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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1207; Project Identifier MCAI–2022–00925–R; Amendment 39–22533; AD 2023–17–07]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Leonardo S.p.a. Model A119 and AW119 MKII helicopters. This AD was prompted by a report of an electrical failure of a starter-generator caused by a ruptured drive shaft. This AD requires visually inspecting the drive shaft of an affected starter-generator and depending on the results, performing a dye penetrant inspection. Depending on the results of the dye penetrant inspection, this AD requires replacing the starter-generator, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference (IBR). The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 1, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 1, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1207; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information, any comments received, and other

information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; internet easa.europa.eu. You may find the EASA material on the EASA website at ad.easa.europa.eu.

- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. The EASA material is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1207.

Other Related Service Information:

For Leonardo Helicopters service information identified in this final rule, contact Leonardo S.p.A., Emanuele Bufano, Head of Airworthiness, Viale G. Agusta 520, 21017 C. Costa di Samarate (Va) Italy; telephone (+39) 0331–225074; fax (+39) 0331–229046; or at customerportal.leonardocompany.com/en-US/. You may also view this service information at the FAA contact information under Material Incorporated by Reference above.

FOR FURTHER INFORMATION CONTACT: Hal Jensen, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (303) 342–1080; email hal.jensen@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2022–0148, dated July 14, 2022 (EASA AD 2022–0148), to correct an unsafe condition for Leonardo S.p.A. Model A119 and AW119MKII helicopters.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Leonardo S.p.A. Model A119 and AW119 MKII helicopters. The NPRM published in the **Federal Register** on June 9, 2023 (88 FR 37810). The NPRM was prompted by a report of an electrical failure of a starter-

generator, caused by a ruptured drive shaft, which was not detected by the generator control unit and caused partial loss of battery power. The NPRM proposed to require visually inspecting the drive shaft of an affected starter-generator and depending on the results, performing a dye penetrant inspection. Depending on the results of the dye penetrant inspection, the NPRM proposed to require replacing the starter-generator, as specified in EASA AD 2022–0148. The FAA is issuing this AD to prevent electrical failure of the starter-generator, which could result in complete loss of electrical power and subsequent loss of control of the helicopter.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its AD. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these helicopters.

Related Service Information Under 14 CFR Part 51

EASA AD 2022–0148 requires a one-time inspection of the drive shaft of the affected starter-generator and, depending on findings, replacing the affected part with a serviceable part as defined therein. EASA AD 2022–0148 also requires reporting the inspection results (including no findings) to Leonardo and implementing improved removal and reinstallation procedures for the starter-generator.

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

Other Related Service Information

The FAA reviewed Leonardo Helicopters Alert Service Bulletin No.

119–121, dated June 21, 2022. This service information specifies procedures for performing visual and dye penetrant inspections and for replacing a starter-generator.

Differences Between This AD and the EASA AD

Service information referenced in EASA AD 2022–0148 does not specify a compliance time to proceed with subsequent procedures if there is misalignment or if the alignment is not clear, whereas this AD requires proceeding with those subsequent procedures before further flight.

Service information referenced in EASA AD 2022–0148 specifies contacting LH [Leonardo Helicopters] spare management to send a starter-generator directly to an authorized repair station for repair and sending a starter-generator directly to an authorized repair station for repair, whereas this AD does not require those actions.

EASA AD 2022–0148 specifies reporting inspection results to Leonardo, whereas this AD does not.

Costs of Compliance

The FAA estimates that this AD affects 136 helicopters of U.S. registry. Labor rates are estimated at \$85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Visually inspecting a starter-generator drive shaft will take about 1 work-hour for an estimated cost of \$85 per helicopter and \$11,560 for the U.S. fleet.

If required, dye-penetrant inspecting a starter-generator drive shaft will take about 3 work-hours for an estimated cost of \$255 per helicopter.

If required, replacing a starter-generator will take about 2 work-hours and parts will cost about \$11,500 for an estimated cost of \$11,670 per helicopter.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce.

This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

AD 2023–17–07 Leonardo S.p.a.:

Amendment 39–22533; Docket No. FAA–2023–1207; Project Identifier MCAI–2022–00925–R.

(a) Effective Date

This airworthiness directive (AD) is effective November 1, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Leonardo S.p.a. Model A119 and AW119 MKII helicopters, certificated in any category.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 2435, Starter-Generator.

(e) Unsafe Condition

This AD was prompted by a report of an electrical failure of a starter-generator that was caused by a ruptured drive shaft. The failure was not detected by the generator control unit and caused partial loss of battery power. The FAA is issuing this AD to prevent electrical failure of the starter-generator, possibly due to incorrect installation or removal. The unsafe condition, if not addressed, could result in complete loss of electrical power and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency EASA AD 2022–0148, dated July 14, 2022 (EASA AD 2022–0148).

(h) Exceptions to EASA AD 2022–0148

(1) Where EASA AD 2022–0148 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where EASA AD 2022–0148 requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(3) Where paragraph (1) of EASA AD 2022–0148 states to, “inspect the drive shaft;” for this AD, replace that text with, “inspect the drive shaft for misalignment and a crack.”

(4) Where the service information referenced in EASA AD 2022–0148 specifies to proceed with subsequent procedures if there is misalignment or if the alignment is not clear; for this AD, proceed with those subsequent procedures before further flight.

(5) Where the service information referenced in EASA AD 2022–0148 states, “with reference to Annex A, perform a liquid penetrant inspection of the drive-shaft, in order to detect the presence of eventual cracks;” for this AD, replace that text with “With reference to Annex A, perform a dye penetrant inspection of the drive-shaft in order to detect any cracks.”

(6) Where the service information referenced in paragraph (1) of EASA AD 2022–0148 specifies contacting LH [Leonardo Helicopters] spare management to send a starter-generator directly to an authorized repair station for repair and sending the starter-generator to an authorized repair station for repair, this AD does not require those actions.

(7) Where paragraphs (2) and (4) of EASA AD 2022–0148 state, “Part II of the ASB;” for this AD, replace that text with, “AMP Data Modules 19–A–24–30–04–00A–520A–A, Starter Generator-Remove Procedure and 19–A–24–30–04–00A–720A–A, Starter Generator-Install Procedure, each Issue 001 and dated May 24, 2021. Except where AMP Data Module 19–A–24–30–04–00A–520A–A Starter Generator-Remove Procedure specifies discarding parts, for this AD, remove those parts from service.”

(8) This AD does not require paragraph (3) of EASA AD 2022–0148.

(9) This AD does not adopt the “Remarks” section of EASA AD 2022–0148.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2022–0148 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199, provided they are restricted to visual flight rules (VFR) with night operations prohibited and no passengers are onboard.

(k) Alternative Methods of Compliance (AMOCs)

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

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

(l) Related Information

For more information about this AD, contact Hal Jensen, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (303) 342–1080; email hal.jensen@faa.gov.

(m) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0148, dated July 14, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0148, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADS@easa.europa.eu; internet easa.europa.eu. You may find the EASA material on the EASA website at ad.easa.europa.eu.

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

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email: fr.inspection@nara.gov, or go to:

www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on August 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023–21065 Filed 9–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 230920–0227]

RIN 0694–AJ30

Addition of Entities and Revision to Existing Entities on the Entity List; Removal of Existing Entity From the Military End User List

AGENCY: Bureau of Industry and Security, Department of Commerce.
ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding twenty-eight entities to the Entity List under the destinations of the People’s Republic of China (China), Finland, Germany, Oman, Pakistan, Russia and the United Arab Emirates. These entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. This rule also revises two existing entries on the Entity List under the destinations of China and Pakistan and removes an entity from the Military-End User List under the destination of China.

DATES: This rule is effective September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Entity List (supplement no. 4 to part 744 of the EAR (15 CFR parts 730–774)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United

States, pursuant to § 744.11(b). The EAR impose additional license requirements on, and limit the availability of, most license exceptions for exports, reexports, and transfers (in-country) when a listed entity is a party to the transaction. The license review policy for each listed entity is identified in the “License Review Policy” column on the Entity List, and the impact on the availability of license exceptions is described in the relevant **Federal Register** document that added the entity to the Entity List. The Bureau of Industry and Security (BIS) places entities on the Entity List pursuant to parts 744 (Control Policy: End-User and End-Use Based) and 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and makes all decisions to remove or modify an entry by unanimous vote.

Entity List Decisions

Additions to the Entity List

Pursuant to § 744.11 of the EAR, the ERC determined to add the following entities to the entity list: Asia Pacific Links Ltd. under the destination of China; Evolog Oy, Luminor Oy, and Siberica Oy under the destination of Finland; ICW-Industrial Components Weirich under the destination of Germany; and Device Consulting, Grant Instrument, SMT-iLogic, and Streloy under the destination of Russia. These entities have been implicated in a conspiracy to violate U.S. export controls, including a scheme to supply the Special Technology Center, an entity on the BIS Entity List, with components to make unmanned aerial vehicles (UAVs) for Russia’s Main Intelligence Directorate of the General Staff (GRU). This activity is contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR.

The ERC determined to add Speed Business Trading (HK) Ltd. and Sunrising Logistics (HK) Ltd. to the Entity List under the destination of China, on the basis of actions and activities that are contrary to the national security and foreign policy interests of the United States. Specifically, these companies have procured and/or attempted to procure U.S.-origin items that would ultimately

support Iran's weapons of mass destruction and UAV programs.

The ERC determined to add Nanjing Institute of Astronomical Optics and Technology to the Entity List. This entity is added to the Entity List under the destination of China for procuring U.S.-origin items in likely furtherance of Chinese military research, and contrary to the national security and foreign policy interests of the United States, under § 744.11 of the EAR.

The ERC determined to add International Smart Digital Interface Company (ISDIC) and associated individual Moaz Ahmed Mohammed al-Haifi to the Entity List under the destination of Oman for actions contrary to the national security and foreign policy interests of the United States under § 744.11 of the EAR. Specifically, these entities have provided support to Yemen-based Houthi forces.

For these fourteen entities added to the Entity List, there is a license requirement for all items subject to the EAR. License applications will be reviewed pursuant under a presumption of denial.

The ERC determined to add the following entities to the Entity List for contributions to Pakistan's unsafeguarded nuclear activities: New Era Enterprises FZE under the destination of the United Arab Emirates; Well Fair International (Hong Kong) Ltd. under the destination of China; and AHD International; Genesis Technical Consultancy Services; Indus Tooling Solution; Longford Engineering (Pvt) Ltd; and Polymaster Engineering under the destination of Pakistan. These seven entities require a license for all items subject to the EAR. License applications will be reviewed pursuant to § 744.2(d) of the EAR.

The ERC determined to add VSMPO-AVISMA Corporation PJSC to the Entity List under the destination of Russia for representing a critical risk of diversion of U.S defense technologies. VSMPO-AVISMA is directly involved in producing and manufacturing titanium and metal products for the Russian military and security services. The ERC has determined that this entity qualifies as a military end-user as defined in § 744.21(a)(2) of the EAR and is therefore receiving a footnote 3 designation because it is a Russian or Belarusian 'military end user.' A footnote 3 designation subjects this entity to the Russia/Belarus-Military End User Foreign Direct Product (FDP) rule, detailed in § 734.9(g). This entity is added with a license requirement for all items subject to the EAR, and a license review policy of denial.

The ERC determined to add Guilin Alpha Rubber & Plastics Technology Company Limited, Hangzhou Fuyang Koto Machinery Company Limited, Raven International Trade Limited, S&C Trade PTY Company Limited, Shenzhen Caspro Technology Company Limited (Shenzhen Caspro), and an employee of Shenzhen Caspro, Yun Xia Yuan to the Entity List, all under the destination of China, for working as a network to procure aerospace components, including dual-use components for unmanned aerial vehicle applications, for the Iran Aircraft Manufacturing Company (HESA). The aerospace components are used to develop and produce Shahed-series UAVs, which have been used by Iran to attack oil tankers in the Middle East and by Russia in Ukraine. These activities are contrary to the national security and foreign policy interests of the United States under § 744.11. The ERC has determined that these six entities qualify as military end-users as defined in § 744.21(a)(2) of the EAR and are therefore receiving footnote 3 designations because they are Russian or Belarusian 'military end users.' A footnote 3 designation subjects these entities to the Russia/Belarus-Military End User FDP rule, detailed in § 734.9(g). These entities are added with a license requirement for all items subject to the EAR, and a license review policy of denial, apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis.

For the reasons described above, this final rule adds the following 28 entities to the Entity List and includes, where appropriate, aliases:

China

- Asia Pacific Links Ltd.;
- Guilin Alpha Rubber & Plastics Technology Company Limited;
- Hangzhou Fuyang Koto Machinery Company Limited;
- Nanjing Institute of Astronomical Optics and Technology;
- Raven International Trade Limited;
- S&C Trade PTY Company Limited;
- Shenzhen Caspro Technology Company Limited;
- Speed Business Trading (HK) Ltd.;
- Sunrising Logistics (HK) Ltd.;
- Well Fair International (Hong Kong) Ltd.; *and*
- Yun Xia Yuan.

Finland

- Evelog Oy;
- Luminor Oy; *and*
- Siberica Oy.

Germany

- ICW-Industrial Components Weirich.

Oman

- International Smart Digital Interface Company (ISDIC); *and*
- Moaz Ahmed Mohammed al-Haifi.

Pakistan

- AHD International;
- Genesis Technical Consultancy;
- Indus Tooling Solution;
- Longford Engineering (Pvt) Ltd.; *and*
- Polymaster Engineering.

Russia

- Device Consulting;
- Grant Instrument;
- SMT-iLogic;
- Streloy; *and*
- VSMPO-AVISMA Corporation PJSC.

United Arab Emirates

- New Era Enterprises FZE.

Modifications to the Entity List

In this final rule, BIS is revising two existing entries on the Entity List. The ERC has determined to modify the existing entry for Akhtar & Munir, first added to the Entity List under the destination of Pakistan on March 22, 2018 (86 FR 12479), by adding one alias, one address, and revising the license review policy to reference § 744.2(d) of the EAR. The ERC has determined to modify the existing entry for ICSOSO Electronics Co. Ltd., first added to the Entity List under the destination of China on June 30, 2022 (87 FR 38925), by adding seven aliases and six addresses to the entry.

ERC MEU List Decisions

Removals From the MEU List

Pursuant to the procedures detailed in supplement no. 5 to part 744 of the EAR, this final rule removes Zhejiang Perfect New Material Co., Ltd, an entity located in China, from the Military End User List (MEU List) (supplement no. 7 to part 744). The entry for this entity was added to the MEU List on December 23, 2020 (85 FR 83799, December 23, 2020). The ERC determined to remove the entry for Zhejiang Perfect New Material Co., Ltd from the MEU List on the basis of a request for removal submitted to BIS pursuant to § 744.21(b)(2) of the EAR.

This final rule removes the following one entity, located in China, from the MEU List:

China

- Zhejiang Perfect New Material Co., Ltd.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on September 27, 2023 pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before October 27, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on October 27, 2023, require a license in accordance with this final rule.

Export Control Reform Act of 2018

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

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this

collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at <https://www.reginfo.gov/public/do/PRAMain>.

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

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 2. Supplement no. 4 to part 744 is amended by:

- a. Under CHINA,
- i. Adding in alphabetical order, entries for “Asia Pacific Links Ltd.,” “Guilin Alpha Rubber & Plastics Technology Company Limited,” and “Hangzhou Fuyang Koto Machinery Company Limited;”
- ii. Revising the entry for “ICSOSO Electronics Co. Ltd.”;
- iii. Adding in alphabetical order, entries for “Nanjing Institute of Astronomical Optics and Technology;” “Raven International Trade Limited;” “S&C Trade PTY Company Limited;” “Shenzhen Caspro Technology Company Limited;” “Speed Business Trading (HK), Ltd.,” “Sunrising Logistics (HK) Ltd.,” “Well Fair International (Hong Kong) Ltd.,” and “Yun Xia Yuan;”
- b. Under FINLAND, adding in alphabetical order, entries for “Evolog Oy,” “Luminor Oy,” and “Siberica Oy;”
- c. Under GERMANY, adding in alphabetical order, an entry for “ICW-Industrial Components Weirich;”
- d. Under OMAN, adding in alphabetical order, entries for “International Smart Digital Interface Company (ISDIC)” and “Moaz Ahmed Mohammed al-Haifi;”
- e. Under PAKISTAN:
- i. Adding in alphabetical order an entry for “AHD International;”
- ii. Revising the entry for “Akhtar & Munir,” and
- iii. Adding in alphabetical order entries for “Genesis Technical Consultancy;” “Indus Tooling Solution;” “Longford Engineering (Pvt) Ltd.,” and “Polymaster Engineering”.
- f. Under RUSSIA, adding in alphabetical order, entries for “Device Consulting;” “Grant Instrument;” “SMT-iLogic;” “Steloy;” and “VSMPO–AVISMA Corporation PJSC;”
- g. Under UNITED ARAB EMIRATES, adding in alphabetical order, an entry for “New Era Enterprises FZE”.

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License Requirement	License review policy	Federal Register citation
*	*	*	*	*
CHINA, PEOPLE'S REPUBLIC OF	*	*	*	*
	Asia Pacific Links Ltd., a.k.a., the following one alias: —Asia Pacific Links Limited. Office 8E and Room E 8/F, Shing Hing Commercial Building, 21–27 Wing Kut Street, Central District, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	*	*	*	*
	Guilin Alpha Rubber & Plastics Technology Company Limited, a.k.a., the following one alias: —Alpha Rubber. 90# Villa, Yingtelai Garden, Seven Star District, Guilin City, Guangxi Province, China; <i>and</i> Industry Chuangye Yuan, Kongming West Road, Seven Star District, Guilin City, Guangxi Province, China; <i>and</i> Run Yuan A6–2 HuiXian Road Seven Star District, Guilin City, Guangxi Province, China; <i>and</i> Venture Industrial Park, Kongming West Road, Qixing District, Guilin City, Guangxi Province, China; <i>and</i> Seven Star Road No. 71 Seven Star District, Guilin City, Guangxi Province, China.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	*	*	*	*
	Hangzhou Fuyang Koto Machinery Company Limited, a.k.a., the following two aliases: —Koto Machinery; <i>and</i> —Hangzhou Fuyang Ketuo Machinery. No. 3 Hengliangting, Fuyang City, Zhejiang Province, China; <i>and</i> No.1007, Huifeng Building, No. 3 Hengliangting Road, Fuchunjiang Street, Fuyang City, Hangzhou, Zhejiang, China; <i>and</i> Room 1205, No. 19, Jinping Road, Fuchun Street, Fuyang District, Hangzhou, Zhejiang, China.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	*	*	*	*
	ICSOSO Electronics Co. Ltd., a.k.a., the following eight aliases: —IC Soso Electronics Co. Ltd.; —Shenzhen Vic-zone Electronic Co Ltd; —Shenzhen Wangniahua Electronics Co., Ltd; —Vic-Zone Co., Limited; —Viczone Electronics Company Ltd.; —Viczone Technology Company Limited; —Vizo Group Limited (Hong Kong); <i>and</i> —Weizhuo Group Co., Ltd. (Hong Kong).			

Country	Entity	License Requirement	License review policy	Federal Register citation
	Unit 614, 6/F, Block A, Po Lung Center, 11 Wang Chiu Road, Kowloon, Hong Kong; <i>and</i> Rm. 311, 3/F, Genplas Industrial Building, 56 Hoi Yuen Road, Kwun Tong, Kowloon, Hong Kong; <i>and</i> 26–38 Kwai Cheong Rd, Room 06 Block A 23/F, Hoover Industrial Building, Kwai Chung, N.T., Hong Kong; <i>and</i> Room 2405 Dynamic World Building, Zhonghang Road, Futian District, Shenzhen, China; <i>and</i> Room 2405 Dengcheng International, Zhonghang Road, Futian District, Shenzhen, China; <i>and</i> Zhong Road 30, Ping DiFu Ping, LongGang District, Shenzhen, China; <i>and</i> R1810 B Building Jiahe Tower No. 3006, Shennan Mid Rd, Shenzhen, China; <i>and</i> Unit C,D, 10/F, Shenmao Building, News Rd., Futian, Shenzhen, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	87 FR 38925, 6/30/22. 88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*
	Nanjing Institute of Astronomical Optics and Technology, a.k.a., the following one alias: —NIAOT.			
	No 188 Bancang Street, Nanjing, 210042, China; <i>and</i> No 188 Bancang Street, Nanjing, 210042, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*
	Raven International Trade Limited, No. 19 Jingping Road Fuchun Street, Fuyang Hangzhou Zhejiang, China; <i>and</i> Flat B, 9/F, Mega Cube, No. 8 Wang Kwong Road, Kowloon, Hong Kong.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*
	S&C Trade PTY Company Limited, Room 203, B, Lijingshangwu, No. 57 Busha Road, Buji Longgang, Shenzhen, China.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*
	Shenzhen Caspro Technology Company Limited a.k.a., the following two aliases: —CASPRO Technology Co. Ltd.; <i>and</i> —Shenzhen Casp Technology Co., Ltd. Room 203, B Building, No. 57 Busha Road, Nanwan, Longgang, Shenzhen, China; <i>and</i> Room 802, Building B, No. 50, Zhuangcun Road, Xiner Community, Shajing Street, Bao'an District, Shenzhen, China.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*
	Speed Business Trading (HK) Ltd., Workshop 60 3/F Block A East, Sun Industrial Centre, No. 16 Shing Yip Street, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	* * *	*	*	*

Country	Entity	License Requirement	License review policy	Federal Register citation
	Sunrising Logistics (HK) Ltd., a.k.a., the following five aliases: —Sunrising Electronics; —Sunrising Electronics China Ltd.; —Sunrising Electronics HK Ltd; —Sunrising International; <i>and</i> —Sunrising Logistics. 15–17 Hing Yip St. Room 5–6, 15 Block B, 4F Chung Mei Center, Kowloon, Hong Kong; <i>and</i> Room 205, 2/F Winful Center, 30 Shing Yip Street, Kwun Tong, Kowloon, Hong Kong; <i>and</i> Flat 11, 12F Shing Yip Industrial Building, 19–21 Shing Yip Street, Kwun Tong, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Well Fair International (Hong Kong) Ltd., Unit 1105, Hua Qin International Building, 340 Queen's Road, Central, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Yun Xia Yuan, a.k.a., the following two aliases: —Chilli Yua; <i>and</i> —Yunxia Yuan. Room 203, B Building, No. 57 Busha Road, Nanwan, Longgang, Shenzhen, China; <i>and</i> Room 802, Building B, No. 50, Zhuangcun Road, Xiner Community, Shajing Street, Bao'an District, Shenzhen, China.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial for all items subject to the EAR apart from food and medicine designated as EAR99, which will be reviewed on a case-by-case basis. See §§ 746.8(b) and 744.21(e).	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
FINLAND	Evolog Oy, Vanha Porvoontie 231A, Vantaa, 01380, Finland; <i>and</i> Tikkurilantie 10, Vantaa, 01380, Finland; <i>and</i> Kaskikalliontie 16F6, Vantaa, 01200, Finland.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Luminor Oy, a.k.a., the following two aliases: —FinPost; <i>and</i> —Luminor Logistics. Hakintie 7A, Vantaa, Uusimaa, 01380, Finland.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Siberica Oy, a.k.a., the following one alias: —Siberica. Hakintie 7A, Vantaa, 01380, Finland.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
GERMANY	ICW-Industrial Components Weirich, Geranienstr. 35, Heusweiler, 66265, Germany.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
OMAN				

Country	Entity	License Requirement	License review policy	Federal Register citation
	International Smart Digital Interface Company (ISDIC), a.k.a., the following two aliases: —Digital Interface Company Limited; <i>and</i> —Int'l Smart Digital. 8730 Way, Block 387, Al Ma'abilah South, Muscat, Oman; <i>and</i> P.O. Box 176 6959 Way, Block 224, Al Nebras St., Al Ma'abilah, Muscat, Oman.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Moaz Ahmed Mohammed al-Haifi, 8730 Way, Block 387, Al Ma'abilah South, Muscat, Oman.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
PAKISTAN	AHD International, House 9, Building 9, Business Bay, Phase VII, Bahria Town, Rawalpindi, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	83 FR 12479, 3/22/18. 88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Akhtar & Munir, a.k.a., the following one alias: —Aimtech Trading Co. Hussain Plaza 60–B No. 3, Adamjee Road, Punjab 46000, Pakistan; <i>and</i> Office No. 333, 3rd Floor, Rania Mall, Band Road, Rawalpindi, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	83 FR 12479, 3/22/18. 88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Genesis Technical Consultancy Services, Office Number 12, 4th Floor, Khyber Plaza, Blue Area, Islamabad, Pakistan <i>and</i> Flat No.01, 3rd Floor, Khyber Plaza Plot No.96, Blue Area, Islamabad, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Indus Tooling Solution, Suite Number 406, 4th Floor, Ibrahim Trade Tower, Plot Number 1, Block Number 6, Shahrah-e-Faisal, Karachi, Pakistan; <i>and</i> Suite Number 20, F-Block, Marghazar Colony, Multan Road, Lahore, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Longford Engineering (Pvt) Ltd., 21-Km, Off Ferozepur Road, Green Cap Housing Scheme, Lahore, 8200688, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Polymaster Engineering, Office Number 7, Islam Plaza, G–9 Markaz, Islamabad, 44000, Pakistan.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
RUSSIA	Device Consulting, a.k.a., the following one alias: —Device Consulting Co. Ltd. Aerodromnaya St. 6–A–45, St. Petersburg, 197348, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Grant Instrument, Tsvetochaya St. 16, Building 1, Room 425, St. Petersburg, 196006, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.

Country	Entity	License Requirement	License review policy	Federal Register citation
	SMT-iLogic, a.k.a., the following two aliases: —SMT-iLogic, LLC; and —SMT Aylogik. Mineralnaya, Dom 13, Litera A, Pomeshtenie 15N, Saint Petersburg, 195197, Russia; and Mineralnaya St. 13 Litera A, Ind 15H, St. Petersburg, 19005, Russia; and Nepokorennikh Avenue, 17, Building 4, B, Room 5—N, St. Petersburg, 195220, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	Streloy, Dmitrovsky Per. 13, Office 7, St. Petersburg, 191025, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
	VSMPO—AVISMA Corporation PJSC, a.k.a., the following seven aliases: —Avisma; —Korporatsiya VSMPO-Avisma; —Oao Korporatsiya VSMPO-Avisma; —Verkhnyaya Salda Metallurgical Production Association for Aviation Special Materials; —VSMPO; —VSMPO—AVISMA; and —VSMPO Avisma OAO. 1, Parkovaya St., Verkhnyaya Salda, Sverdlovsk Region, 624760, Russia; and Pao D. 2 Korp. 4 Str. 13 Of. 6, Per. Sawinski B., Moscow, 119435, Russia; and 29 Zagorodnaya Str., Berezniki, Perm Krai, 618421, Russia; and 2—4—6, Bld. 13 Bolshoi Savvinskiy Pereulok, Moscow, 119435, Russia.	For all items subject to the EAR. (See §§ 734.9(g), ³ 746.8(a)(3), and 744.21(b) of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.
UNITED ARAB EMIRATES.	New Era Enterprises FZE, Business Center RAKEZ, Ras al Khaimah, UAE.	For all items subject to the EAR. (See § 744.11 of the EAR).	See § 744.2(d) of the EAR	88 FR [INSERT FR PAGE NUMBER] 9/27/2023.

Supplement No. 7 to Part 744 [Amended]

■ 3. Supplement no. 7 to part 744 is amended under CHINA, PEOPLE'S REPUBLIC OF by removing the entry for "Zhejiang Perfect New Material Co., Ltd."

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

[FR Doc. 2023–21080 Filed 9–25–23; 8:45 am]

BILLING CODE 3510–JT–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R01–OAR–52023–0305; FRL–11112–02–R1]

Approval and Promulgation of Delegation of Authority for Designated Facilities and Pollutants; New Hampshire; Delegation of Authority

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving delegation of authority to the New Hampshire Department of Environmental Services (NHDES) for implementing and

enforcing the Clean Air Act (CAA) Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction on or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014. This action amends regulatory text to promulgate the delegation of authority and is taken in accordance with the CAA.

DATES: This rule is effective on October 27, 2023.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2023–0305. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at <https://www.regulations.gov> or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that, if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID-19.

