paragraph (h)(8)(iii) of this section are intended to be severable from paragraph (h)(8)(iv) of this section. In the event paragraph (h)(8)(iii) is not implemented, or in the event that paragraph (h)(8)(iv) is not implemented, DHS intends that either of those provisions be implemented as an independent rule, without prejudice to petitioners in the United States under this section, as consistent with law.

* * * * *

**Ian J. Brekke,**

*Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security.*

[FR Doc. 2021–00183 Filed 1–7–21; 8:45 am]

**BILLING CODE 9111–97–P**

# Reader Aids

**Federal Register**

Vol. 86, No. 5

Friday, January 8, 2021

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | **202–741–6000** |
| **Laws** | **741–6000** |
| **Presidential Documents** | |
| Executive orders and proclamations | **741–6000** |
| **The United States Government Manual** | **741–6000** |
| **Other Services** | |
| Electronic and on-line services (voice) | **741–6020** |
| Privacy Act Compilation | **741–6050** |

### ELECTRONIC RESEARCH

#### World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

#### E-mail

**FEDREGTOC** (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

## FEDERAL REGISTER PAGES AND DATE, JANUARY

| | |
|---|---|
| 1–222 | 4 |
| 223–412 | 5 |
| 413–932 | 6 |
| 933–1248 | 7 |
| 1249–1736 | 8 |

## CFR PARTS AFFECTED DURING JANUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**2 CFR**

5900 ..... 1253

**3 CFR**

**Proclamations:**
10129 ..... 215
10130 ..... 413
10131 ..... 417

**Executive Orders:**
13969 ..... 219
13970 ..... 421
13971 ..... 1249

**Administrative Orders:**
Presidential Permits:
Permit of December 31, 2020 ..... 435

**6 CFR**

**Proposed Rules:**
27 ..... 495

**7 CFR**

760 ..... 439
271 ..... 358
273 ..... 358

**8 CFR**

214 ..... 1676

**10 CFR**

430 ..... 1253
431 ..... 4
1061 ..... 451

**Proposed Rules:**
50 ..... 1022

**12 CFR**

3 ..... 708
5 ..... 1254
217 ..... 708
252 ..... 708
324 ..... 708
620 ..... 223
747 ..... 933

**Proposed Rules:**
204 ..... 1303
1241 ..... 1306
1242 ..... 1326

**14 CFR**

39 ..... 458
97 ..... 25, 27

**15 CFR**

710 ..... 936
712 ..... 936
742 ..... 944
745 ..... 936
774 ..... 461, 944

**17 CFR**

23 ..... 223, 229
39 ..... 949
140 ..... 949
210 ..... 748
270 ..... 748

**20 CFR**

655 ..... 1

**Proposed Rules:**
655 ..... 29

**21 CFR**

101 ..... 462

**Proposed Rules:**
1301 ..... 1030
1309 ..... 1030
1321 ..... 1030

**22 CFR**

212 ..... 250

**25 CFR**

**Proposed Rules:**
15 ..... 1037

**26 CFR**

1 ..... 254, 464, 810, 1256

**29 CFR**

18 ..... 1
503 ..... 1
780 ..... 1168
788 ..... 1168
795 ..... 1168
4001 ..... 1256
4204 ..... 1256
4206 ..... 1256
4207 ..... 1256
4211 ..... 1256
4219 ..... 1256

**Proposed Rules:**
18 ..... 29
503 ..... 29

**32 CFR**

**Proposed Rules:**
158 ..... 1063
310 ..... 498

**33 CFR**

220 ..... 1278

**Proposed Rules:**
165 ..... 32

**37 CFR**

**Proposed Rules:**
401 ..... 35
404 ..... 35

**39 CFR**

**Proposed Rules:**
111 ..... 1080

**40 CFR**

30 ..... 469

## LIST OF PUBLIC LAWS

**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

**Last List January 7, 2021**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free email notification service of newly enacted public laws. To subscribe, go to *https://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=PUBLAWS-L&A=1*

**Note:** This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.