FOR FURTHER INFORMATION CONTACT: Jessica Kilpatrick, Air Permits, Toxics, and Indoor Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, APTB05-2, Boston, MA 02109-0287. Telephone: 617-918-1652. Fax: 617-918-0652 Email: kilpatrick.jessica@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background and Purpose
- II. Final Action
- III. Statutory and Executive Order Reviews

I. Background and Purpose

On July 7, 2023, EPA published a Notice of Proposed Rulemaking (NPRM), which proposed to approve delegation of authority to NHDES for implementing and enforcing the Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, at 40 CFR part 62, subpart OOO. NHDES submitted to EPA a formal request for delegation of authority on February 6, 2023. The request letter included a memorandum of agreement (MoA) developed by NHDES and EPA, which defines the policies, responsibilities, and procedures NHDES and EPA will abide by in administering the Federal Plan requirements. The MoA was signed by the NHDES Commissioner on February 6, 2023 and the EPA Region 1 Deputy Regional Administrator on June 27, 2023. The NPRM informed the public of the MoA, provided a copy of the signed document, and proposed amending associated regulatory text for the delegation of authority. No comments were received regarding the proposed rulemaking.

This action amends regulatory text at 40 CFR part 62, subpart EE—New

Hampshire to promulgate the delegation of authority for existing municipal solid waste landfills. The rationale for EPA's approval of the delegation of authority is explained in the NPRM and will not be restated here.

II. Final Action

EPA approves amending regulatory text at § 62.7405 to promulgate the delegation of authority to NHDES for implementing and enforcing the Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, at 40 CFR part 62, subpart OOO.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator has the authority to delegate the authority to implement a 111(d)/129 Federal Plan that complies with the provisions of the CAA and applicable Federal regulations. See 40 CFR 60.27. In reviewing 111(d)/129 Federal Plan delegation requests, EPA's role is to approve state choices, provided that they meet the criteria of the CAA and of EPA's implementing regulations. Accordingly, this action merely codifies in the Code of Federal Regulations EPA's delegation of authority to implement the Federal Plan and does not impose additional requirements beyond those imposed by the already-applicable Federal Plan. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action does not apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. As such, it does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Industrial facilities, Intergovernmental relations, Methane, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: September 18, 2023.

David Cash,

Regional Administrator, EPA Region 1.

Part 62 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

- 1. The authority citation for part 62 continues to read as follows:

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

Subpart EE—New Hampshire

- 2. Revise § 62.7405 to read as follows:

§ 62.7405 Identification of plan—delegation of authority.

(a) Letter from the New Hampshire Department of Environmental Services (NHDES), submitted February 6, 2023, requested delegation of authority from EPA to implement and enforce the Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014 (Existing MSW Landfills

Federal Plan) at Subpart 000 of this part.

(b) Identification of sources. The Existing MSW Landfills Federal Plan applies to each municipal solid waste landfill that meets the following criteria:

(1) Commenced construction, reconstruction, or modification on or before July 17, 2014.

(2) Accepted waste at any time since November 8, 1987, or has additional capacity for future waste deposition.

(c) On February 6, 2023, NHDES Commissioner Robert R. Scott signed the Memorandum of Agreement Concerning the Delegation of Authority of the Federal Plan for Existing Municipal Solid Waste Landfills to the New Hampshire Department of Environmental Services by the United States Environmental Protection Agency. On June 27, 2023, Region 1 Deputy Regional Administrator Karen McGuire signed the MoA.

(d) The delegation became fully effective as of October 27, 2023.

[FR Doc. 2023–20880 Filed 9–26–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2021–0093; FF09E22000 FXES1113090FEDR 234]

RIN 1018–BF56

Endangered and Threatened Wildlife and Plants; Reclassification of the Relict Darter From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), reclassify the relict darter (*Etheostoma chienense*) from endangered to threatened under the Endangered Species Act of 1973 (Act), as amended. The relict darter is a fish species that occupies the Bayou de Chien stream system in western Kentucky. This action is based on a thorough review of the best available scientific and commercial information, which indicates that relict darter is not currently in danger of extinction throughout all or a significant portion of its range, but it is still likely to become so in the foreseeable future. We are also finalizing a rule under section 4(d) of the Act that provides for the conservation of the relict darter.

DATES: This rule is effective October 27, 2023.

ADDRESSES: Public comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at <https://www.regulations.gov> at Docket No. FWS–R4–ES–2021–0093.

FOR FURTHER INFORMATION CONTACT: Lee Andrews, Field Supervisor, U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office, 330 West Broadway, Suite 265, Frankfort, KY 40601; telephone 502–695–0468. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants reclassification from endangered to threatened if it no longer meets the definition of endangered (in danger of extinction throughout all or a significant portion of its range). We are reclassifying the relict darter as a threatened species (*i.e.*, “downlisting” the species) because we have determined it is not currently in danger of extinction. Reclassifying a species under the Act can only be accomplished by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule reclassifies relict darter from an endangered species to a threatened species on the Federal List of Endangered and Threatened Wildlife (List), with a rule issued under section 4(d) of the Act, based on the species’ current status, which has been improved through implementation of conservation actions.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Based

on the status review, the current threats analysis, and evaluation of conservation measures, we conclude that the relict darter no longer meets the Act’s definition of an endangered species and should be reclassified to a threatened species. The species is no longer in danger of extinction throughout all or a significant portion of its range but is likely to become so within the foreseeable future.

We have determined that the relict darter is a threatened species due to the following threats:

- Habitat destruction and modification caused by sedimentation, stream channelization, removal of riparian vegetation, drainage of riparian wetlands, and point and nonpoint source discharges (Factor A).
- Drought, accidental spills, and other potential catastrophic events (Factor E).
- Low genetic diversity resulting in reduced adaptive capacity and the inability to withstand stochastic disturbances (Factor E).
- Effects from climate change that are likely to exacerbate the impacts of drought, hurricanes, and flooding associated with storms and hurricanes in the future (Factor E).

Section 4(d) rule. We are issuing a rule under the authority of section 4(d) of the Act (a “4(d) rule”) for the relict darter. The 4(d) rule specifically tailors the incidental take exceptions for the relict darter to provide protective mechanisms to State and Federal partners so that they may continue certain activities that are not anticipated to cause direct injury or mortality to the relict darter. These activities will facilitate the conservation and recovery of the species through routine enforcement, assisting sick or injured fish, and the active habitat management this species uniquely requires.

Previous Federal Actions

Please refer to the proposed downlisting rule (87 FR 12056; March 3, 2022) for a detailed description of previous Federal actions concerning the relict darter.

Summary of Changes From the Proposed Rule

In preparing this final rule, we reviewed and fully considered all comments we received during the comment period from the peer reviewers and the public on the proposed rule to reclassify the relict darter. Minor, nonsubstantive changes and clarifications were made to the species status assessment (SSA) report and this document in response to comments. In preparing this final rule,

we also refined the *Status Throughout a Significant Portion of Its Range* analysis in order to better explain our determinations. However, the information we received during the peer review and public comment period on the proposed rule did not change our analysis, rationale, or determination for reclassifying the relict darter as a threatened species under the Act or for the 4(d) rule for the species.

Summary of Comments and Recommendations

In the proposed rule published on March 3, 2022 (87 FR 12056), we requested that all interested parties submit written comments on the proposal by May 2, 2022. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. A newspaper notice inviting general public comment was published in the Paducah Sun on April 2, 2022. We did not receive any requests for a public hearing. All substantive information received during the comment period has either been incorporated directly into this final determination or is addressed below.

Peer Reviewer Comments

As discussed in Supporting Documents below, we received comments from three peer reviewers. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final SSA report. Peer reviewer comments are addressed in the following summary and were incorporated into the final SSA report as appropriate.

(1) *Comment:* Two peer reviewers and one State partner reviewer suggested we revise the species' taxonomic discussion in chapter 2 of the SSA based on new information presented by Near et al. (2011).

Our response: We incorporated the reference and modified the text to follow the phylogeny (classification) presented by Near et al. (2011). The relict darter is one of 11 recognized/valid species in the *Etheostoma squamiceps* complex (clade *Stigmacerca*).

(2) *Comment:* One peer reviewer asked for clarification on whether the Little Bayou de Chien population was included in genetic analyses conducted by Kattawar and Piller (2020).

Our response: Kattawar and Piller (2020) analyzed tissue samples from across the species' range, including the Little Bayou de Chien watershed. Their analyses demonstrated a panmictic population, where random mating occurs among all individuals in the Bayou de Chien watershed. We added clarifying text to the SSA report to reflect this information.

(3) *Comment:* One peer reviewer asked if anything is known about the larval drift phase of the relict darter. They commented that similar species become benthic upon hatching, suggesting that the larval phase would have a low dispersal ability.

Our response: Larval relict darters become benthic immediately after hatching, suggesting low dispersal ability for the larval stage (Shute 2020, pers. comm.). New text was added to the life-history diagram (figure 4) and table 1 of the SSA report.

(4) *Comment:* One peer reviewer suggested that genetic drift would not be a significant threat to the relict darter due to the apparent panmictic population, as demonstrated by the genetic connectivity of the Little Bayou de Chien and Bayou de Chien populations (Kattawar and Piller 2020).

Our response: We agree with the reviewer's comment about the relict darter's panmictic population, so we updated the SSA report and removed a discussion related to genetic drift and inbreeding depression as a threat to the relict darter. Despite the evidence of genetic connectivity, we suspect that the Little Bayou de Chien and Bayou de Chien populations have limited contemporary gene flow based on recent survey results and the presence of ecological barriers separating the two watersheds. Therefore, we retained a brief discussion of genetic isolation in the SSA report.

(5) *Comment:* One peer reviewer asked if our estimate of the species' overall status would change if we recognized a single population (single management unit) versus the two populations described in the SSA report.

Our response: Our interpretation of the species' status would not change under this scenario. If the Bayou de Chien and Little Bayou de Chien populations were combined in the SSA, we would be left with a single population with moderate resiliency. Due to its small size and limited occupancy, the Little Bayou de Chien population would contribute little to overall resiliency.

(6) *Comment:* One reviewer suggested we mention the species' vulnerability to

chemical spills in the Bayou de Chien watershed.

Our response: We added additional text in chapter 4 (Water Quality Degradation) of the SSA report summarizing the species' vulnerability to chemical spills.

(7) *Comment:* One peer reviewer suggested that we add a table summarizing all Kentucky Pollutant Discharge Elimination System (KPDES) violations in the Bayou de Chien watershed over the last 10 to 15 years.

Our response: In chapter 3 of the SSA report, we added table 3, which summarizes all current KPDES permits in the Bayou de Chien watershed. For one permittee, the City of Fulton Treatment Works, we also summarized all permit violations since 2010.

Public Comments

(8) *Comment:* Two commenters stated that the reclassification is premature and untimely, indicating that relict darter is one of the rarest fishes in the United States, living in only five sites and with proof of reproduction in only one site. They stated that endemic species, due to their narrow geographical range are especially prone to extinction, indicating that habitat degradation and water quality impairment will impact the species in the future. They also indicated that small population size and little genetic variability put the species at risk of extinction.

Our response: We acknowledge in our March 3, 2022, proposed rule (87 FR 12056) and in this final rule that the relict darter is naturally a narrow endemic species. We recognize that redundancy and representation may be inherently low for a narrow endemic like the relict darter. The fact that the species exhibits little genetic variation across its range and has a very low effective population size suggests a past population bottleneck (e.g., rangewide habitat disturbance) and subsequent genetic drift (loss of rare alleles in a small population). Its low species redundancy and representation are tempered by the moderate resiliency of the Bayou de Chien/Jackson Creek population, which has high relict darter abundance and evidence of continued reproduction. The increased population size and successful recruitment trends have improved based on surveys completed during the past decade and reduce the risk of extinction. Further, this moderately resilient population has survived threats, primarily because conservation efforts over the past three decades have improved and protected habitat within the system, thus enabling the breeding, feeding, and sheltering

needs of the relict darter to be met and sustaining the population over time.

We also acknowledge that habitat loss and degradation through stream channel disturbance, removal of riparian vegetation, and pollution continue to affect the species, even though conservation actions over the past three decades have led to improved habitat conditions in portions of the Bayou de Chien mainstem and Jackson Creek, contributing to moderate resiliency for the larger population. The relict darter has benefited from protection as an endangered species under the Act and from improvements in water quality and habitat conditions stemming from both national and Kentucky statutes and regulations. However, these regulations have not prevented the degradation of some habitats used by the species. The primary threats that are currently acting on the species are expected to continue into the future, climate change is expected to exacerbate existing threats, and the species' low redundancy and low representation put the species at risk of extinction throughout all of its range in the foreseeable future. Thus, after assessing the best available information, we conclude that the relict darter is not currently in danger of extinction, but it is likely to become in danger of extinction within the foreseeable future throughout all of its range, consistent with a reclassification from endangered to threatened status under the Act.

(9) *Comment:* One commenter stated that the future conditions model only predicts how future urbanization could impact habitat and did not account for other potential sources of habitat disturbance or water quality impairment, such as agriculture. The commenter stated that the focus should be to increase conservation efforts to minimize the chance of adverse changes to physical habitat from human activity.

Our response: As detailed in the SSA report, we determined the rate of land cover change for each HUC 12 watershed encompassing relict darter populations using National Land Cover Database (NLCD) data. We also reviewed land cover change at the HUC 14 level in order to examine smaller watersheds such as Jackson Creek. Tables summarizing our land use analysis are provided in appendix E of the SSA report. The NLCD database considers land cover change that may result from a number of activities, including urban development, forestry, and agriculture. Between 2001–2011, total percent forest cover decreased by less than 1 percent across all watersheds, while total percent agriculture (*i.e.*, pasture/hay and cultivated crops) and development

increased by less than 1 percent across all watersheds. For our future scenarios, we assumed the same rate of land cover change for Scenario 1 (continuation of current trend), a decrease in the rate of land cover change for Scenario 2, and an increase in the rate of land cover change for Scenario 3. Therefore, the future scenario analysis does encompass other sources of habitat disturbance and water quality impairment as indicated by land use change. Regarding conservation efforts, the Act requires Federal agencies to utilize their authorities to carry out conservation programs for the conservation of both threatened and endangered species. We recognize that future efforts are dependent on funding availability, available conservation opportunities, and the willing cooperation of our partners, so only a portion of actions may be undertaken in the future.

Supporting Documents

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

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought peer review of the SSA report. The Service sent the SSA report to three independent peer reviewers and received three responses. The purpose of peer review is to ensure that our reclassification determinations and 4(d) rules are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise in the biology, habitat, and threats to the species.

I. Final Listing Determination Background

A thorough review of the relict darter's taxonomy, life history, and ecology is presented in the SSA report (Service 2020, pp. 8–15) and is summarized below.

Species Information

The relict darter is a small, narrowly endemic, benthic fish that occupies the Bayou de Chien stream system in western Kentucky. It can be distinguished from other darters by the number of dorsal fin rays (bony or

cartilaginous spines of first and second fins along top of body), its breeding behavior (egg-clustering with parental care), and the color and morphology of the dorsal fins of breeding males. Females and nonbreeding males have light-tan-colored backs and sides, with brown mottling and six to eight dark brown saddles. They have white, unmarked undersides. Breeding males have gray to dark brown sides and backs and light tan undersides (Page et al. 1992, p. 628).

Taxonomy

The relict darter, *Etheostoma chienense*, is a member of the Class Actinopterygii (ray-finned fishes), Order Perciformes, Family Percidae (perches), and Tribe Etheostomatini (darters) (Etnier and Starnes 1993, pp. 18–25, 440–441). The relict darter was first discovered in the Bayou de Chien system in 1975 (Webb and Sisk 1975), reported as *E. squamiceps*, but it was not recognized as a distinct species and described until 1992.

Genetics

A population bottleneck and subsequent genetic drift likely explain the species' low genetic diversity and low effective population size, which is estimated at a mean of 221.5 individuals, lower than what is usually sufficient (500) to retain a species' evolutionary potential (Soule 1980, pp. 151–169; Kattawar and Piller 2020, entire). Agricultural expansion within the Bayou de Chien system during the early to mid-20th century, including widespread channelization and straightening of stream channels, likely led to a sharp reduction in the size of the relict darter population. Populations have likely stabilized some over time, but the effects of a population bottleneck and subsequent genetic drift appears to have led to low levels of genetic diversity across the range. Recent field surveys (2010–2019) suggest that relict darters in Little Bayou de Chien are isolated from the rest of the system; however, genetic analyses indicate a single panmictic population, where random mating occurs among all individuals in the Bayou de Chien system (*i.e.*, individuals can interbreed without restrictions) (Kattawar and Piller 2020, entire).

Distribution

The relict darter's historical range included the Bayou de Chien stream system, a 554-square-kilometer (km²) (214-square-mile (mi²)) watershed located within the Mississippi Valley Loess Plains ecoregion (Woods et al. 2002, entire) in Fulton, Graves, and

Hickman Counties, Kentucky (Webb and Sisk 1975, entire; Warren et al. 1994, entire; Piller and Burr 1998, entire). Bayou de Chien is a low-gradient, sand, gravel, and silt-bottomed stream that begins in southwestern Graves County and flows westward approximately 47 km (29.2 mi) through Hickman and Fulton Counties, before ultimately emptying into Obion Creek near Hickman, Kentucky. All but the terminal 8–10 km (5.0–6.2 mi) of Bayou de Chien have been subjected to extensive channelization, and the dominant land use is row-crop agriculture (Webb and Sisk 1975, p. 63). Currently, the relict darter continues to occupy portions of the Bayou de Chien system in Fulton, Graves, and Hickman Counties, Kentucky. The species is represented by two geographically isolated populations: Bayou de Chien/Jackson Creek and Little Bayou de Chien (Service 2020, p. 20).

Habitat

The species typically occupies slow-flowing runs, glides, or pools of small to medium-sized, lowland streams with sand and gravel substrates. In these habitats, the species is most commonly observed near cover, such as undercut banks, woody debris piles, or snags. An abundance of woody debris provides a sufficient supply of spawning substrates and, consequently, the highest mean densities of the species (Service 2020, p. 10).

Biology

The species feeds primarily on midge larvae and other small invertebrates. Spawning occurs from mid-March to early June, and the species has a maximum lifespan of 3 to 4 years. Like all members of the *Etheostoma squamiceps* complex, females deposit eggs on the undersides of submerged objects, and egg clusters are guarded by the male until hatching occurs (Service 1994, p. 7). During a 1999 survey, most nests were located on natural materials such as small rocks, woody debris, and live tree roots, but 37 percent of nests were found on anthropogenic materials such as rubber tires, plastic, roof shingles, glass, concrete blocks, metal road signs, and concrete slabs (Piller and Burr 1998, pp. 147–151).

The species was characterized as uncommon or rare at most collection sites in the 1990s, generally consisting of 1 to 23 individuals per site (Piller and Burr 1998, pp. 66–71). Recent surveys indicate the species continues to be rare in some reaches but is more common in others. Generally, the greatest number of darters per sampling reach and the highest mean densities (0.43 darters/

square meter) have been observed in Jackson Creek and an approximately 22.6-km (14.1-mi) reach of Bayou de Chien (0.30 darters/square meter), extending from just downstream of the U.S. 51 bridge crossing in Hickman County upstream to the Pea Ridge Road bridge crossing in Graves County (Service 2020, appendix A).

Regulatory and Analytical Framework

Regulatory Framework

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

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

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence.

In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects. We consider these same five factors in downlisting a species from endangered to threatened.

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

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

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

provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

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

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at <https://www.regulations.gov> at Docket No. FWS-R4-ES-2021-0093.

To assess relict darter viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency reflects the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and

described the beneficial and risk factors influencing the species' viability.

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

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS-R4-ES-2021-0093 on <https://www.regulations.gov>.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. In addition, the SSA (Service 2019, entire) documents our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The following is a summary of this status review and the best available information gathered since that time that have informed this decision.

Factors Influencing Relict Darter Viability

At the time of listing in 1993, the relict darter was known only from the Bayou de Chien mainstem and Jackson Creek, but it was later discovered in Little Bayou de Chien in 2017 (Service 2019, p. 11). Threats to the species at the time of listing were water quality and habitat deterioration resulting from stream channelization, siltation contributed by incompatible land use practices, and water pollutants from waste discharges. Relict darter distribution was reduced by these factors, and because the species was known to inhabit only limited areas and known to spawn in only one small tributary, it was deemed vulnerable to extirpation from toxic chemical spills (see 58 FR 68480; December 27, 1993). Additionally, because of its small population size, the species' long-term

genetic viability was determined to be questionable at the time of listing.

While the relict darter's viability has improved over time (see *Conservation Efforts*, below), three major factors are influencing the viability of the species now and are expected to affect it into the future: habitat loss and degradation, restricted range/isolation, and climate change. Habitat loss and degradation resulting from siltation, channelization/riparian vegetation removal, drainage of riparian wetlands, and water quality degradation (pollution) (Factor A) pose the largest risk to the current and future viability of the relict darter. Other potential stressors to the species are the restricted range of the species and climate change (Factor E). We find the species does not face threats from overutilization (Factor B), disease or predation (Factor C), or invasive species (Factor E). A brief summary of relevant stressors is presented below; for a full description, refer to chapter 3 of the SSA report (Service 2020, entire).

Siltation

Siltation is the process whereby excess sediments are suspended or deposited in a stream. Excessive levels of sediments accumulate and cover the stream bottom, filling the interstitial spaces with finer substrates and homogenizing and decreasing the available habitat for fishes. In severe cases, sediment can bury larger substrate particles such as gravel and cobble, as well as woody debris. Siltation can abrade or suffocate fish gills, eggs, and larvae; reduce disease tolerance; degrade or destroy spawning habitats, affecting egg, larval, and juvenile development; modify migration patterns; reduce food availability through the blockage of primary production; and reduce foraging efficiency (Berkman and Rabeni 1987, pp. 285–294; Waters 1995, pp. 5–7; Wood and Armitage 1997, pp. 211–212; Meyer and Sutherland 2005, pp. 2–3). Thus, siltation is a threat to all life stages of the relict darter. In addition, relict darter spawning substrates are usually the undersides of fixed objects (e.g., wood, tree roots, cobble, tires), which are vulnerable to the effects of siltation (i.e., embeddedness, or being completely covered in sediment) (Service 2020, p. 14).

Sediment (siltation) is one of the most common stressors of aquatic communities in the Bayou de Chien system (Kentucky Division of Water (KDOW) 2018, pp. 43–45). The primary sources of sediment are listed as agriculture (crop production) and habitat degradation (channel erosion/incision from upstream

hydromodifications, dredging, and loss of riparian habitat). The Bayou de Chien system is extensively farmed (e.g., row crops and livestock), and a large portion of the system has been deforested. These land use practices result in a high silt load within the system that continues to degrade habitats and impact the species. Croplands have the potential to contribute large sediment loads during storm events, thereby causing increased siltation and potentially introducing harmful agricultural pollutants such as pesticides. Unrestricted livestock access to streams has the potential to cause siltation and other habitat disturbance (Fraley and Ahlstedt 2000, pp. 193–194). Grazing may reduce water infiltration rates and increase stormwater runoff; trampling and vegetation removal increase the probability of erosion and siltation (Brim Box and Mossa 1999, p. 103). Physical habitat disturbance from sedimentation is less common in Jackson Creek than in other portions of the Bayou de Chien system.

Several streams within the Bayou de Chien system have been identified as impaired due to siltation and have been included by the State of Kentucky on its list of impaired waters required under section 303(d) of the Clean Water Act (33 U.S.C. 1313(d)) (KDOW 2018, pp. 43–45). Portions of several streams occupied by the relict darter are on this list, including Cane Creek (stream kilometers (km) 0–8.5 (stream miles (mi) 0–5.3)) in Hickman County, Little Bayou de Chien (stream km 1.8–3.8 and 18.8–22.5 (stream mi 1.1–2.4 and 11.7–14.0)) in Fulton and Hickman Counties, and South Fork Bayou de Chien (stream km 0–12.6 (stream mi 0–7.8)) in Graves County.

Channelization/Riparian Vegetation Removal

Stream channelization is a common practice used to reduce the effects of flooding, increase the drainage rate of agricultural land, and maximize the amount of tillable land (Piller and Burr 1998, p. 65). These modified channels are often managed through vegetation removal and dredging to improve flood conveyance or through placement of quarried stone or gabion baskets to protect against bank erosion (Allan and Castillo 2007, p. 327).

Historically, Bayou de Chien was presumably a free-flowing stream with alternating areas of riffles, runs, and pools. Since that time, many stream reaches within the system have been channelized and converted to deep ditches with uniform depth, velocity, and substrate (Piller and Burr 1998, p. 71). Channelization has impacted the

Bayou de Chien system by changing stream flow patterns, including reducing instream flows (especially during drier periods) that stress relict darters; decreasing aquatic habitat complexity, which affects sheltering and feeding for relict darters; and reducing stream bank and floodplain (riparian) vegetation (Piller and Burr 1998, p. 71), which affects relict darter feeding and breeding resource needs. Channelized reaches have higher stream velocities and shear stress (a measure of the force of water against the channel boundary) during high flow periods (which leads to channel instability and bank erosion), less instream cover and habitat for aquatic organisms including the relict darter (decreased habitat complexity), less riparian vegetation and correspondingly reduced canopies (reduced shade and reduced woody debris input), and below normal flows during drier periods (Warren et al. 1994, p. 24; Piller and Burr 1998, p. 71). Thus, the relict darter is susceptible to impacts from channelization and reductions in riparian vegetation because these stressors affect flows, habitat complexity, and instream temperatures and reduce the amount of woody material, thus affecting sheltering and reproduction needs of the species.

The reduction or loss of riparian vegetation contributes to siltation through bank destabilization and the removal of submerged root systems that help to hold sediments in place while providing habitat for relict darters and their macroinvertebrate prey (Barling and Moore 1994, p. 544; Beeson and Doyle 1995, p. 989; Allan 2004, p. 262; Hauer and Lamberti 2006, pp. 721–723; Minshall and Rugenski 2006, pp. 721–723). Removal of riparian vegetation can also reduce the stream's capacity for trapping and removing contaminants and nutrients from runoff; increase solar exposure, resulting in higher water temperatures; increase algal abundance (primary production); and reduce inputs of woody debris and leaf litter, thereby reducing food sources for relict darters and lowering overall stream production (Brazier and Brown 1973, p. 4; Karr and Schlosser 1978, p. 231; Peterjohn and Correll 1984, p. 1473; Osborne and Kovacic 1993, p. 255; Barling and Moore 1994, p. 555; Vought et al. 1994, p. 346; Allan 1995, p. 109; Wallace et al. 1999, p. 429; Pusey and Arthington 2003, p. 4). Where a reduction or loss of riparian vegetation occurs, these impacts negatively affect the quality of habitat available to the relict darter for breeding, feeding, and sheltering.

Drainage of Riparian Wetlands

With increased agricultural activity in the Bayou de Chien basin over the last century, much of the basin's vegetation has been cleared, and many riparian wetlands have been drained to make additional lands available for farming (Piller and Burr 1998, p. 65). This situation has caused an overall reduction in the groundwater level and base flows within Bayou de Chien and its tributaries. Many small streams in the system become completely dry or consist of isolated pools by the early fall months (Warren et al. 1994, p. 24). These conditions serve to isolate populations and subject both the adult and juvenile relict darters to increased pressure from predators (Service 1994, p. 14). Dispersal of the species upstream of the Jackson Creek area or into many downstream tributaries may be limited by instream flow conditions (Warren et al. 1994, p. 24).

Water Quality Degradation (Pollution)

Information is lacking on the relict darter's tolerance to specific pollutants, but a variety of contaminants continue to degrade stream water quality within the Bayou de Chien system, and these pollutants may affect the relict darter. Several point-source and nonpoint-source pollutants to aquatic life occur in the Bayou de Chien system (Service 2020, appendix B) (KDOW 2018, pp. 43–45). These pollutants include copper, iron, lead, excess nutrients (total nitrogen and phosphorus), and eutrophication originating from two suspected sources—municipal point source discharges (e.g., sewage treatment) and agriculture (e.g., crop production and animal feeding operations). Portions of four streams that are occupied by relict darter, specifically Bayou de Chien, Cane Creek, Little Bayou de Chien, and South Fork Bayou de Chien, were identified as impaired due to these pollutants (KDOW 2018, pp. 43–45). The impacts of copper, lead, and iron inputs are unknown, but nutrient inputs and eutrophication can lead to excessive algal growths and instream oxygen deficiencies that can seriously affect aquatic species, including the relict darter.

Currently, 13 National Pollutant Discharge Elimination System permits have been issued authorizing the discharge of pollutants within portions of the Bayou de Chien system (Fredenberg 2018, pers. comm.; Service 2020, p. 27). Two sewage treatment plants, the City of Fulton Treatment Works (Kentucky Pollutant Discharge Elimination System (KPDES)

#KY0026913) and the Hickman East Sewage Treatment Plant (KPDES #KY0028436), discharge treated wastewater directly into Bayou de Chien. Between January 2010 and April 2020, the Fulton facility received 13 violation notices from KDOW. The notices were issued for permit exceedances of a variety of chemical parameters (e.g., biochemical oxygen demand (BOD), total suspended solids (TSS), pH) and for failures to meet certain monitoring requirements associated with the permit (Service 2020, appendix C). Insufficient treatment of wastewater could harm relict darter populations by introducing pollutants (e.g., metals, bacteria) and altering water quality conditions (e.g., decreased oxygen levels, elevated pH).

The Bayou de Chien system is also affected by nonpoint-source pollutants, arising from a variety of diffuse sources. Examples of nonpoint-source pollutants include sediment (e.g., stormwater runoff from driveways, fields, construction sites), raw sewage (e.g., septic tank leakage, straight pipe discharges), animal waste from livestock, fertilizers, pesticides, herbicides, and road salt (KDOW 2013, pp. 19–21; KDOW 2018, pp. 43–45). Nonpoint-source pollutants can cause excess eutrophication (increased levels of nitrogen and phosphorus), excessive algal growths that clog the waterway and affect swimming capability and visual predation, instream oxygen deficiencies that affect oxygen intake by relict darters, and other changes in water chemistry that can affect aquatic species such as the relict darter. Nonpoint-source pollution from land surface runoff can originate from virtually any land use activity and has been correlated with impervious surfaces and storm water runoff (Allan 2004, pp. 266–267). Pollutants may include sediments, fertilizers, herbicides, pesticides, animal wastes, septic tank and gray water leakage, pharmaceuticals, and petroleum products. These pollutants tend to increase concentrations of nutrients and toxins in the water and alter the chemistry of affected streams such that the habitat and food sources for species like the relict darter are negatively impacted.

Due to its linear distribution within the Bayou de Chien mainstem and Jackson Creek, the relict darter continues to be vulnerable to accidental chemical or animal waste spills and releases that may result from traffic accidents, agricultural activities, or permitted discharges (Warren et al. 1994, p. 24). Events of this kind have affected other aquatic communities in the

southeastern United States during the recent past (Ahlstedt et al. 2016, pp. 8–9), so similar events have the potential to affect relict darter populations in the Bayou de Chien system. These events could have devastating effects on darters in these reaches (Piller and Burr 1996, p. 74) and could pose a threat to the long-term viability of the species.

Restricted Range/Isolation

The relict darter has always had a limited geographic range, currently consisting of approximately 52.5 stream km (32.7 stream mi) within a single stream system in western Kentucky (Bayou de Chien system). The species was characterized as uncommon or rare at most collection sites in the 1990s (Piller and Burr 1998, pp. 66–71), and recent surveys indicate the species continues to be rare in some reaches but is more common in others.

The species' restricted range and low abundance in some reaches (e.g., Little Bayou de Chien and Cane Creek) make it more vulnerable to extirpation from toxic chemical spills, habitat modification, degradation from land surface runoff (nonpoint-source pollution), and natural catastrophic changes to their habitat (e.g., flood scour, drought). In particular, recent survey data indicate that the relict darter's most successful reproduction occurs in Jackson Creek and middle and headwater reaches of Bayou de Chien, which are vulnerable to catastrophic events, such as a single toxic chemical spill or an extreme weather event such as a drought or flash flood. These events could have devastating effects on darters in these reaches (Piller and Burr 1996, p. 74) and could pose a threat to the long-term viability of the species.

The relict darter is represented by two geographically isolated populations: Bayou de Chien/Jackson Creek and Little Bayou de Chien (Service 2020, p. 20). The fact that the Little Bayou de Chien population is small and isolated from the larger Bayou de Chien/Jackson Creek population makes it more vulnerable to stochastic and catastrophic events, thus affecting overall relict darter viability.

Climate Change

Species that are dependent on specialized habitat types, limited in distribution, or at the extreme periphery of their range may be most susceptible to the impacts of climate change (Byers and Norris 2011, pp. 18–19); however, while continued change is certain, the magnitude and rate of change is unknown in many cases. Climate change has the potential to increase the vulnerability of the relict darter to

random catastrophic events (McLaughlin et al. 2002, pp. 6060–6074; Thomas et al. 2004, pp. 145–148). An increase in both severity and variation in climate patterns is expected; extreme floods, strong storms, and droughts will become more common (Cook et al. 2004, pp. 1015–1018; Ford et al. 2011, p. 2065; Intergovernmental Panel on Climate Change 2014, pp. 58–83). Frequency, duration, and intensity of droughts are likely to increase in the Southeast as a result of global climate change (Thomas et al. 2004, pp. 145–148). Stream temperatures in the Southeast have increased roughly 0.2–0.4 degrees Celsius (°C) (0.4–0.7 degrees Fahrenheit (°F)) per decade over the past 30 years, and as air temperature is a strong predictor of water temperature, stream temperatures are expected to continue to rise (Kaushal et al. 2010, p. 465). Predicted impacts of climate change on fishes include disruption to their physiology (such as temperature tolerance, dissolved oxygen needs, and metabolic rates), life history (such as timing of reproduction, growth rate), and distribution (range shifts, migration of new predators) (Jackson and Mandrak 2002, pp. 89–98; Heino et al. 2009, pp. 41–51; Strayer and Dudgeon 2010, pp. 350–351; Comte et al. 2013, pp. 627–636).

Estimates of the effects of climate change using available climate models typically lack the geographic precision needed to project the magnitude of effects at a scale small enough to discretely apply to the range of a given species. However, data on recent trends and projected changes for Kentucky (Girvetz et al. 2009, pp. 1–19), and, more specifically, the Bayou de Chien system (Alder and Hostetler 2017, entire) provide some insight for evaluating the potential impacts of climate change to the relict darter. Different emission scenarios have been used to calculate estimates of average annual increases in maximum and minimum air temperature, precipitation, snowfall, and other variables (Alder and Hostetler 2017, entire). These scenarios, called representative concentration pathways (RCPs), are plausible pathways toward reaching a target radiative forcing (the change in energy in the atmosphere due to greenhouse gases) by the year 2100 (Moss et al. 2010, p. 752). Depending on the chosen model and emission scenario (RCP 8.5 (high) vs. 4.5 (moderate)), annual mean maximum air temperatures for the Bayou de Chien system are expected to increase by 2.3–3.4 °C (4.1–6.1 °F) by 2074, while precipitation models predict that the Bayou de Chien system

will experience a slight increase in annual mean precipitation (0.5 centimeters/month (0.2 inches/month)) through 2074 (Girvetz et al. 2009, pp. 1–19; Alder and Hostetler 2016, pp. 1–9).

There is uncertainty about the specific effects of climate change (and their magnitude) on the relict darter; however, climate change is almost certain to affect aquatic habitats in the Bayou de Chien system of western Kentucky through increased water temperatures and more frequent droughts (Alder and Hostetler 2017, entire), and species with limited ranges, fragmented distributions, and small population size, such as the relict darter, are thought to be especially vulnerable to the effects of climate change (Byers and Norris 2011, pp. 18–19). Thus, we consider climate change to be a threat to the relict darter.

Regulatory Mechanisms

The relict darter and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act, Kentucky's Forest Conservation Act of 1998 (Kentucky Revised Statutes (KRS), chapter 149, sections 149.330–355), Kentucky's Agriculture Water Quality Act of 1994 (KRS, chapter 224, subchapter 71, sections 224.71–100–224.71–140), and additional Kentucky statutes and regulations regarding natural resources and environmental protection (KRS, chapter 224; title 401 of the Kentucky Administrative Regulations (KAR) at Chapters 10:026, 10:029, and 10:031). While it is clear that the protections afforded by these statutes and regulations have not prevented the degradation of some habitats used by the relict darter, the species has undoubtedly benefited from improvements in water quality and habitat conditions stemming from these regulatory mechanisms.

Conservation Efforts

The relict darter is listed as endangered in Kentucky (OKNP 2019, p. 16), making it unlawful to take the species or damage its habitat without a State permit. Additionally, the relict darter is identified as a species of greatest conservation need in the Kentucky Wildlife Action Plan (KDFWR 2013, chapter 2), which outlines actions to promote species conservation.

Since listing the species (see 58 FR 68480; December 27, 1993), the Service has worked with multiple agencies and private partners (e.g., the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS), the Kentucky Department of Fish and Wildlife Resources (KDFWR), and The

Nature Conservancy (TNC)) to implement conservation actions for the relict darter in the Bayou de Chien system. The Service's Partners for Fish and Wildlife (PFW) program has taken the lead role in this effort by providing technical and financial assistance to agencies and numerous private landowners. PFW has focused its efforts on the use of best management practices (BMPs) and instream conservation practices that enhance and restore riparian and instream habitats used by the relict darter. PFW projects have included a culvert removal in the headwaters of Bayou de Chien, installation of livestock alternate watering systems, placement of artificial spawning structures in Bayou de Chien and Jackson Creek, installation of livestock exclusion fencing along several kilometers of Bayou de Chien and Jackson Creek, and restoration of more than 20.2 hectares (50 acres) of native grasses and wildflowers within riparian areas. In addition to these efforts, PFW biologists have provided over 10 years of technical assistance to the U.S. Department of Agriculture, Wetland Reserve Easement Program, for projects within the Bayou de Chien system (Radomski 2019, pers. comm.). These efforts have resulted in permanent easements covering more than 1,700 acres (688 hectares) in the upper Bayou de Chien system (Morris 2020, pers. comm.). These easements will benefit the relict darter through sediment and nutrient reduction, shading of stream corridors (via riparian plantings), hydrological restoration (via plugging of agricultural ditches and improved groundwater connections), and general habitat creation or wetland restoration.

Synergistic and Cumulative Effects

In addition to affecting the relict darter individually, it is possible that several of the risk factors summarized above are acting synergistically, and all act cumulatively on the species. The combined impact of multiple stressors is likely more harmful than a single stressor acting alone. The dual stressors of climate change and direct human impact have the potential to affect aquatic ecosystems by altering stream flows and nutrient cycles, eliminating habitats, and changing community structure (Moore et al. 1997, p. 942). Increased water temperatures and a reduction in stream flow are the climate change effects that are most likely to affect stream communities (Poff 1992, entire; Thomas et al. 2004, pp. 145–148), and each variable is strongly influenced by land use patterns.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Species Viability

For relict darter populations to be sufficiently resilient, the needs of individuals (slow-flowing riffles and pools, appropriate substrate, food availability, water quality, and aquatic vegetation or large woody debris for cover) must be met at a larger scale. Stream reaches with suitable habitat must be large enough to support an appropriate number of individuals to avoid issues associated with small population size, such as inbreeding depression and the Allee effect (low population density reducing the probability of encountering mates for spawning). Connectivity of stream reaches allows for immigration and emigration between populations and increases the likelihood of recolonization should a population be lost. At the species level, the relict darter needs well-distributed healthy populations to withstand environmental stochasticity (resiliency) and catastrophes (redundancy) and to adapt to biological and physical changes in its environment (representation). To evaluate the current and future viability of the relict darter, we assessed a range of conditions to allow us to estimate the species' resiliency, representation, and redundancy.

We delineated analytical units (populations) by dividing the relict darter's range into two units (Bayou de Chien/Jackson Creek and Little Bayou de Chien) based on known occurrence records, the substantial distance (18.3 kilometers (km) (11.4 miles (mi)) separating known occurrence records in both watersheds, and unsuitable habitat

conditions in downstream reaches of both watersheds.

To assess resiliency, we evaluated four components that relate to the species' habitat or its population demography: physical habitat, water quality, mean density, and occurrence complexity. We assessed habitat using

two components describing physical habitat quality and water quality. The demographic condition was assessed using mean density and occurrence complexity. We established parameters for each condition category by evaluating the range of existing data and

separating those data into categories based on our understanding of the species' demographics and habitat (see table 1, below). Individual component scores were combined and averaged to produce an overall condition score for each population.

TABLE 1—COMPONENT CONDITIONS USED TO ASSESS RESILIENCY FOR RELICT DARTER POPULATIONS

Component	Condition			
	High	Moderate	Low	0
Physical Habitat	Silt deposition low; no extensive or significant habitat alterations (<i>e.g.</i> , recent channelization, riparian clearing); >75% of available habitat suitable for the species.	Silt deposition moderate; habitat alterations at moderate levels—channelization or other habitat disturbance more widespread; 25–75% of available habitat suitable for the species.	Silt deposition extensive; habitats severely altered and recognized as impacting the species; <25% of habitats suitable for the species.	Habitat unsuitable (species absent).
Water Quality	Minimal or no known water quality (WQ) issues (<i>i.e.</i> , no 303(d) streams impacting the species *).	WQ issues recognized and may impact species (<i>i.e.</i> , 1 or 2 303(d) streams).	WQ issues prevalent within system, likely impacting populations (<i>i.e.</i> , numerous 303(d) streams).	Habitat unsuitable (species absent).
Mean Density (# darters/m ²)	>0.15	0.05–0.15	<0.05	Species absent.
Occurrence Complexity.	Occupies main channel and ≥3 tributaries.	Occupies main channel and maximum of 2 tributaries.	Occupies main channel and maximum of ≤1 tributary.	Species absent.

* Signifies streams identified by the State of Kentucky on the list of impaired streams required by section 303(d) of the Clean Water Act (33 U.S.C. 1313(d)).

Our evaluation of representation for the relict darter was based on the species' genetic diversity and the extent and variability of environmental diversity (habitat diversity) across the species' geographical range. Additionally, we assessed relict darter redundancy (ability of the species to withstand catastrophic events) by evaluating the number and distribution of populations with high resilience throughout the species' range. Highly resilient populations, coupled with a broad distribution throughout the historical range, have a positive relationship to species-level redundancy.

Current Condition of the Relict Darter

The relict darter's historical range included the Bayou de Chien stream system, a 554-km² (214-mi²) watershed located within the Mississippi Valley Loess Plains ecoregion (Woods et al. 2002, entire) in Fulton, Graves, and Hickman Counties, Kentucky (Webb and Sisk 1975, entire; Warren et al. 1994, entire; Piller and Burr 1998, entire). Bayou de Chien is a low-gradient stream with a sand, gravel, and silt bottom that begins in southwestern Graves County and flows westward approximately 47 km (29.2 mi) through Hickman and Fulton Counties, before ultimately emptying into Obion Creek near Hickman, Kentucky. Historically, Bayou de Chien was presumably an undisturbed, free-flowing stream with alternating areas of riffles, runs, and pools; however, only a few of these reaches remain because much of the

stream has been channelized and converted to a deep ditch with uniform depth, velocity, and substrate (Piller and Burr 1998, pp. 64–65).

The relict darter's current range is also limited to the Bayou de Chien system in Fulton, Graves, and Hickman Counties, Kentucky. Recent surveys (2010–2019) indicate that the species is now known by two geographically separated populations: Bayou de Chien/Jackson Creek and Little Bayou de Chien. Within the Bayou de Chien/Jackson Creek population, the species occupies patches of suitable habitat within a 30.4-km (18.9-mi) reach of Bayou de Chien, a 3.6-km (2.3-mi) reach of Jackson Creek, a 3.2-km (2.0-mi) reach of South Fork Bayou de Chien, a 10.4-km (6.5-mi) reach of Cane Creek, and a 2.3-km (1.4-mi) reach of Sand Creek. Within the Little Bayou de Chien population, the species occupies patches of suitable habitat within a 2.6-km (1.6-mi) reach. In total, the species currently occupies 52.5 stream km (32.7 stream mi).

The Bayou de Chien/Jackson Creek population exhibits moderate resiliency, as evidenced by recent estimates of mean density and mean population size, recent monitoring data showing evidence of reproduction and recruitment, and our observations of moderate to high physical habitat and water quality conditions within the watershed (see table 2, below; Service 2020, p. 35). Based on recent surveys, Jackson Creek and Bayou de Chien have moderate to high relict darter densities, with population estimates of 1,888 and

22,798 fish, respectively, indicating that the population size has more than doubled since a decade ago (Service 2019, p. 7; Service 2020, p. 36). Resiliency of the Little Bayou de Chien population is lower due to its lower mean density and less optimal habitat conditions (see table 2, below). The species was only recently discovered in the Little Bayou de Chien in July 2017. Recent survey efforts have been limited to two 100-m reaches and several qualitative searches. Population size has not been estimated in these reaches because of the limited quantitative effort; however, 23 relict darters were observed. Low levels of reproduction and recruitment are assumed for the Little Bayou de Chien. Overall, the rangewide mean population estimate is 24,686 relict darters (Service 2019, p. 7).

We consider redundancy and representation of the relict darter to be low due to the species' small number of populations, its low effective population size (mean of 221.5, with a 95 percent confidence interval of 143.3–448.3), and its reduced genetic diversity (see table 2, below; Kattawar and Piller 2020, pp. 27–28). We recognize that redundancy and representation may be inherently low for a narrow endemic like the relict darter. The fact that the species exhibits little genetic variation across its range and has a very low effective population size suggests a past population bottleneck (*e.g.*, rangewide habitat disturbance) and subsequent genetic drift (loss of rare alleles in a small population) (Kattawar and Piller 2020, entire).

TABLE 2—RESILIENCY, REDUNDANCY, REPRESENTATION SUMMARY FOR RELICT DARTER

Population	Resiliency	Redundancy	Representation
Bayou de Chien/Jackson Creek Little Bayou de Chien	Moderate Low.	Naturally Low—the species is a narrowly distributed endemic; populations appear to be separated, but connectivity exists within Bayou de Chien, Jackson Creek, and other large tributaries.	Low—low genetic diversity and low effective population size.

As a narrow endemic species located in one watershed in southwestern Kentucky, the relict darter has inherently low redundancy, with only one known population at the time of listing and currently two known populations. Representation is also limited based on its restricted range, yet the species has survived a likely population bottleneck. Despite low genetic diversity, genetic analyses indicate a single panmictic population, indicating some recent genetic exchange between populations. Low species redundancy and representation are tempered by the moderate resiliency of the Bayou de Chien/Jackson Creek population. This historical population continues to exhibit resiliency today, with high relict darter abundance and evidence of continued reproduction. This moderately resilient population has survived threats, primarily because conservation efforts over the past three decades have improved habitat within

the system, thus enabling the breeding, feeding, and sheltering needs of the relict darter to be met and thus sustaining the population over time.

Future Conditions

In our SSA (Service 2020, entire), we defined viability as the ability of the species to sustain populations in the wild over time. To help address uncertainty associated with the degree and extent of potential future stressors and their impacts on the species' needs, the concepts of resiliency, redundancy, and representation were assessed using three plausible future scenarios (continuation of current trend, improving trend, and worsening trend), using the same analytical units and components described above, in Summary of Biological Status and Threats. We devised these scenarios by identifying data sources related to the primary threats anticipated to affect the relict darter in the future. For the habitat

loss and degradation threat, we looked at land cover change and urbanization, as well as conservation activity, and we also included predicted impacts of future climate change. The three scenarios capture the range of uncertainty in the changing landscape and how relict darter will respond to the changing conditions (see table 3, below). We used the best available data and models to project out 50 years into the future (*i.e.*, 2070), a timeframe where we were reasonably certain the land use change, urbanization, and climate models used could project patterns in the species' range relevant to the relict darter and its habitat given the species' lifespan, as well as the amount of time for the species to respond to the threats. For each scenario, we provided a summary of resiliency for each population at 10, 30, and 50 years in the future. For more information on the models and their projections, please see the SSA report (Service 2020, entire).

TABLE 3—FUTURE CONDITION OF THE RELICT DARTER BY THE YEARS 2030, 2050, AND 2070 UNDER THREE FUTURE SCENARIOS

Scenario	Population	Predicted future condition		
		10 Years	30 Years	50 Years
1	Bayou de Chien/Jackson	Moderate	Moderate	Moderate.
	Little Bayou de Chien	Low	Low	Low.
2	Bayou de Chien/Jackson	Moderate	Moderate–High	Moderate–High.
	Little Bayou de Chien	Low	Low–Moderate	Moderate.
3	Bayou de Chien/Jackson	Moderate	Low–Moderate	Low.
	Little Bayou de Chien	Low	Potential Extirpation ..	Potential Extirpation.

Under Scenario 1 (continuation of current trend), small increases in urbanization were predicted by 2050 and 2070 within the watersheds of both extant populations (Service 2020, pp. 41–43), but associated negative effects on habitat and population elements were expected to be minimal. We also predicted continued implementation of conservation actions under KDFWR's conservation strategy and through the Service's PFW program. Using a moderate level of climate change (RCP 4.5), within the next 10 years, portions of the Bayou de Chien system were impacted by either drought or floods, with slightly warmer temperatures. Over the long term (30–50 years), drought

affected all populations but at intervals and severity levels similar to what has occurred over the last 10 years.

Considering all of these factors, we expect no change in resiliency for the two known populations; however, the low resiliency of the Little Bayou de Chien population makes it much more vulnerable to extirpation from the effects of stochastic disturbance. Under Scenario 1, both representation and redundancy of the relict darter are expected to remain at low levels. The species is limited to one low resiliency population and one moderate resiliency population, both of which occupy streams within a single ecoregion, Mississippi Valley Loess Plains. Within

this ecoregion, relict darters occupy second- to fourth-order reaches, but habitat diversity within these reaches tends to be low. The species also has low genetic diversity, which cannot be increased through augmentations, reintroductions, or other genetics-based conservation actions because genetic diversity cannot be created for a species that has a limited gene pool. The species' low genetic diversity could potentially limit its ability to adapt to changing environmental conditions over time. Furthermore, both populations will remain vulnerable to catastrophic events, such as an extreme drought or chemical spill, because the species' distribution is generally limited to a

single, continuous stream reach within each population.

Under Scenario 2 (improving trend), we projected a number of improved conditions and positive outcomes that led to overall improved resiliency and redundancy for the relict darter. We projected both land use change and urbanization to be lower than current rates. The current trend in climate improved, with lower annual increases in temperature and less severe droughts or floods in the short term (RCP 4.5). Over the long term (30–50 years), drought affected both populations but at intervals and severity levels lower than what occurred over the last 10 years. Conservation efforts, including new efforts along occupied reaches of Little Bayou de Chien, increased through State wildlife action plans, and other Service partnerships with Federal, State, and nongovernmental partners. These actions contributed to improved water quality conditions, increases in forest and riparian cover, and reductions in point source and nonpoint-source pollutants in all historical tributary systems.

Based on these habitat and water quality improvements, we expect both extant populations to increase in size, with continued reproduction and recruitment. We also expect these populations to expand into unoccupied historical tributaries, eventually resulting in improved occurrence complexity in both watersheds. All of these actions and conditions will result in increased resiliency for the Bayou de Chien/Jackson and Little Bayou de Chien populations over the next 30–50 years. Under Scenario 2, representation of the relict darter is expected to remain at a low level. The species' expansion within the Bayou de Chien and Little Bayou de Chien watersheds will bolster the species' resiliency and redundancy, but the species' low genetic diversity cannot be increased. Under Scenario 2, redundancy of the relict darter will increase due to the species' expansion and improved resiliency within the Bayou de Chien and Little Bayou de Chien watersheds and due to the species' recolonization of historical tributaries such as South Fork Bayou de Chien. This increased redundancy will decrease the likelihood that a catastrophic event, such as an extreme drought or pollution event, would lead to the species' extinction. Under Scenario 2, we expect the relict darter to exhibit low–moderate redundancy.

Under Scenario 3 (worsening trend), we projected rates of land use change and urbanization to be higher than current rates. Under this scenario, the current trend in climate worsened (high

RCP of 8.5), and within the next 10 years, populations were impacted by either drought or floods, with warmer stream temperatures and lower rainfall. Over the long term (30–50 years), drought affected both populations at intervals and severity levels higher than what has occurred over the last 10 years. Some conservation actions continued in the Bayou de Chien system, but there was a net decrease in these activities due to reduced agency funding. All of these actions and conditions resulted in declining habitat and water quality conditions that will negatively affect resiliency estimates for both extant populations.

For this scenario, we project low resiliency for the Bayou de Chien/Jackson population and potential extirpation of the Little Bayou de Chien population by 2070. Under Scenario 3, representation of the relict darter is expected to remain at a low level. Reduced resiliency of the Bayou de Chien/Jackson Creek population and extirpation of the Little Bayou de Chien population will increase the species' vulnerability to stochastic disturbance and will likely reduce the species' ability to adapt to changing environmental conditions. Under Scenario 3, redundancy of the relict darter is expected to remain at a low level; however, extirpation of the Little Bayou de Chien population reduces the species' range, leaving it with a single population (Bayou de Chien/Jackson Creek) that is more vulnerable to a catastrophic event such as an extreme drought or chemical spill. The species' redundancy is also weakened by lower resiliency of the Bayou de Chien/Jackson Creek population, which will be faced with declining physical habitat and water quality conditions.

Determination of Relict Darter's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of “endangered species” or “threatened species.” The Act defines an endangered species as a species that is in danger of extinction throughout all or a significant portion of its range, and a threatened species as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial,

recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we conclude that the risk factors acting on the relict darter and its habitat, either singly or in combination, are not of sufficient imminence, intensity, or magnitude to indicate that the species is in danger of extinction (an endangered species) throughout all of its range. As described above in *Current Condition of the Relict Darter*, the relict darter is naturally a narrow endemic species. Its low species redundancy and representation are tempered by the moderate resiliency of the Bayou de Chien/Jackson Creek population, which has high relict darter abundance and evidence of continued reproduction. Population size has increased and recruitment trends have improved based on surveys completed during the past decade. Further, this moderate resiliency population has survived threats, primarily because conservation efforts over the past three decades have improved and protected habitat within the system, enabling the breeding, feeding, and sheltering needs of the relict darter to be met and thus sustaining the population over time. The Service continues to work with partners on these projects. Additionally, a second population in the Little Bayou de Chien was discovered in 2017. While this newly discovered population has low resiliency, the addition of a second population adds to the species' redundancy.

Our analysis of the relict darter's current condition shows that while the species has maintained resiliency since it was listed (see 58 FR 68480; December 27, 1993), it is now represented by only two populations in one watershed, and thus redundancy is still inherently low. The species also has low representation based on its reduced genetic diversity and low effective population size (Factor E), likely a result of a population bottleneck caused by extensive channelization and habitat disturbance throughout the Bayou de Chien system in the early 20th century. Habitat loss and degradation through stream channel disturbance, removal of riparian vegetation, and pollution continue to affect the species (Factor A), even though conservation actions over the past three decades have led to improved habitat conditions in

portions of the Bayou de Chien mainstem and Jackson Creek, contributing to moderate resiliency for the larger population. The current resiliency of the Jackson Creek/Bayou de Chien population, with a population size that has doubled in the past decade to nearly 25,000 relict darters showing evidence of reproduction and successful recruitment, along with the added redundancy of the newly discovered Little Bayou de Chien population and the reduced habitat threats, indicate that the species is not currently in danger of extinction. Therefore, after assessing the best available information, we conclude that the relict darter no longer meets the Act's definition of an endangered species.

The relict darter has benefited from protection as an endangered species under the Act, and from improvements in water quality and habitat conditions stemming from both national and Kentucky statutes and regulations; however, these regulations have not prevented the degradation of some habitats used by the species (Factor D). The primary threats that are currently acting on the species are expected to continue into the future, climate change (Factor E) is expected to exacerbate existing threats, and the species' low redundancy and low representation put the species at risk of extinction within the foreseeable future throughout all of its range. Fifty years was considered "foreseeable" in this case because we can reasonably determine within this 50-year timeframe that both the threats as presented in the models of predicted urbanization, land use, and climate change and the species' responses to those threats are likely.

The range of plausible future scenarios of relict darter habitat conditions and water quality factors suggest slightly variable resiliency into the future. Under the continuation of current trend scenario (Scenario 1), resiliency remains low or moderate in the two populations, with redundancy and representation remaining low. Under the improving trend scenario (Scenario 2), resiliency improves for both populations, with habitat conditions predicted to improve because of an increased percentage of forested land with reduced percentages of both agricultural land and urbanization, along with reduced climate change rates. Representation remains low under this scenario, but redundancy improves because of reintroduction of the species into historical habitats or natural expansion within the system. There is greater uncertainty regarding the species' future status, primarily due to conservation

action implementation with this scenario than in the other two future scenarios. Under the worsening trend scenario (Scenario 3), resiliency is low in the one remaining population, and one population is likely extirpated resulting in reduced redundancy and low representation. This expected reduction in both the number and distribution of resilient populations is likely to increase the species' vulnerability to both stochastic and catastrophic disturbances. Compared to the other two scenarios, the conditions from Scenario 3 were considered more likely to contribute to the future condition of the species, primarily because of expected continued sedimentation and water quality degradation combined with the expected synergistic effects of climate change in the future.

In summary, while the relict darter's viability has improved over time (see *Conservation Efforts*, above), three major factors that are influencing the viability of the species are expected to affect it into the future: habitat loss and degradation, restricted range/isolation, and climate change. Habitat loss and degradation resulting from siltation, channelization/riparian vegetation removal, drainage of riparian wetlands, and water quality degradation (pollution) pose the largest risk to the current and future viability of the relict darter. With the plausibility of future land use changes that could impact instream habitat and water quality, the projected worsening climate conditions, and given the inherently low redundancy that increases vulnerability to catastrophic events, the relict darter is at risk of extinction within the next 50 years. Thus, after assessing the best available information, we conclude that the relict darter is not currently in danger of extinction, but it is likely to become in danger of extinction within the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity v. Everson*, 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Center for Biological Diversity*), vacated the aspect of the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014)

that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the "significance" question or the "status" question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Center for Biological Diversity*, we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (*i.e.*, endangered). In undertaking this analysis for relict darter, we choose to address the significance question first. First, we assessed the two portions of the range (Bayou de Chien/Jackson Creek and Little Bayou de Chien). In the absence of a legal definition of significance in the Act, we determined significance on a case-by-case basis for the relict darter using a reasonable interpretation of significance and providing a rational basis for our determination. In doing so, we considered what is currently observed about the contributions made by each geographic portion in terms of biological factors, focusing on the importance of each in supporting the continued viability of the species. We evaluated whether these areas occupy relatively large or particularly high-quality or unique habitat. As a narrow ranging endemic, both relict darter populations occur within one 554-km² (214-mi²) watershed in three counties in southwestern Kentucky (Service 2020, p. 17), and Little Bayou de Chien is a tributary to Bayou de Chien. We determined that the Bayou de Chien/Jackson Creek portion is significant, as it is large geographically relative to the entire range of the species, it contains high-quality/high-value habitat for the species, and it contains habitat essential to the relict darter's life history; therefore, it is important for the overall conservation of the species. We determined that the Little Bayou de Chien portion is not significant, as it constitutes a very small portion (*i.e.*, less than 5 percent) of the range and

does not represent unique or high-quality habitat for the relict darter.

Since we determined that Bayou de Chien/Jackson Creek is a significant portion, we next evaluate whether the relict darter is in danger of extinction (*i.e.*, endangered) in that portion. The Bayou de Chien/Jackson Creek population has high relict darter abundance and evidence of continued reproduction. Population size has increased and recruitment trends have improved based on surveys completed during the past decade. Further, this moderate resiliency population has survived threats, primarily because conservation efforts over the past three decades have improved and protected habitat within the system, enabling the breeding, feeding, and sheltering needs of the relict darter to be met and thus sustaining the population over time. Thus, the Bayou de Chien/Jackson Creek portion is not in danger of extinction and does not have a different status than the entire range. Based on this, there are no portions of the species' range that provide a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors v. Department of the Interior*, No. 16-cv-01165-JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Determination of Status

Our review of the best scientific and commercial data available indicates that the relict darter meets the Act's definition of a threatened species. Therefore, we reclassify the relict darter as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. The Act encourages cooperation with the States and requires that recovery actions be implemented for all listed species. The protections required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate

goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystem.

Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. All planning documents can be found on our website (<https://www.fws.gov/program/endangered-species>), or from our Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.*, restoration of native vegetation), research, propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands (such as TNC preserves and county-owned nature preserves). To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands where appropriate. Funding for recovery actions could become available from a variety of sources, including Federal budgets, State programs, and cost share grants from non-Federal landowners, the academic community, and nongovernmental organizations. We invite you to submit any new information on this species whenever it becomes available (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) requires Federal agencies to evaluate their actions with respect to any species that is listed as an

endangered or threatened species. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species. If a Federal action may affect a listed species, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require consultation as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Forest Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 *et seq.*) permits by the U.S. Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

II. Final Rule Issued Under Section 4(d) of the Act

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the listed species. The Act allows the Secretary to promulgate protective regulations for threatened species pursuant to section 4(d) of the Act. Because we are reclassifying this species as a threatened species, the prohibitions in section 9 do not apply directly. We are, therefore, adopting a set of regulations to provide for the conservation of the species in accordance with section 4(d), which also authorizes us to apply any of the prohibitions in section 9 to a threatened species. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of species listed as threatened species. The U.S. Supreme Court has noted that statutory language similar to the language in section 4(d) of the Act authorizing the Secretary to take action that she "deems necessary and advisable" affords a large degree of deference to the agency (see *Webster v.*

Doe, 486 U.S. 592, 600 (1988)). Conservation is defined in the Act to mean 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 the Act are no longer necessary. Additionally, the second sentence of section 4(d) of the Act states that the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants. Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting one or more of the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld, as a valid exercise of agency authority, rules developed under section 4(d) that included limited prohibitions against takings (see *Alsea Valley Alliance v. Lautenbacher*, 2007 WL 2344927 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 WL 511479 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, "once an animal is on the threatened list, the Secretary has an almost infinite number of options available to [her] with regard to the permitted activities for those species. [She] may, for example, permit taking, but not importation of such species, or [she] may choose to forbid both taking and importation but allow the transportation of such species" (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), the Service has developed a rule that is designed to address the relict darter's specific threats and conservation needs. Although the statute does not require us to make a "necessary and advisable" finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the relict darter. As

discussed above under Summary of Biological Status and Threats, we have concluded that the relict darter is likely to become in danger of extinction within the foreseeable future primarily due to habitat degradation and loss stemming from siltation, channelization and riparian vegetation removal, riparian wetland drainage, and water quality degradation. These threats contribute to the negative effects associated with the species' restricted range and effects of climate change. The provisions of this 4(d) rule will promote conservation of the relict darter by providing continued protection from take and encouraging management of the landscape in ways that meet both watershed and riparian management considerations and the conservation needs of the relict darter. The provisions of this rule are one of many tools that we will use to promote the conservation of the relict darter.

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation.

This obligation does not change in any way for a threatened species with a species-specific 4(d) rule. Actions that result in a determination by a Federal agency of "not likely to adversely affect" continue to require the Service's written concurrence and actions that are "likely to adversely affect" a species require formal consultation and the formulation of a biological opinion.

Provisions of the 4(d) Rule

The provisions of this 4(d) rule will promote conservation of the relict darter by adopting the same prohibitions that apply to an endangered species under section 9 of the Act and 50 CFR 17.21. Except as otherwise authorized or permitted, this 4(d) rule continues to prohibit importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; and selling or offering for sale in interstate or foreign commerce. The prohibitions apply throughout the species' range.

Identical to the regulations that apply under endangered status, the prohibitions in this 4(d) rule prohibit all forms of take within the United States. Under the Act, "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulations at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating intentional and incidental take will help preserve the species' remaining populations, enable beneficial management actions to occur, and decrease synergistic, negative effects from other stressors.

This 4(d) rule prohibits intentional take, including capturing and handling, because these activities require training and experience. Such activities include, but are not limited to, monitoring and research involving capturing and handling relict darters. While these activities are important to relict darter recovery, there are proper techniques for capturing and handling fish that require training and experience. Improper capture or handling can cause injury or even result in death of relict darters. Therefore, to ensure that these activities continue to be conducted correctly by properly trained personnel, the 4(d) rule prohibits intentional take; however, these activities could be covered under a permit issued under section 10(a)(1)(A) of the Act.

Threats to the species are noted above and described in detail under Summary of Biological Status and Threats. The most significant threat expected to affect the species in the foreseeable future is habitat loss and degradation from siltation, channelization and riparian vegetation removal, drainage of riparian wetlands, and water quality degradation. Some activities have the potential to affect the relict darter,

including agriculture and land development. These activities may result in incidental take through increases in siltation, diminishing water quality, altering stream flow, and reducing fish passage. Therefore, this 4(d) rule prohibits take to help preserve the relict darter's remaining populations, slow the rate of population decline, preserve and potentially provide for expansion of the population, and decrease synergistic, negative effects from other stressors.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Exceptions

The 4(d) rule also provides for the conservation of the species by incorporating several exceptions to allow for routine enforcement activities, allow for assisting sick or injured fish, and encourage the active habitat management this species uniquely requires. The statute also contains certain statutory exceptions from the prohibitions, which are found in sections 9 and 10 of the Act, and other regulatory exceptions from the prohibitions, which are found in our regulations at 50 CFR part 17, subparts C and D. Below, we describe these exceptions to the prohibitions for the relict darter.

To start, this rule outlines several regulatory exceptions to the prohibitions for the relict darter. First, the rule excepts take associated with activities that are authorized by permits under § 17.32. This means that if a manager has received or receives a permit for a particular activity (e.g., a section 10(a)(1)(A) permit for monitoring relict darters), any take that occurs as a result of activities covered by this permit remains excepted from the prohibitions on take under the issued permit; in other words, the manager would not be liable for any take for which the manager already has a permit.

Second, the final rule incorporates certain regulatory exceptions that allow

take by any person in defense of his own life or the lives of others; take by representatives of the Service or of a State conservation agency to aid a sick specimen or to dispose of, salvage, or remove a dead specimen that is reported to the Office of Law Enforcement; and take by Federal and State law enforcement officers performing their official duties to possess, deliver, carry, transport, or ship any relict darters taken in violation of the Act, as necessary.

Next, the final 4(d) rule allows employees of State conservation agencies operating under a cooperative agreement with the Service in accordance with section 6(c) of the Act to take relict darters in order to carry out conservation programs for the species. We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist us in implementing all aspects of the Act. In this regard, section 6 of the Act provides that we shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve the relict darter that may result in otherwise prohibited take without additional authorization.

Finally, the 4(d) rule provides species-specific exceptions to the standard take prohibitions; these species-specific exceptions facilitate continued and increased implementation of beneficial management practices that provide for conservation of the species. Within each occupied stream, restoration actions will promote expansion of the relict darter's range and reduce the fragmentation and isolation of populations. These actions can reduce stressors that impact the relict darter, including runoff of siltation and pollution, and may (through riparian reforestation) mediate local water temperatures expected to increase with climate change. Incidental take associated with habitat restoration actions excepted by the 4(d) rule may

result in some minimal level of harm or temporary disturbance to the relict darter. For example, a culvert replacement project would likely elevate suspended sediments for several hours, and the darters would need to move out of the sediment plume to resume normal feeding behavior. Because 4(d) rule exceptions do not apply during the relict darter's 4-month spawning period, a critical phase of the species' life history, the potential for incidental take is further minimized.

Overall, these activities benefit the species by expanding suitable habitat and reducing within-population fragmentation, contributing to conservation and recovery. Consistent with all of the exceptions and based on the best available information, our 4(d) rule excepts incidental take associated with the following activities, if carried out in accordance with existing regulations and permit requirements, and conducted outside the March through June spawning season:

- Channel restoration or improvement projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers and, if the projects involve known relict darter spawning habitat, take place between June 30 and March 1. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

- Streambank stabilization projects that use bioengineering methods to replace preexisting, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species and, if the projects involve known relict darter spawning habitat, that take place between June 30 and March 1. Stream banks may be stabilized using native live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), native live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between

successive lifts of soil fill). Stream banks must not be stabilized through the use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

Bridge and culvert replacement/removal projects or low head dam removal projects that remove migration barriers or generally allow for improved upstream and downstream movements of relict darters while maintaining normal stream flows, preventing bed and bank erosion, and improving habitat conditions for the species and improving habitat conditions for the species, if completed between June 30 and March 1.

Transportation projects that follow best management practices that eliminate sedimentation, do not block stream flow, do not channelize streams, and provide for fish passage under a wide range of hydrologic conditions at stream crossings and that are done between June 30 and March 1.

Projects carried out in the species' range by the U.S. Department of Agriculture's Natural Resources Conservation Service that do not alter habitats known to be used by the relict darter beyond the fish's tolerances and are performed between June 30 and March 1 to avoid the time period when the relict darter will be found within its spawning habitat, if such habitat is affected by the activity.

Nothing in this 4(d) rule changes in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the relict darter. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service, where appropriate.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), need not be prepared in connection with determining a species' listing status under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We also determine that 4(d) rules that accompany regulations adopted pursuant to section 4(a) of the Act are not subject to NEPA.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

There are no known Tribes or Tribal lands within the range of the relict darter.

References Cited

A complete list of references cited in this rulemaking is available on the internet at <https://www.regulations.gov>.

Authors

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

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by revising the entry for “Darter, relict” under Fishes to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* FISHES	*	*	*	*
Darter, relict	<i>Etheostoma chienense</i> ...	Wherever found	T	58 FR 68480, 12/27/1993; 88 FR [Insert Federal Register page where the document begins], 9/27/2023; 50 CFR 17.44(hh). ^{4d}
*	*	*	*	*

■ 3. Amend § 17.44 by adding paragraphs (gg) and (hh) to read as follows:

§ 17.44 Special rules—fishes.

* * * * *

(gg) [Reserved]

(hh) Relict darter (*Etheostoma chienense*).

(1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to relict darter. Except as provided under paragraph

(hh)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to

be committed, any of the following acts in regard to this species:

- (i) Import or export, as set forth at § 17.21(b) for endangered wildlife.
- (ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.
- (iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.
- (iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.

- (v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

- (i) Conduct activities as authorized by a permit under § 17.32.
- (ii) Take, as set forth at § 17.21(c)(2) through (4) for endangered wildlife.
- (iii) Take as set forth at § 17.31(b).
- (iv) Take incidental to an otherwise lawful activity caused by:

(A) Channel restoration or improvement projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers and, if the projects involve known relict darter spawning habitat, that take place between June 30 and March 1. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

(B) Streambank stabilization projects that use bioengineering methods to replace preexisting, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species and, if the projects involve known relict darter spawning habitat, that take place between June 30 and March 1. Stream banks may be stabilized using native live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), native live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Stream banks must not be stabilized through the use

of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(C) Bridge and culvert replacement/removal projects or low head dam removal projects that remove migration barriers or generally allow for improved upstream and downstream movements of relict darters while maintaining normal stream flows, preventing bed and bank erosion, and improving habitat conditions for the species, if completed between June 30 and March 1.

(D) Transportation projects that follow best management practices that eliminate sedimentation, do not block stream flow, do not channelize streams, and provide for fish passage under a wide range of hydrologic conditions at stream crossings and that are done between June 30 and March 1.

(E) Projects carried out in the species' range by the Natural Resources Conservation Service, U.S. Department of Agriculture, that:

(1) Do not alter habitats known to be used by the relict darter beyond the fish's tolerances; and

(2) Are performed between June 30 and March 1 to avoid the time period when the relict darter will be found within its spawning habitat, if such habitat is affected by the activity.

(v) Possess or engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023-20945 Filed 9-26-23; 8:45 am]

BILLING CODE 4333-15-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306-0065; RTID 0648-XD358]

Fisheries of the Exclusive Economic Zone Off Alaska; Several Groundfish Species 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; apportionment of reserves; request for comments.

SUMMARY: NMFS apportions amounts of the non-specified reserve to the initial total allowable catch (ITAC) of Bering Sea (BS) Pacific ocean perch, Bering Sea and Aleutian Islands (BSAI) Kamchatka

flounder, BSAI northern rockfish, BSAI sharks, and Central Aleutian Islands and Western Aleutian Islands (CAI/WAI) blackspotted/rougheye rockfish. This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI management area.

DATES: Effective September 26, 2023, through 2400 hours, Alaska local time, December 31, 2023. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, October 11, 2023.

ADDRESSES: You may submit comments on this document, identified by docket number NOAA-NMFS-2022-0094, by any of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2022-0094 in the Search box. Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

Mail: Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

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 <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907-586-7228.

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

The 2023 ITAC of BS Pacific ocean perch was established as 10,118 metric tons (mt), the 2023 ITAC of BSAI Kamchatka flounder was established as 6,442 mt, the 2023 ITAC of BSAI northern rockfish was established as 9,350 mt, the 2023 ITAC of BSAI sharks was established as 213 mt, and the 2023 ITAC of CAI/WAI blackspotted/rougheye rockfish was established as 141 mt by the final 2023 and 2024 harvest specifications for groundfish of the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the ITACs for BS Pacific ocean perch, BSAI Kamchatka flounder, BSAI northern rockfish, BSAI sharks, and CAI/WAI blackspotted/rougheye rockfish need to be supplemented from the non-specified reserve to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish to ITACs in the BSAI management area as follows: 1,785 mt to BS Pacific ocean perch, 1,137 mt to BSAI Kamchatka flounder, 1,650 mt to BSAI northern rockfish, 120 mt to BSAI sharks, and 25 mt to CAI/WAI blackspotted/rougheye rockfish. These apportionments are consistent with § 679.20(b)(1)(i) and do not result in overfishing of any target species because the revised ITACs and total allowable catches (TACs) are equal to or less than the specifications of the acceptable biological catch in the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023).

The harvest specification for the 2023 ITACs and TACs included in the harvest specifications for groundfish in the BSAI are revised as follows 11,903 mt for BS Pacific ocean perch, 7,579 mt for BSAI Kamchatka flounder, 11,000 mt for BSAI northern rockfish, 333 mt for BSAI sharks, and 166 mt for CAI/WAI blackspotted/rougheye rockfish.

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 apportionment of the non-specified reserves of groundfish to BS Pacific ocean perch, BSAI Kamchatka flounder, BSAI northern rockfish, BSAI sharks, and CAI/WAI blackspotted/rougheye rockfish. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 5, 2023.

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

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until October 11, 2023.

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

Dated: September 22, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023-21051 Filed 9-26-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306-0065; RTID 0648-XD359]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Atka Mackerel 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 the 2023 Atka mackerel incidental catch allowance (ICA) for the Bering Sea

subarea and Eastern Aleutian district (BS/EAI) to the Amendment 80 cooperative allocation for the BS/EAI in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the 2023 total allowable catch of Atka mackerel in the BSAI to be fully harvested.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), September 25, 2023 through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT:

Steve Whitney, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the 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 (Magnuson-Stevens Act). Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 Atka mackerel ICA for the BS/EAI is 800 metric tons (mt) and the 2023 Atka mackerel total allowable catch allocated to the Amendment 80 cooperative for the BS/EAI is 21,083 mt as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and correction (88 FR 18258, March 28, 2023).

The Administrator, Alaska Region, NMFS, has determined that 700 mt of the Atka mackerel ICA for the BS/EAI will not be harvested. Therefore, in accordance with § 679.91(f), NMFS reallocates 700 mt of Atka mackerel from the BS/EAI ICA to the BS/EAI Amendment 80 cooperative allocation in the BSAI. In accordance with § 679.91(f), NMFS will reissue the cooperative quota permit for the reallocated Atka mackerel following the procedures set forth in § 679.91(f)(3).

The harvest specifications for Atka mackerel included in the harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) and corrected (88 FR 18258, March 28, 2023) are revised as follows: 100 mt of Atka mackerel for the BS/EAI ICA and 21,783 mt of Atka mackerel for the Amendment 80 cooperative allocation for the BS/EAI. Table 6 is revised and republished in its entirety as follows:

TABLE 6—FINAL 2023 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector ¹	Season ^{2 3 4}	2023 Allocation by area		
		Eastern Aleutian District/Bering Sea	Central Aleutian District ⁵	Western Aleutian District
TAC	n/a	27,260	17,351	24,671
CDQ reserve	Total	2,917	1,857	2,640
	A	1,458	928	1,320
	Critical Habitat	n/a	557	792
	B	1,458	928	1,320
	Critical Habitat	n/a	557	792
Non-CDQ TAC	n/a	24,343	15,494	22,031
ICA	Total	100	75	20
Jig ⁶	Total	118	.....	.....
BSAI trawl limited access	Total	2,343	1,542	.....
	A	1,171	771	.....
	Critical Habitat	n/a	463	.....
	B	1,171	771	.....
	Critical Habitat	n/a	463	.....
Amendment 80 sector	Total	21,783	13,877	22,011
	A	10,892	6,939	11,006
	Critical Habitat	n/a	4,163	6,603
	B	10,892	6,939	11,006
	Critical Habitat	n/a	4,163	6,603

Note: Seasonal or sector apportionments may not total precisely due to rounding.

¹ Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtracting the CDQ reserves, ICAs, and jig gear allocation, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the ITAC for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in Table 33 to 50 CFR part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see §§ 679.20(b)(1)(ii)(C)).

² Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

³ The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

⁴ Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10 and the B season from June 10 to December 31.

⁵ Section 679.20(a)(8)(ii)(C)(1)(i) limits no more than 60 percent of the annual TACs in Areas 542 and 543 to be caught inside of Steller sea lion protection areas; section 679.20(a)(8)(ii)(C)(1)(i) equally divides the annual TACs between the A and B seasons as defined at § 679.23(e)(3); and section 679.20(a)(8)(ii)(C)(2) requires that the TAC in Area 543 shall be no more than 65 percent of ABC in Area 543.

⁶ Sections 679.2 and 679.20(a)(8)(i) require that up to 2 percent of the Eastern Aleutian Islands District and the Bering Sea subarea TAC be allocated to jig gear after subtracting the CDQ reserve and the ICA. NMFS sets the amount of this allocation for 2023 at 0.5 percent. The jig gear allocation is not apportioned by season.

This will enhance the socioeconomic well-being of harvesters dependent upon Atka mackerel in this area. The Regional Administrator considered the following factors in reaching this decision: (1) the current catch of Atka mackerel ICA in the BS/EAI; and, (2) the harvest capacity and stated intent on future harvesting patterns of the Amendment 80 cooperative that participates in this BS/EAI fishery.

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 harvest of Atka

mackerel in the BS/EAI fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 21, 2023.

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

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

Dated: September 21, 2023.

Kelly Denit,

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

[FR Doc. 2023–20976 Filed 9–22–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD069]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2023 total allowable catch of Pacific ocean perch in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), September 22, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907-586-7228.

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

The 2023 total allowable catch (TAC) of Pacific ocean perch in the Western Regulatory Area of the GOA is 2,529 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish of the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2023 TAC of Pacific

ocean perch in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,429 mt, and is setting aside the remaining 100 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 Pacific ocean perch in the Western Regulatory Area of the GOA.

While this closure is in effect, 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 directed fishing of Pacific ocean perch in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of September 21, 2023.

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

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

Dated: September 22, 2023.

Kelly Denit,

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

[FR Doc. 2023-21074 Filed 9-22-23; 4:15 pm]

BILLING CODE 3510-22-P

Proposed Rules

Federal Register

Vol. 88, No. 186

Wednesday, September 27, 2023

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

[Docket ID: OPM–2023–0028]

RIN 3206–AO64

Prevailing Rate Systems; North American Industry Classification System Based Federal Wage System Wage Surveys

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a proposed rule to update the 2017 North American Industry Classification System (NAICS) codes currently used in Federal Wage System (FWS) wage survey industry regulations with the 2022 NAICS revisions published by the Office of Management and Budget (OMB).

DATES: Send comments on or before October 27, 2023.

ADDRESSES: You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) and title, by the following method:

• *Federal Rulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, by telephone at (202) 606–2858, or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION:

Section 5343 of title 5, U.S. Code, provides OPM with the authority and

responsibility to prescribe practices and procedures for conducting wage surveys. Beginning in November 2006, based on recommendations of the Federal Prevailing Rate Advisory Committee (FPRAC), the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, full scale surveys have been using NAICS codes as the method of determining if an industry is appropriate for survey. OMB updates the NAICS codes every five years, at which time OPM also updates the list of NAICS codes covered by OPM wage survey regulations. On July 30, 2019, OPM issued a final rule (84 FR 36813) to update the 2012 NAICS codes used in FWS wage survey industry regulations with the 2017 NAICS revisions published by OMB. OPM's current regulations use 2017 NAICS codes. OMB has now published the NAICS revisions for 2022, which result in certain changes in industry coverage for FWS wage surveys. This rulemaking proposes to update OPM's regulations with the 2022 NAICS codes revisions.

The following sections of 5 CFR part 532 list the industries included in the FWS wage surveys by 2017 NAICS codes:

- Section 532.213—Industries included in regular appropriated fund wage surveys.
- Section 532.221—Industries included in regular nonappropriated fund surveys.
- Section 532.223—Establishments included in regular nonappropriated fund surveys.
- Section 532.267—Special wage schedules for aircraft, electronic, and optical instrument overhaul and repair positions in Puerto Rico.
- Section 532.285—Special wage schedules for supervisors of negotiated rate Bureau of Reclamation employees.
- Section 532.313—Private sector industries.

OPM has reviewed these regulations in light of OMB's NAICS revisions for 2022 and is proposing the following changes:

- Delete NAICS code 515 (Broadcasting (except internet)) from the list of required NAICS codes in 5 CFR 532.213 and add NAICS code 516 (Broadcasting and content providers);
- Delete NAICS codes 44132 (Tire dealers), 443 (Electronics and appliance stores), 44611 (Pharmacies and drug

stores), 4471 (Gasoline stations), 44814 (Family clothing stores), 4522 (Department stores), 4523 (All other general merchandise stores), 45321 (Office supplies and stationery stores) and 4542 (Vending machine operators) from the list of required NAICS codes in 5 CFR 532.221 and add NAICS codes 44134 (Tire dealers), 449210 (Electronics and appliance retailers), 45611 (Pharmacies and drug stores), 4571 (Gasoline stations), 45811 (Clothing and clothing accessories retailers), 4551 (Department stores), 4552 (Warehouse clubs, supercenters, and other general merchandise retailers), and 45941 (Office supplies and stationery retailers);

- Delete NAICS codes 4471 (Gasoline stations) and 4542 (Vending machine operators) from the list of required NAICS codes in 5 CFR 532.223 and add NAICS code 4571 (Gasoline stations);
- Delete NAICS codes 333316

(Photographic and photocopying equipment manufacturing) and 334613 (Blank magnetic and optical recording media manufacturing) from the list of required NAICS codes in 5 CFR 532.267 and add NAICS codes 333310 (Commercial and service industry machinery manufacturing) and 334610 (Manufacturing and reproducing magnetic and optical media);

- Delete NAICS code 515 (Broadcasting (except internet)) from the list of required NAICS codes in 5 CFR 532.285 and add NAICS code 516 (Broadcasting and content providers);
- Delete NAICS code 441310

(Automotive parts and accessory stores) from the list of required NAICS codes in 5 CFR 532.287;

- Revise the title of NAICS code 4413 to read “Automotive parts, accessories, and tire retailers” in the list of required NAICS codes in the Artillery and combat vehicles specialized industry in 5 CFR 532.313;
- Delete NAICS codes 44421

(Outdoor power equipment stores), 5173 (Wired and wireless telecommunications carriers), and 517911 (Telecommunications resellers) from the list of required NAICS codes in the Artillery and combat vehicle specialized industry in 5 CFR 532.313 and add NAICS codes 44423 (Outdoor power equipment retailers), 5171 (Wired and wireless telecommunications carriers (except Satellite)) and 517121 (Telecommunications resellers);

- Delete NAICS codes 5151 (Radio and television broadcasting), 5152 (Cable and other subscription programming), 5173 (Wired and wireless telecommunications carriers) and 517911 (Telecommunications resellers) from the list of required NAICS codes in the Communications specialized industry in 5 CFR 532.313 and add NAICS codes 5161 (Radio and television broadcasting stations), 5162 (Media streaming distribution services, social networks, and other media networks and content providers), 5171 (Wired and wireless telecommunications carriers(except Satellite)), and 517121 (Telecommunications resellers);
- Delete NAICS codes 333316 (Photographic and photocopying equipment manufacturing) and 334613 (Blank magnetic and optical recording media manufacturing) from the list of required NAICS codes in the Electronics specialized industry and Guided missiles specialized industry in 5 CFR 532.313 and add NAICS codes 333310 (Commercial and service industry machinery manufacturing) and 334610 (Manufacturing and reproducing magnetic and optical media); and
- Delete NAICS codes 333314 (Optical instrument and lens manufacturing), 333316 (Photographic and photocopying equipment manufacturing) and 334613 (Blank magnetic and optical recording media manufacturing) from the list of required NAICS codes in the Sighting and fire control equipment specialized industry in 5 CFR 532.313 and add NAICS codes 333310 (Commercial and service industry machinery manufacturing) and 334610 (Manufacturing and reproducing magnetic and optical media).

No other sections are affected by 2022 changes in NAICS codes. OPM is also proposing to replace the year “2017” with “2022” in the table titles of all applicable sections.

FPRAC recommended these changes by consensus at its May 18, 2023, meeting. The transcript of this meeting can be found on the Federal Wage System website, available at <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/#url=FPRAC>.

Expected Impact of This Proposed Rule

OPM is issuing this proposed rule so that its FWS wage survey industry regulations remain consistent and up-to-date with OMB’s NAICS codes. OPM expects this rulemaking to have no significant impact on whether

companies are included or excluded from wage surveys. The expected costs would be de minimis since the Department of Defense, the lead agency responsible for conducting FWS wage surveys, will only have to make some minor changes in their computer systems to follow the updated NAICS codes. OPM does not anticipate this rulemaking will have a substantial impact on the local economies or a large impact in the local labor markets. However, OPM is requesting comment on this proposed rule regarding the impact. OPM is particularly interested in receiving comments on its use of NAICS codes in FWS wage survey industry regulations. OPM will continue to study the implications of such impacts of this or future rules as needed, as this and future changes in OMB’s NAICS codes may have higher impact on wage survey methodology.

Regulatory Review

Executive Orders 13563, 12866, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rulemaking is not a “significant regulatory action” under the provisions of Executive Order 12866 and, therefore, was not reviewed by OMB.

Regulatory Flexibility Act

The Director of OPM certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because this rulemaking will affect only Federal agencies and employees.

Federalism

OPM examined this rulemaking in accordance with Executive Order 13132, Federalism, and determined that it will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Act of 1995

This rulemaking will not 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 year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

This rulemaking does not impose any reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, OPM is proposing to amend 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

■ 2. In § 532.213, amend the table in paragraph (a) by revising the column headings, removing the entry for NAICS code 515, and adding in numerical order an entry for NAICS code 516 to read as follows.

§ 532.213 Industries included in regular appropriated fund wage surveys.

(a) * * *

2022 NAICS codes	2022 NAICS codes
* * *	* * *
516	Broadcasting and content providers.
* * *	* * *
* * *	* * *

■ 3. In § 532.221, amend the table in paragraph (a) by revising the column headings, removing the entries for NAICS codes 44132, 443, 44611, 4471, 44814, 4522, 4523, 45321, 4542, and adding in numerical order entries for NAICS codes 44134, 449210, 4551, 4552, 45611, 4571, 45811, 45941 to read as follows:

§ 532.221 Industries included in regular nonappropriated fund surveys.

(a) * * *

2022 NAICS codes		2022 NAICS codes	
44134	Tire dealers.		
449210	Electronics and appliance retailers.		
4551	Department stores.		
4552	Warehouse clubs, supercenters, and other general merchandise retailers.		
45611	Pharmacies and drug stores.		
4571	Gasoline stations.		
45811	Clothing and clothing accessories retailers.		
45941	Office supplies and stationery retailers.		

* * * * *

■ 4. In § 532.223, revise paragraph (a) to read as follows:

§ 532.223 Establishments included in regular nonappropriated fund surveys.

(a) All establishments having 20 or more employees in the prescribed industries within a survey area must be included in the survey universe.

Establishments in NAICS codes 4571, 71391, and 71395 must be included in the survey universe if they have eight or more employees.

■ 5. In § 532.267, amend the table in paragraph (c)(1) by revising the column headings, removing the entries for NAICS codes 333316 and 334613, and adding in numerical order entries for

NAICS codes 333310 and 334610 to read as follows:

§ 532.267 Special wage schedules for aircraft, electronic, and optical instrument overhaul and repair positions in Puerto Rico.

* * * * *

(c) * * *

(1) * * *

2022 NAICS codes		2022 NAICS codes	
333310	Commercial and service industry machinery manufacturing.		
334610	Manufacturing and reproducing magnetic and optical media.		

* * * * *

■ 6. In § 532.285, amend the table in paragraph (c)(1) by revising the column headings, removing the entry for NAICS code 515, and adding in numerical

order an entry for NAICS code 516 to read as follows:

§ 532.285 Special wage schedules for supervisors of negotiated rate Bureau of Reclamation employees.

* * * * *

(c) * * *

(1) * * *

2022 NAICS codes		2022 NAICS industry titles	
516	Broadcasting and content providers.		

* * * * *

§ 532.287 [Amended]

■ 7. In § 532.287, amend the table in paragraph (c)(4) by:

■ a. Removing the column heading “2017 NAICS codes” and adding in its place “2022 NAICS codes”;

■ b. Removing the column heading “2017 NAICS industry titles” and adding in its place “2022 NAICS industry titles”; and

■ c. Removing the entry for NAICS code 441310.

■ 8. In § 532.313, amend the table in paragraph (a) by:

■ a. Revising the column headings;

■ b. Under the heading “Artillery and Combat Vehicle Specialized Industry”:

■ i. Revising the entry for NAICS Code 4413;

■ ii. Removing the entries for NAICS Codes 44421, 5173, and 517911; and

■ iii. Adding in numerical order entries for NAICS Codes 44423, 5171, and 517121;

■ c. Under the heading “Communications Specialized Industry”:

■ i. Removing the entries for NAICS Codes 5151, 5152, 5173, and 517911; and

■ ii. Adding in numerical order entries for NAICS Codes 5161, 5162, 5171, and 517121;

■ d. Under the heading “Electronics Specialized Industry”:

■ i. Removing the entries for NAICS Codes 333316 and 334613; and

■ ii. Adding in numerical order entries for NAICS Codes 333310 and 334610

■ e. Under the heading “Guided Missiles Specialized Industry”:

■ i. Removing the entries for NAICS Codes 333316 and 334613; and
 ■ ii. Adding in numerical order entries for NAICS Codes 333310 and 334610;
 ■ f. Under the heading “Sighting and Fire Control Equipment Specialized Industry”:

■ i. Removing the entries for NAICS Codes 333314, 333316, and 334613; and
 ■ ii. Adding in numerical order entries for NAICS Codes 333310 and 334610.
 The revisions and additions read as follows:

§ 532.313 Private sector industries.
 (a) * * *

2022 NAICS codes		2022 NAICS industry titles				
*	*	*	*	*	*	*
Artillery and Combat Vehicles Specialized Industry						
*	*	*	*	*	*	*
4413	Automotive parts, accessories, and tire retailers.					
44423	Outdoor power equipment retailers.					
*	*	*	*	*	*	*
5171	Wired and wireless telecommunications carriers (except Satellite).					
517121	Telecommunications resellers.					
*	*	*	*	*	*	*
Communications Specialized Industry						
*	*	*	*	*	*	*
5161	Radio and television broadcasting stations.					
5162	Media streaming distribution services, social networks, and other media networks and content providers.					
5171	Wired and wireless telecommunications carriers (except Satellite).					
517121	Telecommunications resellers.					
*	*	*	*	*	*	*
Electronics Specialized Industry						
333310	Commercial and service industry machinery manufacturing.					
*	*	*	*	*	*	*
334610	Manufacturing and reproducing magnetic and optical media.					
*	*	*	*	*	*	*
Guided Missiles Specialized Industry						
*	*	*	*	*	*	*
333310	Commercial and service industry machinery manufacturing.					
*	*	*	*	*	*	*
334610	Manufacturing and reproducing magnetic and optical media.					
*	*	*	*	*	*	*
Sighting and Fire Control Equipment Specialized Industry						
333310	Commercial and service industry machinery manufacturing.					
*	*	*	*	*	*	*
334610	Manufacturing and reproducing magnetic and optical media.					
*	*	*	*	*	*	*

* * * * *

[FR Doc. 2023–21069 Filed 9–26–23; 8:45 am]

BILLING CODE 6325–39–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 843

[Docket ID: OPM–2023–0008]

RIN 3206–AO55

Federal Employees' Retirement System; Present Value Conversion Factors for Spouses of Deceased Separated Employees; Correction

AGENCY: Office of Personnel
Management.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the RIN in a proposed rule that was published in the **Federal Register** on July 14, 2023, regarding the Present Value Conversion Factors for Spouses of Deceased Separated Employees in the Federal Employees' Retirement System.

DATES: This correction is effective on September 27, 2023.

FOR FURTHER INFORMATION CONTACT:
Karla Yeakle, (202) 606–0299.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of July 14, 2023, in FR Doc. 2023–14983, on page 45100 in the document heading, the RIN is corrected to read “3206–AO55.”

Dated: September 21, 2023.

Kayyonne Marston,
Federal Register Liaison.

[FR Doc. 2023–20963 Filed 9–26–23; 8:45 am]

BILLING CODE 6325–38–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. APHIS–2022–0014]

Importation of Live Dogs for Resale From Regions Where African Swine Fever Exists or Is Reasonably Believed to Exist

AGENCY: Animal and Plant Health
Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations to establish requirements regarding the importation of live dogs for resale, whether through retail or wholesale channels or fee-based adoption, from regions where African swine fever (ASF) exists or is reasonably believed to exist. These regulations are necessary because dogs imported from

ASF-affected countries for resale purposes, along with bedding, represent a potential risk for the introduction of ASF into the United States. This action would address that risk.

DATES: We will consider all comments that we receive on or before November 27, 2023.

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

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2022–0014 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2022–0014, 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 www.regulations.gov or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Mary Kate Anderson, Staff Veterinary Medical Officer, Live Animal Imports, Veterinary Services, APHIS, 4700 River Road, Riverdale, MD 20737; (301) 851–3300; email: LAIE@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Health Protection Act (AHPA, 7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture may prohibit or restrict the importation or entry of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock.

Pursuant to this authority, the Animal and Plant Health Inspection Service (APHIS) administers the regulations in 9 CFR part 93. The regulations in part 93 govern the importation of live animals into the United States, and place restrictions on the importation of certain species or types of animals in order to address the risk that the animals present of introducing or disseminating diseases or pests of livestock.

The regulations in part 93 currently include requirements regarding the importation of live swine in order to address the risk that the swine may

present of introducing African swine fever (ASF) into the United States; § 93.505 requires swine imported into the United States to be accompanied by a certificate attesting that the region of origin of the swine is free of ASF. ASF is a highly contagious disease of wild and domestic swine that can spread rapidly in swine populations with extremely high rates of morbidity and mortality.

APHIS monitors possible pathways of introduction of ASF into the United States and has identified dogs imported from ASF-affected countries for resale purposes, along with their bedding, as a potential pathway for introduction of ASF into the United States. Dogs for resale includes any transfer of ownership or control of an imported dog of less than 6 months of age to another person, for more than de minimis consideration (this includes such transactions as retail sale, wholesale, and fee-based adoption). Accordingly, on August 2, 2021, APHIS issued a Federal Order (DA–2021–01),¹ effective on August 16, 2021, imposing several requirements on the importation of dogs for resale from regions where ASF exists or is reasonably believed to exist. The Federal Order requires:

- The U.S. importer must obtain an APHIS Animal Care import permit for dog(s) intended for resale and satisfy all import requirements.

- The dog(s) imported for resale must also meet all of the following APHIS Veterinary Services (VS) import requirements:

- The dog(s) and their shipping crate/container must be free of dirt, wood shavings, hay, straw, or any other organic/natural bedding material.

- All bedding that accompanies the dog(s) during transit must be properly disposed of at the post-entry point(s) of concentration in a way that prevents the introduction or spread of ASF.

- Disposal methods may include incineration; or disinfecting the bedding with an APHIS-approved disinfectant, placing the bedding in a leakproof bag, sealing the bag, disinfecting the bag exterior with an APHIS-approved disinfectant, inserting the disinfected bag into another leakproof bag, sealing that bag, disinfecting the bag exterior with the same disinfectant product, and disposing of the bag in a landfill in accordance with all State and local regulations.

- Dog(s) must have an International Standards Organization (ISO) compliant microchip implanted, and the microchip number must be verified

¹ https://www.aphis.usda.gov/import_export/downloads/vs-federal-order-asf.pdf.

immediately before the animal is bathed.

- To certify a microchip as ISO compliant, the microchip must operate at a radio frequency of 134.2 kHz. ISO microchip numbers usually contain 15 digits.

- Dog(s) must be bathed at the U.S. post-entry point(s) of concentration within 2 calendar days of arrival at the U.S. port of entry, and completion of this requirement must be documented on the VS Dog Import Record.

- U.S. post-entry point(s) of concentration are the first location where shipments of imported dog(s) are directly moved to following arrival at the U.S. port of entry.

Both parts of the VS Dog Import Record must be completed and submitted for each shipment of imported dog(s) intended for resale.

- Part 1 of the VS Dog Import Record must include the following information:

- The name, phone number, email, and address of the importer.
 - The country of origin.
 - The APHIS Animal Care import permit number.
 - The number of dogs shipped.
 - The U.S. port of entry.
 - The date of the dog(s)' arrival in the United States.

- The address(es) of the first U.S. post-entry point(s) of concentration.

- Importer certification and signature.

- Part 2 of the VS Dog Import Record must include the following information:

- The APHIS Animal Care import permit number.
 - Each dog's name (if applicable), microchip number, age, gender, breed, color/markings, and the date of bath completion.

- The name, phone number, email, and signature of the importer.

- The name, phone number, email and signature of the bather(s).

- Upon arrival at the U.S. post-entry point(s) of concentration, all bedding that accompanied the dog(s) during shipping must be properly disposed of.

- The individual microchip number must be verified immediately before each animal is bathed.

- The dog(s) must be bathed at the U.S. post-entry point(s) of concentration within 2 calendar days following entry into the United States. Completion of this requirement must be documented on the VS Dog Import Record and signed by the importer and bather(s).

- The VS Dog Import Record verifying the completion of all VS import requirements for every dog in the shipment must be submitted to APHIS within 2 business days following the dogs' entry into the United States.

- VS may require, at its discretion, animal inspection at the post-entry point(s) of concentration in the United States to verify import requirements were met. APHIS is proposing to add the above requirements, by adding paragraph (c) to § 93.600.

In general, the proposed regulation adheres to the requirements of the Federal Order. However, we are proposing one change with regard to unique identification of the dogs. While the Federal Order requires the microchip to be ISO-compliant and operate at a specific radio frequency, we are instead proposing that the microchip must meet APHIS-approved standards in providing unique identification. The list of such approved standards would be maintained on the internet at <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/dog-import-into-us/import-live-dogs-into-us>, and we would publish a notice in the **Federal Register** if we update the list.

The list would currently state that microchips that are ISO-compliant and operate at a radio frequency of 134.2 kHz are APHIS-approved. However, if ISO adopts an alternate frequency that APHIS evaluates and finds acceptable, or should a different international standards body arise that is equivalently stringent to ISO, this deviation from the Federal Order would provide APHIS with sufficient flexibility to make changes to the list of acceptable identification to meet the terms of the regulations in a manner that does not require rulemaking.

Executive Orders 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below.

APHIS has determined that dogs imported from ASF affected countries for resale purposes, along with their bedding, represent a possible pathway for the introduction of disease. To block this pathway, APHIS issued a Federal Order (DA-2021-01) imposing several restrictions on the importation of dogs for resale from regions where ASF exists or is reasonably believed to exist.

ASF is found in countries around the world. More recently, it has spread to the Dominican Republic and Haiti. ASF has also spread through China, Mongolia and Vietnam, as well as within parts of the European Union.

Animal breeders and importers may be affected by this rulemaking. They will have to spend additional time to complete and submit the required documents. Importers will need to verify that they have met these restrictions by completing and submitting a Dog Import Record that will record information regarding the dogs' characteristics, identification, origin, entry into the United States, disposition of their bedding and packing material, and confirmation of bathing.

The U.S. importer must obtain an APHIS Animal Care (AC) import permit for dog(s) intended for resale, and satisfy all import requirements therein, including age and vaccination requirements. The dog(s) imported for resale must also meet all of the following APHIS Veterinary Services (VS) import requirements. The dog(s) and their shipping crate/container must be free of dirt, wood shavings, hay, straw, or any other organic/natural bedding material. All bedding that accompanies the dog(s) during transit must be properly disposed of at the post-entry point(s) of concentration in a way that prevents the introduction or spread of ASF. Dog(s) must have an International Standards Organization (ISO) compliant microchip implanted, and the microchip number must be verified immediately before the animal is bathed. Dog(s) must be bathed at the U.S. post-entry point(s) of concentration within 2 calendar days of arrival at the U.S. port of entry, and completion of this requirement must be documented on the VS Dog Import Record.

We have reason to believe that many of these requirements, such as microchipping and bathing, are routine industry practices and that entities will incur at most minimal additional costs in implementing them. Accordingly, based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with

State and local officials. (See 2 CFR chapter IV.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The information collection activities in this proposed rule are included under the Office of Management and Budget (OMB) control number 0579–0478 which has been submitted to OMB for approval.

E-Government Act Compliance

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

List of Subjects in 9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, APHIS proposes to amend 9 CFR part 93 as follows:

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, FISH, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Amend § 93.600 by adding paragraph (c) to read as follows:

§ 93.600 Importation of dogs.

* * * * *

(c) *Dogs imported for resale purposes from regions where African swine fever exists or is reasonably believed to exist.* In order for a dog for resale purposes (any transfer of ownership or control of an imported dog of less than 6 months of age to another person, for more than de minimis consideration) to be imported from a region listed in accordance with § 94.8(a)(2) of this subchapter as a region in which African swine fever (ASF) exists or is reasonably believed to exist, the following requirements must be met:

(1) *Permitting.* The U.S. importer must obtain an import permit in accordance with § 2.150 of this chapter for any dog intended for resale, and satisfy all import requirements in §§ 2.150 through 2.152 of this chapter, including age and vaccination requirements.

(2) *Cleaning and disinfecting.* The dogs and their shipping crate/container must be free of dirt, wood shavings, hay, straw, or any other organic/natural bedding material. Additionally, all bedding that accompanies the dog(s) during transit must be properly disposed of at the U.S. post-entry point(s) of concentration in a way that prevents the introduction or spread of ASF. U.S. post-entry points of concentration are the first location where shipments of imported dogs are directly moved to following arrival at the U.S. port of entry. Disposal methods include:

(i) Incineration; or
(ii) Disinfecting the bedding with a disinfectant specified by APHIS for use in mitigating ASF, placing the bedding in a leakproof bag, sealing the bag, disinfecting the bag exterior with the same disinfectant product, inserting the disinfected bag into another leakproof bag, sealing that bag, disinfecting the bag exterior with the same disinfectant product, and disposing of the bag in a landfill in accordance with all State and local regulations.

(3) *Bathing.* Dogs must be bathed at the U.S. post-entry point of concentration within 2 calendar days of arrival at the U.S. port of entry, and completion of this requirement must be documented on a VS Dog Import Record.

(4) *Identification.* Dogs must have a microchip implanted that meets APHIS-approved standards in providing unique identification. A list of all such standards is found on <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/dog-import-into-us/import-live-dogs-into-us>. APHIS will publish a notice in the **Federal Register** if the list of identification standards is updated. Immediately before a dog is bathed in accordance with paragraph

(c)(3) of this section, the party bathing the dog must verify that the dog has met the requirements of this paragraph (c)(4).

(5) *Certification.* The VS Dog Import Record verifying the completion of all VS import requirements for every dog in the shipment must be signed by the importer and bather and submitted to APHIS within 2 business days following the dogs' entry into the United States. Both parts of the VS Dog Import Record, as listed in this paragraph (c)(5), must be completed and submitted for each shipment of imported dogs intended for resale.

(i) Part 1 of the VS Dog Import Record must include the following information:

- (A) The name, phone number, email, and address of the importer;
- (B) The country of origin of the dog(s);
- (C) The APHIS Animal Care import permit number;
- (D) The number of dogs shipped;
- (E) The U.S. port of entry;
- (F) The date of the dog(s)' arrival in the United States;
- (G) The addresses of the first U.S. post-entry points of concentration; and
- (H) Importer certification and signature.

(ii) Part 2 of the VS Dog Import Record must include the following information:

- (A) The APHIS Animal Care import permit number;
- (B) Each dog's name (if applicable), microchip number, age, gender, breed, color/markings, and the date of bath completion;
- (C) The name, phone number, email, and signature of the importer; and
- (D) The name, phone number, email, and signature of the bather(s).

(6) *Non-compliance.* Non-compliance with any of APHIS' import requirements by an importer could result in appropriate enforcement or remedial actions, including refusal of entry.

* * * * *

Done in Washington, DC, this 21st day of September 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–20952 Filed 9–26–23; 8:45 am]

BILLING CODE 3410–34–P

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

[Docket No. FAA–2023–1882; Project Identifier MCAI–2023–00651–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2022–07–15, which applies to all Airbus SAS Model A318, A319, A320, and A321 series airplanes. AD 2022–07–15 requires replacing affected braking and steering control units (BSCUs) and revising the operator's existing FAA-approved minimum equipment list (MEL). Since the FAA issued AD 2022–07–15, a type 1 relay combined with an affected BSCU would induce BSCU freezing. This proposed AD would remove certain airplanes from the applicability, retain the requirements of AD 2022–07–15, require an inspection for the relay type installed and replacement of type 1 relays with type 2 relays, and prohibit the installation of affected relays at certain locations, limit the installation of affected BSCUs on certain airplanes, and prohibit the installation of affected BSCUs for certain other airplanes, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 13, 2023.

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

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket

No. FAA–2023–1882; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For the EASA AD identified in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; website *easa.europa.eu*. You may find this material on the EASA website at *ad.easa.europa.eu*. It is also available at *regulations.gov* under Docket No. FAA–2023–1882.
- For Airbus service information identified in this NPRM, contact Airbus SAS, Airworthiness Office—ELAS, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com*; website *airbus.com*.
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT:

Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone 206–231–3667; email *Timothy.P.Dowling@faa.gov*.

SUPPLEMENTARY INFORMATION:**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–1882; Project Identifier MCAI–2023–00651–T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone 206–231–3667; email *Timothy.P.Dowling@faa.gov*. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–07–15, Amendment 39–22003 (87 FR 22438, April 15, 2022), for all Airbus SAS Model A318–111, –112, –121, and –122 airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, –153N, and –171N airplanes; Model A320–211, –212, –214, –216, –231, –232, –233, –251N, –252N, –253N, –271N, –272N, –273N airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –251NX, –252N, –252NX, –253N, –253NX, –271N, –271NX, –272N, and –272NX airplanes. AD 2022–07–15 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022–0032, dated March 3, 2022 (EASA AD 2022–0032), to correct an unsafe condition.

AD 2022–07–15 requires replacing affected BSCUs and revising the operator's existing FAA-approved MEL. The FAA issued AD 2022–07–15 to address loss of braking performance with significant increase in airplane stopping distance, possibly resulting in runway excursion.

Actions Since AD 2022–07–15 Was Issued

Since the FAA issued AD 2022–07–15, EASA superseded AD 2022–0032 and issued EASA AD 2023–0093, dated May 5, 2023, which was subsequently

revised. EASA AD 2023–0093R1, dated May 15, 2023 (EASA AD 2022–0093R1) (also referred to as the MCAI), retains the requirements of EASA AD 2023–0032 and requires replacement of type 1 relays with type 2 relays.

The MCAI noted that BSCU channel failures could induce, in the event of dual channel failures, loss of anti-skid function together with the reversion to the alternate braking mode, and loss of nose wheel steering, and lead to loss of braking performance with significant increase in airplane stopping distance, possibly resulting in runway excursion.

The MCAI states that further investigation identified a type 1 relay installed in a position where a type 2 relay should have been installed. The combination of a type 1 relay with an affected BSCU could induce BSCU freezing. EASA therefore determined that it is necessary to replace type 1 relays with type 2 relays.

The MCAI also states that type 1 relays are no longer installed on Model A320 Current Engine Option (CEO) airplanes (*i.e.*, Model A318 series airplanes; A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes). Type 1 relays were required to be replaced on Model A320 CEO airplanes by AD 96–04–06, Amendment 39–9518 (61 FR 6927, February 23, 1996). AD 96–04–06 corresponded to DGAC France AD F–1993–163–043, dated September 29, 1993. Model A320 CEO airplanes are therefore not included in the applicability of this proposed AD.

Further, EASA stated that some relays installed at functional item number (FIN) locations 24GG and 25GG were not in conformity with the Airplane Inspection Report on certain airplanes.

In addition, it was determined that certain airplanes have been delivered with a BSCU P/N E21327107.

Explanation of Retained Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2022–07–15, this proposed AD would retain all the requirements of AD 2022–07–15. Those requirements are referenced in EASA AD 2023–0093R1, which, in turn, is referenced in paragraph (g) of this proposed AD.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0093R1 specifies procedures for replacing affected BSCUs

if a fault signature is triggered, and implementing the instructions of master minimum equipment list (MMEL) updates on the basis of which the operator's existing MEL must be amended—that is, procedures for revising the operator's existing FAA-approved MEL with the provisions in the MMEL updates specified in the EASA AD. EASA AD 2023–0093R1 also specifies procedures for a general visual inspection of the FINs 24GG and 25GG to identify the relay type installed, and replacement of each type 1 relay with a type 2 relay. EASA AD 2023–0093R1 also limits the installation of affected parts.

Airbus Alert Operators Transmission A32N025–22, Rev 01, dated May 10, 2023, including Appendixes 1 through 3, dated May 2023, defines BSCU fault signatures that may be triggered on the airplane, and specifies procedures for replacing affected parts, among other actions.

This proposed AD would also require Airbus Alert Operators Transmission A32N025–22, Rev 00, dated February 24, 2022, including Appendixes 1 through 4, dated February 21, 2022, which the Director of the Federal Register approved for incorporation by reference as of May 2, 2022 (87 FR 22438, April 15, 2022).

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

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would retain all requirements of AD 2022–07–15. This proposed AD would remove airplanes from the applicability and require accomplishing the actions specified in EASA AD 2023–0093R1 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Compliance With MEL Revisions

EASA AD 2023–0093R1 requires operators to “inform all flight crews” of revisions to the MEL, and thereafter to “operate the airplane accordingly.” However, this proposed AD would not specifically require those actions as those actions are already required by FAA regulations. FAA regulations (14 CFR 121.628 (a)(2)) require operators to provide pilots with access to all of the information contained in the operator's MEL. Furthermore, 14 CFR 121.628 (a)(5) requires airplanes to be operated under all applicable conditions and limitations contained in the operator's MEL. Therefore, including a requirement in this proposed AD to operate the airplane according to the revised MEL would be redundant and unnecessary.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0093R1 by reference in this AD. This proposed AD would, therefore, require compliance with EASA AD 2023–0093R1 entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0093R1 does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in EASA AD 2023–0093R1. Service information required by EASA AD 2023–0093R1 for compliance will be available at regulations.gov under Docket No. FAA–2023–1882 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 349 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2022–07–15.	Up to 5 work-hours × \$85 per hour = \$425.	\$0	Up to \$425	Up to \$148,325.
Relay inspection and replacement (new proposed actions).	Up to 9 work-hours × \$85 per hour = \$765.	0	Up to 765	Up to 266,985.

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all known costs in the cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by:
- a. Removing Airworthiness Directive (AD) 2022–07–15, Amendment 39–22003 (87 FR 22438, April 15, 2022); and
 - b. Adding the following new AD:

Airbus SAS: Docket No. FAA–2023–1882; Project Identifier MCAI–2023–00651–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 13, 2023.

(b) Affected ADs

This AD replaces AD 2022–07–15, Amendment 39–22003 (87 FR 22438, April 15, 2022) (AD 2022–07–15).

(c) Applicability

This AD applies to the Airbus SAS airplanes, certificated in any category, identified in paragraphs (c)(1) through (3) of this AD.

(1) All Model A319–151N, A319–153N, and A319–171N airplanes.

(2) All Model A320–251N, A320–252N, A320–253N, A320–271N, A320–272N, and A320–273N airplanes.

(3) All Model A321–251N, A321–251NX, A321–252N, A321–252NX, A321–253N, A321–253NX, A321–271N, A321–271NX, A321–272N, and A321–272NX airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing Gear; and America Code 92, Electrical System Installation.

(e) Unsafe Condition

This AD was prompted by the detection of several channel failures on the braking and steering control unit (BSCU), inducing, in

case of dual channel failures, loss of anti-skid function together with the reversion to the alternate braking mode, and loss of nose wheel steering. This AD was further prompted by the determination that a type 1 relay combined with an affected BSCU could induce BSCU freezing. The FAA is issuing this AD to address these conditions, which could lead to loss of braking performance with significant increase in airplane stopping distance, possibly resulting in runway excursion.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) 2023–0093R1, dated May 15, 2023 (EASA AD 2023–0093R1).

(h) Exceptions to EASA AD 2023–0093R1

(1) Where EASA AD 2023–0093R1 refers to "10 March 2022 [the effective date of EASA AD 2022–0032 at original issue]," this AD requires using May 2, 2022 (the effective date of AD 2022–07–15).

(2) Where EASA AD 2023–0093R1 refers to its effective date, this AD requires using the effective date of this AD.

(3) Where EASA AD 2023–0093R1 defines "the AOT 1" as "Airbus Alert Operators Transmission (AOT 1) A32N025–22," this AD requires using Airbus Alert Operators Transmission A32N025–22, Rev 00, dated February 24, 2022, including Appendixes 1 through 4, dated February 21, 2022, or Airbus Alert Operators Transmission A32N025–22, Rev 01, dated May 10, 2023, including Appendixes 1 through 3, dated May 2023.

(4) Where paragraphs (2) and (3) of EASA AD 2023–0093R1 specify "in accordance with the instructions of the AOT 1," replace those words with "in accordance with the 'Remove and replace BSCU P/N E21327307' step in paragraph 5.6., 'Instructions,' of Airbus Alert Operators Transmission A32N025–22, Rev 00, dated February 24, 2022, including Appendixes 1 through 4, dated February 21, 2022, or of Airbus Alert Operators Transmission A32N025–22, Rev 01, dated May 10, 2023, including Appendixes 1 through 3, dated May 2023." No other actions in Airbus Alert Operators Transmission A32N030–23, Rev 00, dated February 27, 2023, including Appendixes 1 and 2, dated February 21, 2023 (referenced in EASA AD 2023–0093R1 and not incorporated by reference in this AD), or Airbus Alert Operators Transmission A32N025–22, Rev 01, dated May 10, 2023, including

Appendixes 1 through 3, dated May 2023, are required for compliance for the replacement.

(5) Where paragraph (4) of EASA AD 2023–0093R1 requires operators to “implement the instructions of the MMEL [master minimum equipment list] update,” this AD requires replacing those words with “implement the operator’s existing FAA-approved minimum equipment list (MEL) with the provisions specified in ‘The MMEL update’ as identified in EASA AD 2023–0093R1.”

(6) Where paragraph (4) of EASA AD 2023–0093R1 specifies to “inform all flight crews, and, thereafter, operate the airplane accordingly,” this AD does not require those actions as those actions are already required by existing FAA operating regulations.

(7) This AD does not adopt the “Remarks” section of EASA AD 2023–0093R1.

(i) No Reporting Requirement

Although certain service information specified in EASA AD 2023–0093R1 specifies to report certain information and send affected parts to the manufacturer, this AD does not require those actions.

(j) Additional AD Provisions

The following provisions also apply to this AD:

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

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(ii) AMOCs approved previously for AD 2022–07–15 are approved as AMOCs for the corresponding provisions of EASA AD 2023–0093R1 that are required by paragraph (g) of this AD.

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

(3) *Required for Compliance (RC)*: Except as required by paragraph (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or

changes to procedures or tests identified as RC require approval of an AMOC.

(k) Additional Information

For more information about this AD, contact Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone 206–231–3667; email Timothy.P.Dowling@faa.gov.

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2023–0093R1, dated May 15, 2023.

(ii) Airbus Alert Operators Transmission A32N025–22, Rev 01, dated May 10, 2023, including Appendixes 1 through 3, dated May 2023.

(4) The following service information was approved for IBR on May 2, 2022 (87 FR 22438, April 15, 2022).

(i) Airbus Alert Operators Transmission A32N025–22, Rev 00, dated February 24, 2022, including Appendixes 1 through 4, dated February 21, 2022.

(ii) [Reserved]

(5) For EASA AD 2023–0093R1, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADS@easa.europa.eu; website easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(6) For Airbus service information identified in this AD, contact Airbus SAS, Airworthiness Office—EIAS, Rond-Point Emile Dewoitine No. 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email account.airworth-eas@airbus.com; website airbus.com.

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

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

Issued on September 15, 2023.

Victor Wicklund,

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

[FR Doc. 2023–20399 Filed 9–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1879; Project Identifier AD–2023–00286–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2019–16–05, which applies to all The Boeing Company Model 777 airplanes. AD 2019–16–05 requires an identification of the part number, and if applicable the serial number, of the Captain’s and First Officer’s seats, and applicable on-condition actions for affected seats. Since the FAA issued AD 2019–16–05, the FAA has discovered that certain seat part numbers had been inadvertently omitted from the inspection requirements of AD 2019–16–05. This proposed AD would retain the requirements of AD 2019–16–05 and would add inspection of the previously omitted part numbers. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by November 13, 2023.

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

- *Federal eRulemaking Portal:* Go to regulations.gov. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

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

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2023–1879; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website myboeingfleet.com.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at regulations.gov under Docket No. FAA-2023-1879.

FOR FURTHER INFORMATION CONTACT:

Courtney Tuck, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206-231-3986; email: courtney.k.tuck@faa.gov.

SUPPLEMENTARY INFORMATION:**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA-2023-1879; Project Identifier AD-2023-00286-T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each

page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Courtney Tuck, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206-231-3986; email: courtney.k.tuck@faa.gov. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2019-16-05, Amendment 39-19708 (84 FR 45895, September 23, 2019) (AD 2019-16-05), for all The Boeing Company Model 777-200, -200LR, -300, -300ER, and 777F series airplanes. AD 2019-16-05 was prompted by reports of uncommanded fore/aft movements of the Captain's and First Officer's seats. AD 2019-16-05 requires an identification of the part number, and if applicable the serial number, of the Captain's and First Officer's seats, and applicable on-condition actions for affected seats. The FAA issued AD 2019-16-05 to address uncommanded fore/aft movement of the Captain's and First Officer's seats. An uncommanded fore/aft seat movement during a critical part of a flight, such as takeoff or landing, could cause a flight control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

Actions Since AD 2019-16-05 Was Issued

Since the FAA issued AD 2019-16-05, certain seat part numbers were discovered to have been inadvertently omitted from the service information, and were therefore not included in the requirements of AD 2019-16-05.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Special Attention Service Bulletin 777-25-0607, Revision 2, dated January 27, 2023. The service information describes procedures for identification of the part number, and if applicable, the serial number, of the Captain's and First Officer's seats, and for applicable on-condition actions for affected seats. The on-condition actions include an

inspection of each seat's fore/aft and vertical manual control levers for looseness, installation of serviceable seats, and a seat functional test after any cable adjustment.

The FAA also reviewed Boeing Special Attention Service Bulletin 777-25-0619, Revision 2, dated January 27, 2023. The service information describes procedures for a detailed inspection and repetitive checks of the horizontal movement system for the Captain's and First Officer's seats for findings (e.g., evidence of cracks, scores, corrosion, dents, deformation or visible wear; and incorrectly assembled microswitch assemblies, actuators, and limit switches), and applicable on-condition actions. The on-condition actions include clearing the seat tracks of foreign object debris (FOD), overhauling the horizontal movement system, and replacing the horizontal actuator. The service information also describes procedures for an optional terminating action for the repetitive checks by installing a serviceable Captain's or First Officer's seat.

This proposed AD would also require Boeing Special Attention Service Bulletin 777-25-0619, Revision 1, dated August 8, 2018, which the Director of the Federal Register approved for incorporation by reference as of October 8, 2019 (84 FR 45895, September 3, 2019).

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

Proposed AD Requirements in This NPRM

Although this proposed AD does not explicitly restate the requirements of AD 2019-16-05, this proposed AD would retain all of the requirements of AD 2019-16-05. Those requirements are referenced in the service information identified previously, which, in turn, is referenced in paragraphs (g) and (h) of this proposed AD. This proposed AD would also require accomplishment of the actions specified in Boeing Special Attention Service Bulletin 777-25-0607, Revision 2, dated January 27, 2023, and the actions identified as “RC” (required for compliance) in the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777-25-0619, Revision 2, dated January 27, 2023, described previously, except as discussed under “Differences Between this Proposed AD and the Service Information.”

For information on the procedures and compliance times, see this service

information at *regulations.gov* under Docket No. FAA–2023–1879.

Differences Between This Proposed AD and the Service Information

The effectivity of Boeing Special Attention Service Bulletins 777–25–0607 and 777–25–0619, both Revision 2, dated January 27, 2023, is limited to Model 777–200, –200LR, –300, –300ER, and 777F airplanes with specific line numbers. However, the applicability of this proposed AD includes all Model 777–200, –200LR, –300, –300ER, and 777F series airplanes. Because the affected Captain’s and First Officer’s

seats are rotatable parts, the FAA has determined that these seats could later be installed on airplanes that were initially delivered with acceptable seats, thereby subjecting those airplanes to the identified unsafe condition.

Where Boeing Special Attention Service Bulletin 777–25–0607, Revision 2, dated January 27, 2023, specifies compliance within 72 months after the original issue date of the service bulletin, this proposed AD would require compliance with those actions within 36 months after the effective date of AD 2019–16–05. The 36-month

compliance time corresponds to the compliance time in Boeing Special Attention Service Bulletin 777–25–0619, Revision 2, dated January 27, 2023. The FAA determined during the development of AD 2019–16–05 that a 36-month compliance time was appropriate for doing those actions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 327 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS PER SEAT

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Identification, seat (retained actions from AD 2019–16–05).	1 work-hour × \$85 per hour = \$85.	\$0	\$85	\$27,795.
Detailed inspection, horizontal movement system (retained actions from AD 2019–16–05).	1 work-hour × \$85 per hour = \$85.	0	\$85	\$27,795.
Checks, horizontal movement system (retained actions from AD 2019–16–05).	2 work-hour × \$85 per hour = \$170 per check cycle.	0	\$170 per check cycle	\$55,590 per check cycle.

The FAA estimates the following costs to do any necessary on-condition

actions that would be required. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS PER SEAT *

Action	Labor cost	Parts cost	Cost per product
Adjustment, control lever cable	1 work-hour × \$85 per hour = \$85	\$0	\$85.
Overhaul, horizontal movement system	11 work-hours × \$85 per hour = \$935	Up to \$5,824	Up to \$6,759.
Inspection of each seat’s fore/aft and vertical manual control levers.	1 work-hour × \$85 per hour = \$85	\$0	\$85.
Installation of serviceable seats	1 work-hour × \$85 per hour = \$85	\$0	\$85.
Clearing FOD	1 work-hour × \$85 per hour = \$85	\$0	\$85.
Replacement of the horizontal actuator	1 work-hour × \$85 per hour = \$85, per actuator.	\$7,937 per actuator	\$8,022 per actuator.
Functional test, adjusted control lever cable.	1 work-hour × \$85 per hour = \$85	\$0	\$85.

* The estimated cost for tooling to align an affected seat for adjustment of the control lever cable is up to \$46,064.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some/all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2019–16–05, Amendment 39–19708 (84 FR 45895, September 3, 2019), and

■ b. Adding the following new AD:

The Boeing Company: Docket No. FAA–2023–1879; Project Identifier AD–2023–00286–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 13, 2023.

(b) Affected ADs

This AD replaces AD 2019–16–05, Amendment 39–19708 (84 FR 45895, September 3, 2019) (AD 2019–16–05).

(c) Applicability

This AD applies to all The Boeing Company Model 777–200, –200LR, –300, –300ER, and 777F series airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by reports of uncommanded fore/aft movement of the Captain's and First Officer's seats. The FAA is issuing this AD to address uncommanded fore/aft movement of the Captain's and First Officer's seats. An uncommanded fore/aft seat movement during a critical part of a flight, such as takeoff or landing, could cause a flight control obstruction or unintended flight control input, which could result in the loss of the ability to control the airplane.

(f) Compliance

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

(g) Seat Part Number Identification and On-Condition Actions

Except as specified in paragraph (i) of this AD: At the applicable time specified in Boeing Special Attention Service Bulletin 777–25–0607, Revision 2, dated January 27, 2023, do an inspection to determine the part number, and serial number as applicable, of the Captain's and First Officer's seats, and do all applicable on-condition actions, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–25–0607, Revision 2, dated January 27, 2023. A review of airplane maintenance records is acceptable in lieu of this inspection if the part number and serial number of the Captain's and First Officer's seats can be conclusively determined from that review.

(h) Detailed Inspection and Repetitive Checks of Horizontal Movement System and On-Condition Actions

Except as specified in paragraph (i) of this AD: At the applicable times specified in paragraph 1.E., "Compliance," of Boeing Special Attention Service Bulletin 777–25–0619, Revision 2, dated January 27, 2023, do all applicable actions identified as "RC" (required for compliance) in, and in accordance with, the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–25–0619, Revision 1, dated August 8, 2018, or Revision 2, dated January 27, 2023. As of the effective date of this AD, only Boeing Special Attention Service Bulletin 777–25–0619, Revision 2, dated January 27, 2023, may be used. Actions identified as terminating action in Boeing Special Attention Service Bulletin 777–25–0619, Revision 1, dated August 8, 2018, or Revision 2, dated January 27, 2023, terminate the applicable required actions of this AD, provided the terminating action is done in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–25–0619, Revision 1, dated August 8, 2018, or Revision 2, dated January 27, 2023.

(i) Exceptions to Service Information Specifications

(1) Where Boeing Special Attention Service Bulletin 777–25–0619, Revision 2, dated January 27, 2023, uses the phrase "the Original issue date of this service bulletin," this AD requires replacing those words with "October 8, 2019 (the effective date of AD 2019–16–05)."

(2) Where Boeing Special Attention Service Bulletin 777–25–0607, Revision 2, dated January 27, 2023, specifies compliance for certain actions "within 72 months after the Original Issue date of this service bulletin," this AD requires replacing those words with "within 36 months after October 8, 2019 (the effective date of AD 2019–16–05)."

(3) Where Boeing Special Attention Service Bulletin 777–25–0607, Revision 2, dated January 27, 2023, specifies compliance for certain actions "within 36 months after the Revision 2 date of this service bulletin," this AD requires compliance within 36 months after the effective date of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: 9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by The Boeing Company Organization Designation Authorization (ODA) that has been authorized by the Manager, AIR–520, Continued Operational Safety Branch, FAA, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved for AD 2019–16–05 are approved as AMOCs for the corresponding provisions of this AD.

(5) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(5)(i) and (ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled "RC Exempt," then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

(1) For more information about this AD, contact Courtney Tuck, Aviation Safety Engineer, FAA, 2200 South 216th St., Des Moines, WA 98198; phone: 206–231–3986; email: courtney.k.tuck@faa.gov.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(5) and (6) of this AD.

(l) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) Boeing Special Attention Service Bulletin 777-25-0607, Revision 2, dated January 27, 2023.

(ii) Boeing Special Attention Service Bulletin 777-25-0619, Revision 2, dated January 27, 2023.

(4) The following service information was approved for IBR on October 8, 2019 (84 FR 45895, September 3, 2019).

(i) Boeing Special Attention Service Bulletin 777-25-0619, Revision 1, dated August 8, 2018.

(ii) [Reserved]

(5) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110-SK57, Seal Beach, CA 90740-5600; telephone 562-797-1717; website myboeingfleet.com.

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

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

Issued on September 8, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023-19797 Filed 9-26-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1888; Project Identifier MCAI-2023-00298-E]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: The FAA is correcting a Notice of Proposed Rulemaking (NPRM) that published in the **Federal Register**. The NPRM proposed to issue an airworthiness directive (AD) that would apply to all Rolls-Royce Deutschland Ltd & Co KG (RRD) Model RB211-Trent 800 engines. As published, the docket number referenced throughout the NPRM is incorrect. This document corrects that error. In all other respects,

the original document remains the same; however, for clarity, the FAA is republishing the entire proposed rule in the **Federal Register**.

DATES: The last date for submitting comments to the NPRM (88 FR 63539, September 15, 2023) remains October 30, 2023.

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

- **Federal eRulemaking Portal:** Go to regulations.gov. Follow the instructions for submitting comments.

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

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

- **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA-2023-1888; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact the European Union Aviation Safety Agency (EASA), Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu. It is also available at regulations.gov under Docket No. FAA-2023-1888.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7241; email: sungmo.d.cho@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No.

FAA-2023-1888; Project Identifier MCAI-2023-00298-E" at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM (88 FR 63539, September 15, 2023) that would apply to all RRD Model RB211-Trent 800 engines. The NPRM proposed to require initial and repetitive on-wing or in-shop borescope inspections (BSIs) of certain intermediate-pressure compressor (IPC) rotor shaft balance lands for cracks, dents, and nicks, and replacement of the IPC rotor shaft if necessary, and proposed to prohibit the installation of a certain IPC rotor shaft on any engine, as specified in EASA AD 2023-0040, dated February 16, 2023 (EASA AD 2023-0040) (also referred to after this as the MCAI), which is proposed for incorporation by reference.

The NPRM was prompted by reports of cracks on certain IPC rotor shaft balance lands. This condition, if not addressed, could lead to IPC rotor shaft failure and consequent uncontained high-energy debris, resulting in damage to the airplane.

Need for the Correction

As published, the docket number referenced throughout the NPRM is incorrect. The NPRM incorrectly references “Docket No. FAA–2023–1880” instead of “Docket No. FAA–2023–1888.”

Although no other part of the preamble or regulatory information has been corrected, for clarity, the FAA is publishing the entire proposed rule in the **Federal Register**.

The comment due date of the NPRM remains October 30, 2023.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0040, which specifies procedures for performing initial and repetitive on-wing or in-shop BSIs of the IPC rotor shaft balance land for cracks, dents, and nicks, and replacing the IPC rotor shaft if necessary. The MCAI also specifies prohibiting the installation of a certain IPC rotor shaft on any engine and that accomplishing an in-shop EC inspection of the IPC rotor shaft balance land or replacing the IPC rotor shaft constitutes

as terminating action for the repetitive BSIs.

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

FAA’s Determination

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

Proposed AD Requirements in This NPRM

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

Explanation of Required Compliance Information

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA)

ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and CAAs to use this process. As a result, the FAA proposes to incorporate by reference EASA AD 2023–0040 in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0040 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions within the compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in EASA AD 2023–0040. Service information required by the EASA AD for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1888 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 194 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
BSI of IPC rotor shaft balance land	4.5 work-hours × \$85 per hour = \$382.50	\$0	\$382.50	\$74,205

The FAA estimates the following costs to do any necessary replacements that would be required based on the

results of the proposed inspection. The agency has no way of determining the

number of aircraft that might need these replacements:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace IPC rotor shaft	50 work-hours × \$85 per hour = \$4,250	\$2,123,908	\$2,128,158

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce.

This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Corrected]

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

Rolls-Royce Deutschland Ltd & Co KG:

Docket No. FAA-2023-1888; Project Identifier MCAI-2023-00298-E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 30, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG (RRD) Model RB211-Trent 875-17, RB211-Trent 877-17, RB211-Trent 884-17, RB211-Trent 884B-17, RB211-Trent 892-17, RB211-Trent 892B-17, and RB211-Trent 895-17 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by reports of cracks on the intermediate-pressure compressor (IPC) rotor shaft balance land. The FAA is issuing this AD to detect cracks on the IPC rotor shaft balance land. The unsafe

condition, if not addressed, could lead to IPC rotor shaft failure and consequent uncontained high-energy debris, resulting in damage to the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023-0040, dated February 16, 2023 (EASA AD 2023-0040).

(h) Exceptions to EASA AD 2023-0040

(1) Where EASA AD 2023-0040 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the Remarks paragraph of EASA AD 2023-0040.

(3) Where the service information referenced in EASA AD 2023-0040 specifies to use certain tooling, equivalent tooling may be used.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2023-0040 specifies to notify the manufacturer or supply pictures to the manufacturer of any cracks, dents, or nicks, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

The Manager, AIR-520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: ANE-AD-AMOC@faa.gov.

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

(k) Additional Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7241; email: sungmo.d.cho@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023-0040, dated February 16, 2023.

(ii) [Reserved]

(3) For EASA AD 2023-0040, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110. This material may be found in the AD docket at regulations.gov under Docket No. FAA-2023-1888.

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

Issued on September 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023-21082 Filed 9-25-23; 4:15 pm]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1889; Project Identifier MCAI-2023-00738-E]

RIN 2120-AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: The FAA is correcting a Notice of Proposed Rulemaking (NPRM) that published in the **Federal Register**. The NPRM proposed to issue an airworthiness directive (AD) that would apply to certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000 engines. As published, the docket number referenced throughout the NPRM is incorrect. This document corrects that error. In all other respects, the original document remains the same; however, for clarity, the FAA is publishing the entire proposed rule in the **Federal Register**.

DATES: The last date for submitting comments to the NPRM (88 FR 63885, September 18, 2023) remains November 2, 2023.

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

• **Federal eRulemaking Portal:** Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

• **Fax:** (202) 493-2251.

• **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1889; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

• For service information that is identified in this NPRM, contact the European Union Aviation Safety Agency (EASA), Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this material on the EASA website at ad.easa.europa.eu. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1889.

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110.

FOR FURTHER INFORMATION CONTACT: Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7241; email: sungmo.d.cho@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA-2023-1889; Project Identifier MCAI-2023-00738-E” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the

following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued an NPRM (88 FR 63885, September 18, 2023) that would apply to certain RRD Model Trent 1000 engines. The NPRM proposed to supersede AD 2021-25-04, Amendment 39-21847 (86 FR 71129, December 15, 2021) (AD 2021-25-04), for all RRD Model Trent 1000-AE3, Trent 1000-CE3, Trent 1000-D3, Trent 1000-G3, Trent 1000-H3, Trent 1000-J3, Trent 1000-K3, Trent 1000-L3, Trent 1000-M3, Trent 1000-N3, Trent 1000-P3, Trent 1000-Q3, and Trent 1000-R3 (Trent 1000) engines. AD 2021-25-04 requires operators to revise the airworthiness limitations section (ALS) of their existing approved aircraft maintenance program by incorporating the revised tasks of the applicable time limits manual (TLM) for each affected engine.

The NPRM proposed to require revising the ALS of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts, as specified in EASA AD 2023-

0115, dated June 7, 2023 (EASA AD 2023-0115) (also referred to after this as the MCAI), which is proposed for incorporation by reference. The NPRM was prompted by the manufacturer revising the TLM to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts. The FAA is proposing this AD to prevent the failure of critical rotating parts, which could result in the failure of one or more engines, loss of thrust control, and loss of the airplane.

Need for the Correction

As published, the docket number referenced throughout the NPRM is incorrect. The NPRM incorrectly references “Docket No. FAA-2023-1881” instead of “Docket No. FAA-2023-1889.”

Although no other part of the preamble or regulatory information has been corrected, for clarity, the FAA is publishing the entire proposed rule in the **Federal Register**.

The comment due date of the NPRM remains November 2, 2023.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023-0115, which specifies procedures for operators to revise the ALS of the existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

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

FAA's Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require revising the ALS of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive

tasks and limitations and associated thresholds and intervals for life-limited parts, which are specified in the MCAI described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD and as discussed under “Differences Between this Proposed AD and the MCAI.”

Explanation of Required Compliance Information

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and CAAs to use this process. As a result, the FAA proposes to incorporate by reference EASA AD 2023–0115 in the FAA final

rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0115 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions within compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in EASA AD 2023–0115. Service information required by the EASA AD for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1889 after the FAA final rule is published.

Differences Between This Proposed AD and the MCAI

Where paragraph (3) of EASA AD 2023–0115 specifies revising the approved Aircraft Maintenance Programme within 12 months after the effective date of EASA AD 2023–0115, this proposed AD would require revising the ALS of the existing approved engine maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

This proposed AD would not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2023–0115.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 2 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor Cost	Parts Cost	Cost per product	Cost on U.S. operators
Revise the ALS	1 work-hour × \$85 per hour = \$85	\$0	\$85	\$170

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and

responsibilities among the various levels of government.

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Corrected]

- 2. The FAA amends § 39.13 by:

- a. Removing Airworthiness Directive AD 2021–25–04, Amendment 39–21847 (86 FR 71129, December 15, 2021); and
- b. Adding the following new airworthiness directive:

Rolls-Royce Deutschland Ltd & Co KG:
Docket No. FAA–2023–1889; Project Identifier MCAI–2023–00738–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 2, 2023.

(b) Affected ADs

This AD replaces AD 2021–25–04, Amendment 39–21847 (86 FR 71129, December 15, 2021).

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the engine time limits manual (TLM) life limits of certain critical rotating parts and direct accumulation counting data files. The FAA is issuing this AD to prevent the failure of critical rotating

parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0115, dated June 7, 2023 (EASA AD 2023–0115).

(h) Exceptions to EASA AD 2023–0115

(1) Where EASA AD 2023–0115 defines the AMP as the approved Aircraft Maintenance Programme containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated engine, this AD defines the AMP as the aircraft maintenance program containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated airplane.

(2) Where EASA AD 2023–0115 refers to its effective date, this AD requires using the effective date of this AD.

(3) This AD does not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2023–0115.

(4) Where paragraph (3) of EASA AD 2023–0115 specifies revising the approved AMP within 12 months after the effective date of EASA AD 2023–0115, this AD requires revising the airworthiness limitations section of the existing approved engine maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(5) This AD does not adopt the Remarks paragraph of EASA AD 2023–0115.

(i) Provisions for Alternative Actions and Intervals

After performing the actions required by paragraph (g) of this AD, no alternative actions and associated thresholds and intervals, including life limits, are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2023–0115.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: ANE-AD-AMOC@faa.gov.

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

(k) Additional Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7241; email: sungmo.d.cho@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0115, dated June 7, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0115, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: ADs@easa.europa.eu; website: easa.europa.eu. You may find this EASA AD on the EASA website at ad.easa.europa.eu.

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on September 22, 2023.

Victor Wicklund,

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 158

[Docket No.: FAA–2022–1315; Notice No. 23–14]

RIN 2120–AL86

Update and Clarification of the Passenger Facility Charge Regulations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to amend its Passenger Facility Charge regulations to implement changes to an existing pilot program that resides within the Passenger Facility Charge program. This Congressionally mandated pilot program simplifies the process for public agencies controlling commercial

service airports to obtain FAA authority to impose and use Passenger Facility Charges to fund airport development projects. The FAA also proposes to reaffirm existing program requirements and update or remove obsolete references within the Passenger Facility Charge regulations. Further, this proposed action removes certain Passenger Facility Charge program requirements eliminated in the 2018 FAA reauthorization legislation.

DATES: Send comments on or before November 27, 2023.

ADDRESSES: Send comments identified by docket number FAA–2022–1315 using any of the following methods:

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

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

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

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

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

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

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Jane Johnson, Office of Airports, Airports Policy Branch, APP–510, Federal Aviation Administration, 800 Independence Avenue SW, Room 619, Washington, DC 20591; telephone (202) 267–5878; email jane.johnson@faa.gov.

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List of Abbreviations and Acronyms Frequently Used in This Document

AIP—Airport Improvement Program
 ALP—Airport Layout Plan
 CBI—Confidential Business Information
 CFR—Code of Federal Regulations
 DOT—U.S. Department of Transportation
 FAA—Federal Aviation Administration
 FOIA—Freedom of Information Act
 ICAO—International Civil Aviation Organization
 IRFA—Initial Regulatory Flexibility Analysis
 NEPA—National Environmental Policy Act
 NPIAS—National Plan of Integrated Airport Systems
 NPRM—Notice of Proposed Rulemaking
 OIG—Office of Inspector General
 OMB—Office of Management and Budget
 PFC—Passenger Facility Charge
 RFA—Regulatory Flexibility Act
 RIA—Regulatory Impact Analysis
 SBA—Small Business Administration
 U.S.C.—United States Code

I. Executive Summary

The FAA proposes to amend its PFC regulations to implement changes to a Congressionally mandated pilot program that simplifies the process for public agencies controlling commercial service airports to obtain FAA authority to impose and use PFCs to fund airport development projects. The FAA also proposes to reaffirm existing PFC program requirements and update or remove obsolete references within the PFC regulations. Further, this proposed action removes certain PFC program requirements eliminated in the 2018 FAA reauthorization legislation.

II. Overview of the Proposal

The FAA Reauthorization Act of 2018 (2018 Reauthorization Act),¹ codified at 49 U.S.C. 40117, mandated several changes to the Passenger Facility Charge (PFC) program. The 2018 Reauthorization Act removed previously existing PFC program requirements and mandated changes for other PFC program requirements. This rulemaking action proposes to amend the PFC regulations in part 158 to implement the mandated changes.

The FAA also proposes to amend the PFC regulations to improve PFC program oversight. On December 18, 2018, the U.S. Department of Transportation, Office of Inspector General (OIG) issued Report No. AV2019015, “Most Public Agencies Comply with Passenger Facility Charge Program Requirements, But FAA Can Improve the Use of Its Oversight Tools.” In that report, the OIG made several recommendations to improve the FAA’s oversight and administration of the PFC program.² These recommendations pertained primarily to PFC reporting, recordkeeping, and audit procedures. Through this rulemaking, and as detailed in sections V.B.1. and V.B.2, the FAA is proposing to formalize in regulations policies that the FAA implemented in May 2019, in response to the OIG’s recommendations.³

Further, the FAA is proposing several miscellaneous amendments to the PFC regulations, including but not limited to: replacing obsolete references, correcting grammar or rewording language for clarity, and re-organizing and re-numbering sections to facilitate other amendments proposed in this rulemaking action. See section V.C.10. in this preamble for a cross-reference

¹ Public Law 115–254, October 5, 2018.

² OIG Report No. AV2019015 at 3.

³ See PFC Update 71–19, “Oversight of Public Agency Passenger Facility Charge (PFC) Program,” issued April 1, 2019, on the FAA internet website.

table listing CFR units that the FAA proposes to rename, re-number, or both.

III. Authority for This Rulemaking

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code (U.S.C.). Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40117. Under that section, the FAA is charged with prescribing regulations to impose a passenger facility fee to finance eligible airport-related projects.

This rulemaking is also promulgated pursuant to 49 U.S.C. 106(g), 40116, 47106, 47111, 47114–47116, 47524, and 47526.

IV. History of the PFC Program

The PFC program was established by the Aviation Safety and Capacity Expansion Act of 1990 (Pub. L. 101–508; enacted November 5, 1990) which authorized the Secretary of Transportation (Secretary) to approve local imposition of PFCs of \$1, \$2, or \$3 per enplaned passenger and to use PFC revenue for approved projects. That Act also required the Secretary to issue regulations necessary to implement this authority. The Act directed the Secretary to develop an application procedure, establish terms and conditions for granting PFC authority, set up a system for collecting, handling, and remitting PFC revenue to the appropriate public agency, and establish recordkeeping and audit requirements and procedures for termination. On May 22, 1991, the FAA issued a final rule adopting new regulations to establish the PFC program in part 158.⁴

Pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), the FAA issued a final rule amending part 158 on May 23, 2000.⁵ That action amended the PFC regulations to incorporate administrative and statutory changes in the procedures to establish PFCs, including increasing the PFC level that a public agency may charge from \$1, \$2, or \$3 to \$4 or \$4.50.

On January 7, 2005, the FAA issued a final rule further amending part 158.⁶ In that rulemaking action, the FAA created a new pilot program, as statutorily mandated by Vision 100—Century of Aviation Reauthorization

⁴ 56 FR 24254 (May 29, 1991).

⁵ 65 FR 34536 (May 30, 2000).

⁶ 70 FR 14927 (March 23, 2005).

Act⁷ (Vision 100), to test alternative procedures to authorize public agencies to impose PFCs and use PFC revenue for eligible projects at non-hub airports. Specifically, the FAA added current § 158.30 to prescribe the procedures a public agency controlling a non-hub⁸ airport must follow when notifying the FAA of its intent to impose a PFC and to use PFC revenue on a project. That section also set forth criteria and standards for FAA review and acknowledgment of any notice of intent filed under the pilot program, and FAA objection to a proposed project. Since Vision 100 required the pilot program to be in effect for three years from the date the final rule was enacted, the final rule included a sunset provision of May 9, 2008.

The Federal Aviation Extension Act of 2008⁹ authorized the non-hub pilot program to continue through September 30, 2008. However, when § 158.30 expired on May 9, 2008, there were no effective regulations in place to guide public agencies and the FAA regarding the use of these alternative procedures. Therefore, the FAA published a notice in the **Federal Register** informing public agencies of the program's continuing statutory authority, and the FAA periodically issued internal agency guidance in the form of PFC updates to inform agency personnel of how to administer the non-hub pilot program.

The FAA Modernization and Reform Act of 2012 subsequently eliminated the expiration date from 49 U.S.C. 40117(l) and the FAA continued implementing the non-hub pilot program in accordance with the statute in the absence of effective regulations.¹⁰ The agency continued to use the same forms and procedures that were developed before the sunset of § 158.30, thereby allowing for seamless program continuation.

V. Discussion of the Proposal

The FAA is proposing to amend the PFC program regulations. These proposed amendments are grouped into the following three categories based on the rationale for the proposed change: 2018 Reauthorization Act, PFC Program Oversight, and Miscellaneous Amendments.

A. 2018 Reauthorization Act

This rulemaking action proposes the following changes to the PFC program as mandated by the 2018 Reauthorization Act: (1) changes related to project eligibility for PFC levels above \$3, and (2) changes related to applications and notices of intent for small-¹¹, medium-¹², and large-hub¹³ airports.

1. Changes to Project Eligibility for PFC Levels Above \$3

(a) Background

At the inception of the PFC program, public agencies received authority to impose a PFC of \$1, \$2, or \$3. The project eligibility requirements are contained in current § 158.15, "Project eligibility at PFC levels of \$1, \$2 or \$3." AIR 21 modified the PFC program by allowing a public agency to apply to the FAA to increase the PFC level that it may charge to \$4 or \$4.50 in certain instances. Project Eligibility requirements at PFC Levels of \$4 or \$4.50 are found in current § 158.17. Section 158.17 (a)(1) requires these projects to also meet the eligibility requirements of § 158.15.

AIR 21 limited projects funded at a \$4 or \$4.50 PFC level to those that could not be paid for from funds reasonably expected to be available under the Airport Improvement Program (AIP). The requirement for this AIP funds reasonability determination is found in current § 158.17(a)(2).

AIR 21 also conditioned the funding of surface transportation or terminal projects at the \$4 or \$4.50 level on a finding that the public agency had made adequate provision for financing the airside needs¹⁴ of the airport. The requirement for this airside needs determination is found in current § 158.17(a)(3).

Further, AIR 21 established additional eligibility requirements for projects at medium- and large-hub airports. A project at a medium- or large-hub airport was eligible for PFC funding at \$4 or \$4.50 only if the project would make a significant contribution to: improving air carrier safety and security; increasing competition among

air carriers; reducing current or anticipated congestion; or reducing the impact of aviation noise on people living near the airport. These requirements are contained in current § 158.17(b).

(b) Removal of AIP Funds Reasonability Determination

The 2018 Reauthorization Act amended 49 U.S.C. 40117(b)(4) by removing the AIP funds reasonability determination requirement found in current § 158.17(a)(2). With this change in legislation, the FAA no longer uses this determination to set the collection level for which the project is approved. On May 9, 2019, the FAA issued PFC Update 72–19, "Changes to the Passenger Facility Charge Levels Above \$3," directing FAA personnel to cease applying this requirement while reviewing PFC applications. In this rulemaking action, the FAA proposes to formally remove this requirement from the PFC regulations.

(c) Removal of Significant Contribution Determination

The 2018 Reauthorization Act also eliminated the significant contribution requirement found in current § 158.17(b). As a result, the FAA no longer uses it to determine the collection level for which a project is approved and no longer requires public agencies to submit information related to significant contribution. PFC Update 72–19 directs FAA personnel to no longer apply this requirement in reviewing PFC applications and the FAA proposes to remove the requirement from the PFC regulations. Moving forward, the FAA would rely on airside needs as the determining factor.

(d) Retention of Airside Needs Determination

The 2018 Reauthorization Act retains the airside needs determination under 49 U.S.C. 40117(d)(4) found in current § 158.17(a)(3). Since the airside needs determination is the only requirement remaining within § 158.17 after making the 2018 Reauthorization Act changes, aside from the requirement to comply with § 158.15, the FAA proposes to combine these two sections. Specifically, the FAA proposes to move the airside needs requirement in § 158.17(a)(3) to § 158.15 by adding a new proposed paragraph (d) to current § 158.15 and restating the airside needs requirement, which continues to remain effective. The FAA also proposes to rename § 158.15 as "Project

⁷ Vision 100, 49 U.S.C. 40117(l) (December 12, 2003).

⁸ Non-hub airport means a commercial service airport that has less than 0.05 percent of the passenger boardings. 49 U.S.C. 47102(14).

⁹ Public Law 110–253, June 30, 2008.

¹⁰ Although § 158.30 expired on May 9, 2008, the text of the regulation continues to be printed in the Code of Federal Regulations because of the corresponding removal of the expiration date in the 2012 Act. This rulemaking action would remove that obsolete language.

¹¹ Small hub airport means a commercial service airport that has at least 0.05 percent but less than 0.25 percent of the passenger boardings. 49 U.S.C. 47102(25).

¹² Medium hub airport means a commercial service airport that has at least 0.25 percent but less than 1.0 percent of the passenger boardings. 49 U.S.C. 47102(13).

¹³ Large hub airport means a commercial service airport that has at least 1.0 percent of the passenger boardings. 49 U.S.C. 47102(11).

¹⁴ Airside needs include runways, taxiways, aprons, and aircraft gates.

eligibility”¹⁵ and delete the current text of § 158.17 in its entirety. Consolidating the project eligibility requirements into one section and changing the section title will improve accessibility and comprehension of the requirements.

The FAA also proposes administrative amendments to replace references to former § 158.17(a)(3) throughout part 158 with references to proposed § 158.15(d). These administrative amendments are discussed further under section V.C. below.

2. Changes to Applications and Notices of Intent

(a) Background

The statutory provisions initially authorizing the PFC program required public agencies to submit an application to the FAA to obtain authority to impose PFCs and use PFC revenue. However, Vision 100 established the notice of intent process, mandating that the FAA create a pilot program to test alternative procedures for authorizing eligible agencies for non-hub airports to impose PFCs and use PFC revenue.

Under the non-hub pilot program, only public agencies controlling non-hub airports could use alternative procedures to impose PFCs and use PFC revenue on eligible projects under 49 U.S.C. 40117(l). In lieu of submitting an application in accordance with 49 U.S.C. 40117(c), as prescribed in current § 158.25, public agencies controlling non-hub airports simply could submit a notice of intent to impose a PFC and use PFC revenue. Under these alternative procedures, within 30 days of receipt of the public agency’s notice, the FAA either objected to the public agency’s proposed project(s) or acknowledged the public agency’s notice of intent.

The 2018 Reauthorization Act amended 49 U.S.C. 40117(l) by removing all references to non-hub airports. This legislative change effectively directed the FAA to extend the pilot program to small-, medium-, and large-hub airports, permitting these airports to also obtain authority to impose PFCs and use PFC revenue using alternative notice of intent procedures.

(b) PFC Update 73–20 and Partial Implementation of Program Changes

Immediately following enactment of the 2018 Reauthorization Act, the FAA considered several options for implementing the PFC program changes.

Since the FAA had been successfully implementing notice of intent procedures for non-hub airports for several years, such procedures seemed most appropriate for PFC authorizations for small-, medium-, and large-hub airports. However, rulemaking to amend part 158 would have been required to change the application requirements for public agencies.

Recognizing the immediate need for expeditious processing of PFC applications, the FAA internally implemented program changes to the maximum extent possible. On January 22, 2020, the FAA issued PFC Update 73–20, “Streamlined Procedures for Passenger Facility Charge (PFC) Authorizations at Small-, Medium-, and Large-Hub Airports.” This interim internal guidance partially implemented the program change by streamlining the FAA’s internal review of PFC projects meeting specific criteria for small-, medium-, and large-hub airports. This interim internal guidance did not change the PFC application procedures for public agencies. All applications were still required to meet the statutory and regulatory requirements of 49 U.S.C. 40117 and part 158.

PFC Update 73–20 indicated that all PFC applications received by the FAA from small-, medium-, or large-hub airports are to be processed using the streamlined procedures identified in the PFC update unless such applications are excluded in accordance with applicable PFC guidance. Therefore, all PFC applications not excluded under PFC Update 73–20 are to be treated as a notice of intent with FAA review and acknowledgment or objection within 30 days.

(c) Proposed Amendments for Full Implementation of Program Changes

The FAA proposes to amend part 158 to allow for the full implementation of program changes originating from the 2018 Reauthorization Act. The FAA’s proposed regulations largely mirror the provisions of PFC Update 73–20 to implement the notice of intent pilot program.

The FAA proposes to revise § 158.30 to reflect the 2018 Reauthorization Act program changes and remove the since-rescinded section expiration date, which will provide consistency with current practice and law. Current § 158.30 prescribes regulations for notice of intent PFC authorizations for non-hub airports; however, § 158.30(h) indicates that § 158.30 expired on May 9, 2008. The FAA also intends to move some of the provisions found in § 158.30 to other sections within part 158 to improve readability of the notice of

intent requirements. The FAA is proposing this re-organization of § 158.30 to allow for the inclusion of notice of intent provisions stemming from PFC Update 73–20 and the FAA’s partial implementation of the program changes. These proposed changes are discussed in the following paragraphs.

First, the FAA proposes to amend current § 158.30 by renaming the section heading “Notices of intent.” While § 158.30(a) through (c) would remain largely the same, the FAA is proposing to make several changes. For example, the FAA proposes revising current paragraph (a) by removing language that limits the applicability of § 158.30 to non-hub airports. The FAA is also proposing minor changes to the project information requirements of current § 158.30(b). That paragraph requires public agencies to submit grant-related information when a PFC project is also funded by an AIP grant. The FAA proposes to replace references to AIP grants with “FAA awarded airport grant” so as to include information about other grants also funding the project, such as those authorized under the Bipartisan Infrastructure Law (BIL). Further, the FAA is adding a new paragraph, proposed § 158.30(b)(8), requiring public agencies to submit detailed cost information for non-AIP funded projects that exceed \$10 million.

Second, the FAA proposes to move the text of current § 158.31, “Duration of authority to impose a PFC after project implementation” to an amended § 158.33, and move the text of current § 158.30(d), which includes the notice of intent review requirements, to an amended and proposed § 158.31, “Review of notices of intent.” In turn, the FAA proposes to move the current text of § 158.33, “Duration of authority to impose a PFC before project implementation,” to a newly added proposed § 158.34.

Proposed § 158.31 describes the FAA’s rules for reviewing notices of intent and outlines two stages of FAA review. The first stage of review, which is prescribed in proposed § 158.31(a), addresses the types of applications and projects ineligible for notice of intent consideration. The second stage of review, which is prescribed in § 158.31(b), addresses the FAA’s determinations on projects eligible for notice of intent consideration.

Under proposed § 158.31(a), the FAA will review notices of intent to identify projects ineligible for consideration under this streamlined process. The FAA intends to notify public agencies in writing within 30 days if the FAA determines that a project is ineligible for the notice of intent procedure. This

¹⁵ Prior to AIR 21 and the subsequent final rule allowing for the \$4 or \$4.50 PFC level, all project eligibility requirements were listed in § 158.15, which was titled Project eligibility. In this rulemaking, the FAA proposes to return to that former structure of the PFC regulation for project eligibility.

notification process, outlined in proposed § 158.31(a), was not prescribed in PFC Update 73–20.

The projects ineligible for consideration under proposed § 158.31(a)(1) through (a)(8) are identical to those ineligible for the streamlined procedures under PFC Update 73–20. In determining the types of projects ineligible for streamlined procedures under PFC Update 73–20, the FAA considered the agency's internal delegations of authority as delineated in PFC Order 5500.1, "Passenger Facility Charge," issued August 9, 2001. That document identifies certain types of PFC projects and applications that cannot be processed by the FAA's region and district offices because they require a higher level of internal FAA review and coordination within agency headquarters. Applications involving significant policy precedent, significant legal issues, significant controversy, multimodal projects, and significant noise, access, or revenue diversion issues are not eligible for streamlined processing under PFC Update 73–20. For reasons discussed in the next few paragraphs, the FAA proposes to incorporate these provisions within the regulations.

Under proposed § 158.31(a)(1), the FAA intends to review notices of intent for significant impacts on policy precedent. The FAA's disposition regarding a proposed PFC project could represent a significant policy precedent if the agency's decision would establish or change the FAA's policy on a project or issue. FAA review of such a project would typically require more than the 30 days afforded by the notice of intent process because the FAA would need to evaluate any potential impacts resulting from a change in policy.

Similarly, under proposed § 158.31(a)(2), the FAA intends to review notices of intent for projects with significant legal issues, as determined by the FAA's Office of the Chief Counsel or Office of Airports. Projects with significant legal issues involve matters that may result in litigation or may include projects where NEPA or environmental litigation are present. Such projects might also include circumstances where a Director within the FAA's Office of Airports has made a determination that the public agency has been found to be noncompliant in 14 CFR part 16 proceedings, or the public agency is presently a respondent in 14 CFR part 16 proceedings. Again, such projects need a level of review that requires more than the 30 days afforded by the notice of intent process.

PFC projects that are the subject of significant controversy are also ineligible for streamlined procedures in accordance with § 158.31(a)(3). Significant controversy is evidenced by opposition expressed during a public agency's consultation with air carriers. Other indicators of potential significant controversy include adverse public comments or opposition to the FAA's proposed action from other airport authorities, airport users, Federal, State, or local governments, elected officials or communities. Likewise, multimodal projects or projects involving significant airport noise, access, or revenue diversion issues are also ineligible for these alternative procedures in accordance with proposed § 158.31(a)(4) and (a)(5). Significant airport noise, access, or revenue diversion issues concern those assessing compliance with 49 U.S.C. 47521 *et seq.* (ANCA) and 49 U.S.C. 47111(e) (Action on Grant Assurances Concerning Airport Revenues).

The FAA also considered PFC Update 62–10, "Passenger Facility Charge Delegation of Authority," issued March 11, 2010, in determining the types of projects ineligible for streamlined procedures under PFC Update 73–20. That document identifies additional types of PFC projects and applications that cannot be processed by the FAA's regional and district offices. These include debt service on otherwise ineligible projects or blending of two or more PFC decisions to obtain a uniform collection level. Such projects and applications require specialized review because they tend to be unique and multifaceted. The next few paragraphs discuss the FAA's intent to retain these exclusions as proposed § 158.31(a)(6) and (a)(7).

In proposed § 158.31(a)(6), the FAA proposes to exclude applications involving debt service from the notice of intent streamlined procedures due to the complexity of these applications. When applying to use PFC revenue for certain debt service projects, the FAA encourages each airport to thoroughly discuss in its application those factors it believes most clearly indicate the airport's financial need. The FAA will consider the airport's plans to return to financial stability in its deliberations on the application. If incurring new debt, for any purpose, will help the airport return to financial stability as soon as possible, the public agency should discuss this factor in the application. The FAA also expects an airport attempting to demonstrate that it faces a financial crisis to discuss factors likely to affect its ability to make required payments in the future. Notice of intent

procedures would not be appropriate in such instances because the FAA's evaluation process is too extensive to be completed within 30 days. A longer time frame for review is necessary because this gives the public agency time to respond to any requests for information from the FAA should the application not contain all of the necessary documentation. For example, if during the course of review, the FAA finds that the public agency needs to provide a plan to return to financial stability, 30 days is insufficient to allow for the public agency to develop and submit the plan in order to move forward with the application. Since there is not sufficient time allotted for adequate review under the notice of intent process, the FAA proposes to exclude these types of projects and applications.

The FAA proposes to exclude applications for the blending of two or more PFC decisions to obtain a uniform collection level under proposed § 158.31(a)(7) for reasons similar to debt service on otherwise ineligible projects. Prior to the 2018 Reauthorization Act, public agencies sought to blend PFC applications to enable PFC collections at the higher \$4 or \$4.50 amount when significant contribution was a determining factor. Since the significant contribution determination has been eliminated and public agencies no longer need to demonstrate significant contribution to collect PFCs at the \$4 or \$4.50 level, the FAA does not anticipate receiving many public agency applications for blending. However, in the rare event that a public agency does seek to blend applications, the FAA has found that such action requires a specialized review and analysis that is likely to exceed the 30 days afforded by the notice of intent process. Therefore, the FAA excluded blending under PFC Update 73–20 and proposes that application blending should remain ineligible for the streamlined notice of intent procedures.

Finally, PFC Update 73–20 describes one more type of PFC project ineligible for streamlined processing. Terminal building projects in excess of \$25 million, except stand-alone passenger boarding bridges, are also ineligible for streamlined processing under PFC Update 73–20. The FAA proposes to retain this exclusion as proposed § 158.31(a)(8) for reasons discussed in the following paragraphs.

The initial justification for non-hub airport notice of intent procedures was to achieve PFC program efficiency by eliminating duplicative efforts. In 2002, the FAA examined the PFC program to identify ways to remove unnecessary,

duplicative, and time-consuming steps. The FAA found that while non-hub airports accounted for about 60 percent of the PFC applications processed over the prior five years, they only produced roughly two percent of the total annual PFC revenue. Further, the FAA found that non-hub airports often apply to use PFC revenue either as their matching share for an AIP grant or as a supplement to AIP funding. In such cases involving AIP funds, the FAA has already reviewed the project under the AIP grant procedures, thereby producing a duplication of efforts that created inefficiencies for both non-hub airports and the FAA. Thus, overall, enactment of the non-hub pilot program eliminated duplication, improved program efficiency, and supported expedited review of PFC projects for non-hub airports.

Under the non-hub pilot program for notices of intent, when PFC projects did not include AIP funds, the FAA required public agencies to submit project information sufficient for the FAA to review and consider whether the project is eligible for PFCs, meets a PFC objective, and is justified before acknowledging or objecting to a proposed PFC project. While terminal projects for non-hub airports typically fell into this category, the scale of such projects and the level of complexity tend to be minimal due to the nature of non-hub operations, allowing for review within the 30-day timeframe. However, in partially implementing program changes under PFC Update 73–20, the FAA concluded that terminal building projects for small-, medium-, and large-hub airports, on the other hand, may need more than the 30 days afforded under the notice of intent process.

Endeavoring to retain PFC program efficiencies gained through the notice of intent process while still allowing for adequate review and evaluation of terminal projects, the FAA implemented a \$25 million threshold for terminal projects under PFC Update 73–20 regardless of airport hub size. Since inception of the PFC program, the vast majority of non-hub terminal PFC projects were less than \$25 million. The \$25 million threshold allows nearly all non-hub airport terminal projects to continue to obtain PFC authority through the notice of intent process as they have done historically and allows a vast majority of terminal projects for small-, medium-, and large-hub airports to also use this process.

Terminal projects at or over \$25 million, in most cases, require a more extensive review on the part of the FAA to ensure the project has been fully assessed. Concluding from years of

experience with terminal projects, the FAA found that projects above \$25 million tend to involve more systems and components than smaller projects and have a greater potential to include spaces and equipment ineligible for funding under the PFC program. Therefore, these projects require a more comprehensive review, such as comparison against comparable projects, which would take more than the 30-day notice of intent period. The FAA does not propose changes to this limitation found in proposed § 158.31. The numerous components associated with projects at or over \$25 million generally require a more extensive review on the part of the FAA to ensure the project has been fully assessed. The application evaluation process may include determining if the submission includes sufficient documentation to demonstrate adequate justification for the project; determining whether the project is eligible for PFC funds; assessing the project objective and justification provided by the public agency; reviewing submission of detailed financial information; evaluating modifications to standards; assessing impacts to airport geometry; and determining whether it is necessary to engage in interagency coordination. There may be a need to coordinate with border control agencies or other Federal agencies on the impact of this application and project with respect to these agencies' equities. Other review factors can include amount and duration of the PFC; compliance with airport revenue use requirements; alternative uses; air carrier and public comments; compliance with the Airport Noise and Capacity Act of 1990 (ACNA); airport layout plan (ALP), airspace, and National Environmental Policy Act (NEPA) requirements; the schedule for project implementation; and financial viability of the project. Since many of these determinations and factors are present when a project reaches the \$25 million threshold, such projects cannot be streamlined.

(d) PFC Update 50–06 and 2018 Reauthorization Pilot Program Implementation

The FAA proposes a minor revision to the information that public agencies must submit to the FAA with a notice of intent when seeking authority to impose a PFC. Specifically, the FAA proposes to add §§ 158.25(b)(8) and 158.30(b)(3)(iv) directing public agencies to submit detailed cost information, as required by the Administrator. The FAA's policy on requesting this information from public agencies is currently outlined in PFC

Update 50–06, "Detailed basis of cost information, new project certifications, and changes to the Final Agency Decision," issued September 8, 2006.

The FAA issued PFC Update 50–06 in response to *Village of Bensenville, et al. v. Federal Aviation Administration*, a U.S. Court of Appeals, District of Columbia Circuit decision, that found the FAA had not adequately demonstrated that it had reviewed the cost estimates for an Environmental Impact Statement (EIS) project and that the FAA's records did not support its findings in its decision.¹⁶ With the issuance of PFC Update 50–06, the FAA began requesting the submission of detailed cost information with PFC applications under the authority of current § 158.25(b)(18), which directs public agencies to submit "[s]uch additional information as the Administrator may require." Attachment B to the PFC Application Form 5500–1 explicitly requires public agencies to submit cost details sufficient to identify eligible and ineligible costs if the project amount is over \$10 million, as a result of the decision by the court.

The detailed cost submission requirement for small-, medium-, and large-hub airports has not changed with the availability of the notice of intent process, but this requirement will now apply to non-hub airports. Prior to the 2018 Reauthorization Act, non-hub airports obtaining PFC authority through the notice of intent process were not subject to the detailed cost submission requirements. In PFC Update 50–06, the FAA stated that most non-hub pilot program projects have either existing or planned AIP funding, and these grants involve an FAA review of the costs. Also, most non-hub pilot program projects request less than \$10 million in PFC funding authority. Further, the FAA indicated the 30-day pilot program-processing period does not provide enough time for the FAA to review detailed cost estimates for multiple projects. Section 158.30(b)(7) (which expired on May 9, 2008—See footnote 1) directed public agencies to include "any additional information the Administrator may require" with a notice of intent. The FAA proposes to include this language in § 158.30(b)(7). Similarly, the FAA does not propose to change current policy that non-hub airports must provide detailed cost information when submitting an application under § 158.25 and the project amount is over \$10 million.

¹⁶ *Village of Bensenville, et al. v. Federal Aviation Administration*, 376 F.3d 1114, 1122 (D.C. Cir. 2004).

Since the 2018 Reauthorization Act effectively eliminated any distinction between hub and non-hub notice of intent submissions, the requirement for detailed cost information now extends to non-hub airports. The FAA proposes to add a new subparagraph § 158.30(b)(3)(iv) to clearly indicate within the PFC regulations that submission of cost detail information may be required as part of a notice of intent filing, regardless of hub size. The FAA anticipates the impact of this provision on public agencies will be minimal. Since the FAA proposes to restrict the types of projects eligible for streamlined procedures, the FAA expects that very few projects would require this comprehensive review of material within the 30-day period. Further, public agencies already possess detailed cost information for proposed projects in most cases. Adding this requirement merely directs public agencies to submit such information to the FAA for consideration along with a notice of intent filing.

B. PFC Program Oversight

The proposed regulatory changes to program oversight stem from PFC Update 71–19 and a review of current policies. The proposed changes formalize the policies contained in PFC Update 71–19, improve the informal resolution process, and restructure the current layout of the oversight regulations found in part 158 to improve accessibility and program compliance.

1. Reporting, Recordkeeping and Audit Requirements

On April 1, 2019, the FAA issued PFC Update 71–19, Oversight of Public Agency Passenger Facility Charge (PFC) Program, in response to certain recommendations from the OIG, contained in Report # AV2019015. In that report, the OIG asserted that the FAA lacked a process to ensure that independent audit reports are timely and include required information. The OIG recommended that the FAA establish specific timeframes for issuing audit reports and verify that public agencies' independent audits are performed annually.

Public agencies are required to conduct an audit of their PFC accounts at least annually in accordance with current § 158.67(c). To ensure that these audit reports are submitted in a timely manner, PFC Update 71–19 directs the FAA to request that public agencies submit annual PFC audit reports 30 calendar days after receipt of the auditor's report or 9 months after the end of the audit period. The FAA proposes to amend § 158.69 to formalize

this guidance to now require public agencies to provide a copy of their annual audit to the Administrator within 30 calendar days after receipt of the audit or 9 months after the end of the audit period, whichever is less. The FAA also proposes to separate the requirements of current § 158.67(c) into four sub-paragraphs to separate four unique existing requirements. These sub-paragraphs have been renumbered as § 158.67(c)(1)–(4).

Further, the FAA is proposing two additional subparagraphs, § 158.67(c)(5)–(6) to § 158.67(c). Proposed § 158.67(c)(5) requires PFC audits to include a schedule of revenues and expenditures of the PFC account. This schedule should include the beginning balance in the PFC account on the first day of the fiscal year, PFC Collections for each quarter, PFC Interest Earned for each quarter, disbursements on projects by application for each quarter, and the PFC account closing balance. Current FAA policy concerning the submission of a PFC schedule is found in FAA Order 5500.1, Passenger Facility Charge, August 9, 2001, Paragraph 7–18.b. AUDIT, which indicates that the auditor must, as a minimum, provide opinions as well as a schedule of PFC transactions. Currently, PFC schedule guidance is included in FAA Order 5500.1. The FAA proposes to make this a requirement in the PFC regulations.

Proposed § 158.67(c)(6) requires PFC audits to be performed on an actual basis unless some form of reconciliation documentation is provided by the auditor. This proposal moves current industry practice into a regulatory requirement in order to allow for the real-time accounting of actual total collected towards the total PFC collection. This requirement will improve transparency and ensure that PFC funds are being collected accurately and are accounted for properly.

2. Federal Oversight of Compliance, Informal Resolution, and Termination

The FAA proposes to rename current subpart “E—Termination” as subpart “E—Federal Oversight of Compliance, Informal Resolution, and Termination” and move current § 158.71, which prescribes regulations for Federal oversight, into subpart E. The FAA proposes to consolidate the regulations in subparts D and E, which ensure public agency compliance with the requirements of part 158 and 49 U.S.C. 40117, into the same subpart. The FAA anticipates that consolidating the regulations in subparts D and E will improve access to public agency

obligations and therefore improve compliance.

The annual PFC audit provides validation of and reconciliation between the public agency's audited financial statements and the PFC financial data in the FAA's System of Airports Reporting (SOAR) database. The FAA relies on SOAR data to evaluate whether the PFC collection period is appropriate. Some public agencies have inconsistently submitted required annual audit reports. Inaccurate or absent data impairs the FAA's oversight and ability to fulfill its statutory obligations under 49 U.S.C. 40117(d)(1) and 40117(h).

In some instances, after receiving a public agency's audit report, the FAA may decide to review the imposition and use of PFC revenue. In these cases, the public agency should provide a timely and sufficient response to any FAA inquiry. Accordingly, the FAA proposes to amend current § 158.71 by adding language indicating the Administrator may take further action including, but not limited to, informal resolution, termination, or other action, as appropriate. The FAA also proposes to re-number that section as § 158.83 and rename it “Federal oversight of compliance” to more clearly reflect the provisions.

The FAA also proposes to amend the informal resolution provisions of current § 158.83 by removing the requirement that the FAA audit, review, or both audit and review a public agency's use of PFC revenue or a public agency's collection and remittance of PFC revenue under the oversight authority of current § 158.71 before commencing an informal resolution process with a public agency. As discussed previously, the OIG found the FAA lacks a process to ensure that independent audit reports are timely and include required information. This proposal is part of a larger effort to create a compliance-oriented subpart with a clear escalation process. A compliance-oriented subpart with a clear escalation process also would enable the FAA to engage in informal resolution to address various PFC collection and use issues without the FAA having to first audit the public agency or initiate termination procedures. The FAA also proposes to re-number this section as § 158.85.

C. Miscellaneous Amendments

The FAA is proposing miscellaneous amendments to the PFC regulations. A discussion of these miscellaneous amendments follows.

The FAA proposes to re-organize and re-number several sections within part 158 to facilitate other amendments

proposed in this rulemaking action. In instances where revised section numbers are referenced elsewhere in the PFC regulations, the FAA proposes to make corresponding administrative amendments to those references within the PFC regulations.

1. Changes to Subpart A

(a) Section 158.3—Definitions

The FAA proposes to amend the following definitions:

- **Approved project.** The FAA proposes to replace the reference to § 158.30 with § 158.32. This is a technical correction.
- **Bond financing costs.** The FAA proposes to add language to include the cost of financing other indebtedness, which is consistent with PFC Order 5500.1, Appendix 4, August 9, 2001.
- **Charge effective date.** The FAA proposes to insert the word “first” before the word “date” and replace the word “obliged” with the word “start collecting.” These amendments provide further detail on the FAA’s expectation for the charge effective date.
- **Charge expiration date.** The FAA proposes to replace the phrase “cease to collect” with the phrase “stop collecting.” This is not a substantive change.
- **Debt service.** The FAA proposes to move the word “items” from behind the word “such” to before the word “such.” This is not a substantive change.
- **Exclusive long-term lease or use agreement.** The FAA proposes to add language to this definition that applies to exclusive leases of less than five years that have automatic renewal or carryover options, or to leases that have the effect of granting exclusive use rights. This proposed change is not a substantive change but has been made to align the definition with PFC assurances 5 and 6.
- **Implementation of an approved project.** The FAA proposes to replace the word “nonconstruction” with “non-construction.” This is not a substantive change.
- **Notice of intent (to impose or use PFC revenue).** The FAA proposes to amend the definition by removing the limited applicability to non-hub airports. This amendment is consistent with the 2018 Reauthorization Act. The FAA also proposes to replace the reference to § 158.30 with § 158.32. This amendment harmonizes with the re-numbering of certain sections. This is a proposed substantive change to account for program changes made by the 2018 Reauthorization Act.

(b) Section 158.11—Requests for Air Carrier, Foreign Air Carrier, or Isolated Community Exclusion

The FAA proposes to shorten the title of this section by revising it from “Public agency request not to require collection of PFCs by a class of air carriers or foreign air carriers or for service to isolated communities” to “Requests for air carrier, foreign air carrier, or isolated community exclusion.”

(c) Section 158.13—Use of PFC Revenue

Currently, § 158.13 is titled “Use of PFC Revenue” and § 158.18 is titled “Use of PFC revenue to pay for debt service for non-eligible projects.” Both sections pertain to the use of PFC revenue. Current § 158.13(e) provides an exception for the use of PFC revenue to pay for debt service for non-eligible projects and references current § 158.18. Rather than making this reference, for simplicity, the FAA proposes to move the language contained in § 158.18 into § 158.13(e) and delete § 158.18 entirely.

Additionally, since the last sentence of paragraph (f) pertains to auditing, the FAA proposes to move that language to the auditing requirements for approved projects combining PFC revenue and Federal grant funds within subpart D. Specifically, the FAA proposes to incorporate this language into § 158.67.

(d) Section 158.15—Project Eligibility

The FAA proposes two amendments to this section: (1) change the section title to remove dollar amounts, and (2) add a new paragraph (d) which contains the airside needs test language from § 158.17(a)(3). This second amendment is necessary because most of the requirements of § 158.17 were removed by the 2018 Reauthorization Act and the FAA is proposing to delete § 158.17 and move any surviving requirements to § 158.15.

As discussed in section V.A.1. of the preamble, the FAA is amending § 158.17(a)(3) to revise the airside needs requirement to align with the 2018 Reauthorization Act. The 2018 Reauthorization Act retains the airside needs requirement of 49 U.S.C. 40117(d)(4), which provides that in the case of an eligible surface transportation or terminal project, a PFC project cannot be approved at a collection level higher than \$3 unless the FAA determines that the public agency has made adequate provision for financing the airside needs of the airport.¹⁷

After removal of the funds reasonability determination and the significant contribution requirement,

the only provisions of current § 158.17(a)(1) that would remain in proposed § 158.17 are those relating to the project meeting the eligibility requirements of § 158.15 and the airside needs requirements of current § 158.17(a)(3). Therefore, the FAA proposes to delete current § 158.17 and move the airside needs requirement to a new paragraph within § 158.15(d).

(e) Section 158.19—Requirement for Competition Plans

The FAA proposes to re-number current § 158.19 as § 158.17. This amendment reflects re-numbering changes to part 158.

(f) Section 158.20—Submission of Required Documents

The FAA proposes four amendments to this section: (1) re-number current § 158.20 as § 158.19, (2) revise paragraph (a) to allow for electronic submission of documents, (3) revise paragraph (b) because the databased referenced has been completed, and (4) move the section from subpart B to subpart A.

The FAA now has the capability of receiving documents electronically, which it did not have at the time the regulation was written. The FAA’s PFC online database, System of Airports Reporting (SOAR), for collecting required reports is complete and this proposed change reflects this update. The FAA proposes to move this section to subpart A because electronic submission provisions should pertain to all documents, not just applications.

2. Changes to Subpart B

(a) Section 158.21—General

The FAA proposes to amend current § 158.21 to indicate that a public agency may either submit an application and obtain approval from the Administrator to impose a PFC and use PFC revenue or submit a notice of intent to impose a PFC and use PFC revenue. Currently this section only references PFC applications and FAA approval of PFC applications, not notices of intent and FAA acknowledgment of notices of intent.

(b) Section 158.25—Applications

The FAA proposes to add a new subparagraph, § 158.25(b)(8), directing public agencies to submit detailed cost information, as required by the Administrator. This proposed paragraph is similar to the cost detail information required by proposed § 158.30(b)(3)(iv) discussed in section IV.A.2., the rationale for which is described in that portion of the preamble.

¹⁷ 49 U.S.C. 40117(d)(4)

3. Changes to Subpart C

(a) Section 158.37 Amendment of Approved PFC

The FAA proposes to amend § 158.37 by adding a new paragraph (b)(1) requiring the Administrator to find the public agency has complied with the Reporting, Recordkeeping and Audit requirements before approving a PFC amendment as discussed in section V.B.1. This amendment encourages public agency compliance with audit and recordkeeping requirements and supports the FAA's oversight of PFC audits. Further, this action informs public agencies of the need to submit PFC audit reports before submitting requests for amendments.

(b) Section 158.43 Public Agency Notification to Collect PFCs

The FAA proposes moving the last sentence of paragraph (c) to new paragraph (e) without change. This proposed change separates requirements for public agencies and air carriers to ensure that requirements for each of these entities are clear and accessible.

(c) Section 158.45—Collection of PFCs on Tickets Issued in the U.S.

The FAA proposes to insert “on the return” after “last two enplaning airports.” This proposed amendment change clarifies when PFCs can be collected and harmonizes with § 158.9(a).

4. Changes to Subpart D

(a) Section 158.63—Reporting Requirements: Public Agency

The FAA proposes to amend paragraph (a)(2) by adding “reimbursements” to the list of information that must be included in quarterly reports. This proposed change clarifies that the public agency must report expenditures to outside entities as well as reimbursements to itself. This change is necessary so that the FAA can

verify that the reimbursement is consistent with appropriate regulations, policies, and standards. It also provides the FAA with the relevant information to fulfill its recordkeeping and auditing responsibilities under 49 U.S.C. 40117(g).

(b) Section 158.67—Recordkeeping and Auditing: Public Agency

The FAA proposes to change the title of this section from “Recordkeeping and auditing: Public agency” to “Accounting and auditing: Public agency.” This change supports general improvement in the FAA oversight of the PFC program by making audit requirements clearer for public agencies.

(c) Section 158.69—Recordkeeping and Auditing: Collecting Carriers

The FAA proposes to change the title of this section from “Recordkeeping and auditing: Collecting carriers” to “Accounting and auditing: Collecting carriers.” This change supports general improvement in the FAA oversight of the PFC program by making audit requirements clearer for public agencies.

5. Changes to Subpart E

(a) Section 158.85—Termination of Authority To Impose PFCs

The FAA proposes to re-number current § 158.85 as § 158.87. This amendment reflects re-numbering changes to part 158.

(b). Section 158.87—Loss of Federal Airport Grant Funds

Currently the requirements for loss of Federal airport grant funds are found in § 158.87. The FAA proposes to redesignate these requirements as § 158.89. This amendment reflects re-numbering changes to part 158. Additionally, the FAA proposes to replace a reference to § 158.83 with § 158.85 and also replace a reference to § 158.85 with § 158.87 within proposed

§ 158.89(a). These amendments also reflect re-numbering changes to part 158.

6. Changes to Subpart F

(a) Section 158.95—Implementation of Reduction

The FAA proposes to amend paragraph (c) to add the word “either” in front of the number 50 and “75 percent” after the word “or” to reflect the total reduction. These amendments use plain language for clarification and do not change the regulatory provisions.

7. Changes to Appendix A

Public agencies must comply with PFC assurances when implementing a project funded with PFC revenue. However, the assurances only reference PFC applications and FAA approval of PFC applications, not notices of intent and FAA acknowledgment of notices of intent. The FAA proposes to revise paragraphs A. 2 and A. 3 to reflect that the requirement to comply with PFC assurances also applies to notices of intent and FAA acknowledgment of notices of intent.

8. Section Cross-Reference Table

This section cross reference table is a re-designation listing of renumbered CFR units. This table also shows the old CFR unit numbers of former provisions along with corresponding new CFR unit numbers and current provisions. In instances where the FAA proposes to move a requirement from one section to another section, interested persons can look up the former section number for the requirement and find the new section number for that requirement. Similarly, in cases where the FAA is not proposing to change regulatory requirements within a section but proposes to re-number a section, interested persons can use the table to easily identify the new section number.

TABLE 2—CROSS-REFERENCE LISTING CURRENT AND PROPOSED CFR SECTIONS

Current Provisions/CFR Reference		Proposed Provisions/CFR References	
§ 158.11	Public agency request not to require collection of PFCs by a class of air carriers or foreign air carriers or for service to isolated communities.	§ 158.11	Requests for air carrier, foreign air carrier, or isolated community exclusion.
§ 158.17(a)(1)	Project eligibility at PFC levels of \$4 or \$4.50	§ 158.15	Project eligibility.
§ 158.17(a)(3)		§ 158.15(d)	
§ 158.18	Use of PFC revenue to pay for debt service for non-eligible projects.	§ 158.13(e)	Use of PFC revenue.
§ 158.19	Requirement for competition plans	§ 158.17	Requirement for competition plans.
§ 158.20	Submission of required documents	§ 158.19	Submission of required documents.
§ 158.25(b)(8)	Applications	§ 158.25(b)(9)	Applications.
§ 158.25(b)(9)		§ 158.25(b)(10)	
§ 158.25(b)(10)		§ 158.25(b)(11)	
§ 158.25(b)(11)		§ 158.25(b)(12)	

TABLE 2—CROSS-REFERENCE LISTING CURRENT AND PROPOSED CFR SECTIONS—Continued

§ 158.25(b)(12)		§ 158.25(b)(13)	
§ 158.25(b)(13)		§ 158.25(b)(14)	
§ 158.25(b)(14)		§ 158.25(b)(15)	
§ 158.25(b)(15)		§ 158.25(b)(16)	
§ 158.25(b)(16)		§ 158.25(b)(17)	
§ 158.25(b)(17)		§ 158.25(b)(18)	
§ 158.30(a)	PFC Authorization at Non-Hub Airports	§ 158.30(a)	Notices of intent.
§ 158.30(b)		§ 158.30(b)	
§ 158.30(c)		§ 158.30(c)	
§ 158.30(d)	FAA review of notices of intent.	§ 158.31(b)	FAA review of notices of intent.
§ 158.30(e)	FAA acknowledgment of notices of intent	§ 158.32(a)	FAA acknowledgment of notices of intent.
§ 158.30(f)		§ 158.32(b)	
§ 158.30(g)		§ 158.32(c)	
§ 158.31	Duration of authority to impose a PFC after project implementation.	§ 158.33	Duration of authority to impose a PFC after project implementation.
§ 158.33	Duration of authority to impose a PFC before project implementation.	§ 158.34	Duration of authority to impose a PFC before project implementation.
§ 158.67	Recordkeeping and auditing: Public agency	§ 158.67	Accounting and auditing: Public agency.
§ 158.69	Recordkeeping and auditing: Collecting carriers	§ 158.69	Accounting and auditing: Collecting carriers.
§ 158.71	Federal oversight	§ 158.83	Federal oversight.
§ 158.83	Informal resolution.	§ 158.85	Informal resolution.
§ 158.85	Termination of authority to impose PFCs	§ 158.87	Termination of authority to impose PFCs.
§ 158.87	Loss of Federal airport grant funds	§ 158.89	Loss of Federal airport grant funds.

VI. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of Executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is \$177,000,000, using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. This portion of the preamble summarizes the FAA’s analysis of the economic impacts of this rulemaking.

In conducting these analyses, the FAA has determined that this rulemaking: will result in benefits that justify costs; is not an economically “significant regulatory action” as defined in section 3(f) of Executive Order 12866; will not have a significant economic impact on a substantial number of small entities; will not create unnecessary obstacles to the foreign commerce of the United States; and will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

A. Regulatory Evaluation

1. Need for the Regulation

The proposed rule would amend the PFC regulations to: first, codify changes that have been self-implemented through the 2018 Reauthorization Act; second, improve PFC program oversight and administration based on the OIG report’s recommendations primarily concerning reporting, recordkeeping and audit processes; and third, replace obsolete references, correct grammar or reword language for clarity, and reorganize and re-number sections of part 158.

2. Baseline for the Analysis

Five major sources of airport capital development funding are (1) the AIP; (2) PFCs imposed pursuant to Federal law; (3) tax-exempt bonds; (4) state and local grants; and (5) airport operating revenue from tenant lease and other revenue-

generating activities such as landing fees.

The AIP has been providing Federal grants for airport development and planning since the passage of the Airport and Airway Improvement Act of 1982 (Pub. L. 97–248). AIP funding is usually spent on projects that support aircraft operations such as runways, taxiways, aprons, noise abatement, land purchase, and safety or emergency equipment. The funds obligated for AIP are drawn from the airport and airway trust fund, which is supported by a variety of user fees and fuel taxes.

Airports use different combinations of these sources depending on the individual airport’s financial situation and the type of project being considered. Smaller airports’ individual grants are of much smaller dollar amounts than the grants going to large and medium hub airports. Therefore, the smaller airports are much more dependent on AIP to meet their capital needs. Larger airports are much more likely to issue tax-exempt bonds or finance capital projects with the proceeds of PFCs.

The PFC program was established in 1990 and modified in 2005 to institute a pilot program for non-hub airports to streamline the application process in order for them to access the PFC revenues more efficiently and rapidly. The streamlined application process ensures the non-hub airports’ PFC

applications be treated as a notice of intent with the FAA review and acknowledgment within 30 days instead of 120 days.

PFC Update 73–20 published in January 2020 gave notice that the FAA would review and acknowledge all allowed PFC applications received from small-, medium-, or large-hub airports within 30 days using streamlined procedures. This rulemaking proposes to codify this significant policy change into the FAA's part 158 regulations.

According to the National Plan of Integrated Airport Systems (NPIAS), which details the amounts and types of airport development eligible for Federal funding under the AIP over the next five years, there are nearly 3,300 public-use airports within the national airport system. The 2023–2027 NPIAS¹⁸ published on September 30, 2022, identified 238 non-hub, 80 small-hub, 35 medium-hub and 30 large-hub airports in addition to 2,904 other public-use airports.

This proposed rulemaking would affect 145 small-, medium-, and large-hub airports. As explained in the preceding paragraphs, proposed changes do not concern either the 2,904 other airports that do not use PFC revenues or the 238 non-hub airports that are currently benefiting from the streamlined application process over the last two decades.

3. Benefits

The FAA examined the proposed changes and identified one provision that would benefit approximately 145 small-, medium-, and large-hub airports. Specifically, these airports would continue to use the streamlined application process shortening the FAA's review and acknowledgment period to 30 days from 120 days beyond the expiration of the PFC Update 73–20. The FAA recognizes these gains in efficiency and faster service time to the affected airports. However, these benefits, which would continue to accrue to those airports, are not quantified or monetized.

4. Costs

The FAA has evaluated the cost impacts to the stakeholders involved in this proposed rulemaking, which includes the airports and the FAA. As discussed in the preceding preamble section, the FAA determined that the proposed changes would have no additional cost impacts to airports and the FAA.

¹⁸ “Appendix A: List of NPIAS Airports” following this link: www.faa.gov/airports/planning_capacity/npias/current Last accessed on November 16, 2022.

5. Regulatory Alternatives

This rulemaking proposes amendments to the PFC regulations to address statutorily mandated program changes, program oversight improvements, and minor administrative changes, such as removing or correcting obsolete references.

There are no legally supportable regulatory alternatives to implementing the statutory requirements for the proposed changes. The alternative to rulemaking would be to leave the existing system of orders, guidance, and policy documents in place. However, this is untenable long-term as decentralized program requirements hinder the FAA's ability to ensure compliance and transparency.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act (RFA) of 1980¹⁹, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996²⁰ and the Small Business Jobs Act of 2010²¹, requires Federal agencies to consider the effects of the regulatory action on small businesses and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The FAA identified 145 airports that are owned and operated by both small and non-small entities. In order to estimate the number of small entities, the FAA used the Table of Size Standards²² issued by the Small Business Administration (SBA) for the North American Industry Classification System (NAICS) and found two NAICS codes that these airports would fall under: 488111 (Air Traffic Control) and 488119 (Other Airport Operations). SBA's size standards generally define small businesses based on the number of employees or annual receipts. For these two NAICS codes, the size standard is established as \$35 million (*i.e.*, entities with annual receipts under \$35 million are qualified as small businesses).

¹⁹ Public Law 96–354, 94 Stat. 1164, 5 U.S.C. 601–612.

²⁰ Public Law 104–121, 110 Stat. 857, Mar. 29, 1996.

²¹ Public Law 111–240, 124 Stat. 2504 Sept. 27, 2010.

²² Small Business Administration (SBA). 2022. Table of Size Standards. Effective July 14, 2022. www.sba.gov/document/support-table-size-standards.

Using the U.S. Census data for 488111 and 488119 NAICS codes,²³ the FAA estimated that, with the exception of 13 airports reporting over \$35 million annual revenue, the remaining 132 airports are classified as small entities.

The FAA did not identify any economic impacts on small entities that would be affected by the proposed rule. Therefore, the FAA proposes to certify that the rule will not have a significant economic impact on a substantial number of small entities. The FAA welcomes comments on the basis for this certification.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979,²⁴ as amended by the Uruguay Round Agreements Act,²⁵ prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the effect of this proposed rule and determined that its purpose is to ensure the safety of U.S. civil aviation. Therefore, this proposed rule is in compliance with the Trade Agreements Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995²⁶ 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 an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$177 million in lieu of \$100 million. This proposed rule does not contain such a

²³ www.data.census.gov/cedsci/table?q=488119&g=0100000US&n=488111&tid=CBP2020.CB2000CBP Last accessed November 3, 2022.

²⁴ Public Law 96–39

²⁵ Public Law 103–465

²⁶ Public Law 104–4.

mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995²⁷ requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act²⁸, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

The FAA has determined that there would be no new information collection associated with this proposed rulemaking. The Office of Management and Budget (OMB) previously approved the FAA to collect such information under the provisions of the Paperwork Reduction Act of 1995²⁹ via OMB Control Number 2120–0557.

On November 22, 2021, OMB approved a revision of the FAA's previously approved information collection. That revision reflected changes in the estimated burden resulting from the 2018 Reauthorization Act and the FAA's implementation of PFC Update 73–20. While this rulemaking proposes to codify these changes into the regulations, there are no new information collection actions resulting directly from this rulemaking action.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in

paragraph 5–6.6 and involves no extraordinary circumstances.

VIII. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order (E.O.) 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

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

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,³⁰ and FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures,³¹ the FAA ensures that Federally Recognized Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding proposed Federal actions that have the potential to affect uniquely or significantly their respective Tribes. At this point, the FAA has not identified any unique or significant effects, environmental or otherwise, on tribes resulting from this proposed rule.

C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a “significant energy action” under the Executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

D. Executive Order 13609, International Cooperation

Executive Order 13609, “Promoting International Regulatory Cooperation,” promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory

requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action would have no effect on international regulatory cooperation.

VIII. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

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

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA),³² CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to the person in the **FOR FURTHER INFORMATION CONTACT** section of this document. Any commentary that the FAA receives which is not

²⁷ 44 U.S.C. 3507(d).

²⁸ 5 CFR 1320.8(b)(2)(vi).

²⁹ 44 U.S.C. 3507(d).

³⁰ 65 FR 67249 (Nov. 6, 2000).

³¹ FAA Order No. 1210.20 (Jan. 28, 2004), available at <http://www.faa.gov/documentLibrary/media/1210.pdf>.

³² 5 U.S.C. 552.

specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the internet by—

1. Searching the Federal eRulemaking Portal at www.regulations.gov;
2. Visiting the FAA's Regulations and Policies web page at www.faa.gov/regulations_policies; or
3. Accessing the Government Printing Office's web page at www.GovInfo.gov.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the internet through the Federal eRulemaking Portal.

List of Subjects in 14 CFR Part 158

Air carriers, Airports, Passenger facility charge, Public agencies, Reporting and recordkeeping requirements.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 158 as follows:

PART 158—PASSENGER FACILITY CHARGES (PFCs)

- 1. The authority citation for part 158 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40116–40117, 47106, 47111, 47114–47116, 47524, 47526.

- 2. In part 158, remove the text “PFC’s” wherever it appears, and add in its place the text “PFCs”.

- 3. Amend § 158.3 by revising the definitions for “Approved project”, “Bond financing costs”, “Charge effective date”, “Charge expiration date”, “Debt service”, “Exclusive long-term lease or use agreement”, “FAA Airports office”, “Financial need”, “Implementation of an approved project”, and “Notice of intent (to impose or use PFC revenue)” to read as follows:

§ 158.3 Definitions.

* * * * *

Approved project means a project for which the FAA has approved using PFC revenue under this part. The FAA may

also approve specific projects contained in a single or multi-phased project or development described in an airport capital plan separately. This includes projects acknowledged by the FAA under § 158.32.

Bond financing costs means the costs of financing a bond (or other indebtedness, except debt service) and includes such costs as those associated with issuance, underwriting discount, original issue discount, capitalized interest, debt service reserve funds, initial credit enhancement costs, and initial trustee and paying agent fees.

Charge effective date means the first date on which carriers are required to start collecting a PFC.

Charge expiration date means the date on which carriers are required to stop collecting a PFC.

* * * * *

Debt service means payments for items such as principal and interest, sinking funds, call premiums, periodic credit enhancement fees, trustee and paying agent fees, coverage, and remarketing fees.

Exclusive long-term lease or use agreement means an exclusive lease or use agreement between a public agency and an air carrier or foreign air carrier with a term of 5 years or more. This term also applies to exclusive leases of less than 5 years that have automatic renewal or carryover options, or to leases that have the effect of granting exclusive use rights.

FAA Airports office means a regional, district or field office of the Federal Aviation Administration that administers Federal airport-related matters.

Financial need means that a public agency cannot meet its operational or debt service obligations and does not have at least a 2-month capital reserve fund.

* * * * *

Implementation of an approved project means: (1) With respect to construction, issuance to a contractor of notice to proceed or the start of physical construction; (2) with respect to non-construction projects other than property acquisition, commencement of work by a contractor or public agency to carry out the statement of work; or (3) with respect to property acquisition projects, commencement of title search, surveying, or appraisal for a significant portion of the property to be acquired.

* * * * *

Notice of intent (to impose or use PFC revenue) means a notice under § 158.30 from a public agency that the public agency intends to impose a PFC or use PFC revenue. Except for §§ 158.25 and

158.32, “notice of intent” can be used interchangeably with “application.”

* * * * *

- 4. Revise the section heading to § 158.11 to read as follows:

§ 158.11 Requests for air carrier, foreign air carrier, or isolated community exclusion.

* * * * *

- 5. Amend § 158.13 by revising paragraphs (e) and (f) to read as follows:

§ 158.13 Use of PFC revenue.

* * * * *

(e) *Exception providing for the use of PFC revenue to pay for debt service for non-eligible projects.* The FAA may authorize a public agency to impose a PFC to make payments for debt service on indebtedness incurred to carry out at the airport a project that is not eligible if the FAA determines it is necessary because of the financial need of the airport.

(1) A public agency may request authority to impose a PFC and use PFC revenue under this section using the PFC application procedures in § 158.25. The public agency must document its financial position and explain its financial recovery plan that uses all available resources.

(2) The FAA reviews the application using the procedures in § 158.27. The FAA will issue its decision on the public agency's request under § 158.29.

(f) *Combination of PFC revenue and Federal grant funds.* A public agency may combine PFC revenue and airport grant funds to carry out an approved project.

* * * * *

- 6. Amend § 158.15 by revising the section heading and adding paragraph (d) to read as follows:

§ 158.15 Project eligibility.

* * * * *

(d) A surface transportation or terminal project is eligible for PFC funding at a level above \$3 if the public agency has made adequate provision for financing the airside needs of the airport, including runways, taxiways, aprons, and aircraft gates.

§ 158.17 [Removed]

- 7. Remove § 158.17.

§ 158.19 [Redesignated as § 158.17]

- 8. Redesignate § 158.19 as § 158.17.

- 9. Redesignate § 158.20 as § 158.19 and revise newly redesignated paragraphs (a) introductory text and (b) to read as follows:

§ 158.19 Submission of required documents.

(a) Submittals and documents required by this part may be transmitted

to the appropriate recipient (the public agency, air carrier, the FAA, or any combination thereof) electronically or via email, courier, facsimile, or U.S. Postal Service.

* * * * *

(b) Public agencies and air carriers may use the FAA's national PFC database to post their required quarterly reports, and, in that case, do not have to distribute the reports in any other way.

§ 158.20 [Reserved]

■ 10. Reserve § 158.20.

■ 11. Revise the heading to subpart B to read as follows:

Subpart B—Applications and Notices of Intent

* * * * *

■ 12. Revise § 158.21 to read as follows:

§ 158.21 General.

This subpart specifies the application and notice of intent requirements under which a public agency may obtain authorization to impose a PFC and use PFC revenue on a project. This subpart specifies the consultation, notice and public comment, application, and notice of intent requirements under which a public agency may obtain approval or acknowledgment to impose a PFC and use PFC revenue on a project. This subpart also establishes the procedures for the Administrator's review and approval of applications and amendments, procedures for FAA acknowledgment of notices of intent, and requirements for use of excess PFC revenue.

■ 13. Amend § 158.24 by revising paragraph (a)(2) to read as follows:

§ 158.24 Notice and opportunity for public comment.

(a) * * *

(2) The notice must allow the public to file comments for at least 30 days, but no more than 45 days, after the date of publication of the notice or posting on the public agency's internet website, as applicable.

* * * * *

■ 14. Amend § 158.25 by revising paragraphs (b)(7) through (18), (c)(1)(i), (c)(1)(ii) introductory text, (c)(1)(iii), (c)(2)(iii)(C), (c)(2)(iv) introductory text, and (c)(2)(v) to read as follows:

§ 158.25 Applications

* * * * *

(b) * * *

(7) The project justification, including the extent to which the project achieves one or more of the objectives set forth in § 158.15(a) and (if a PFC level above

\$3 is requested) the requirements of § 158.15.

(i) For any project for terminal development, including gates and related areas, the public agency shall discuss any existing conditions that limit competition between and among air carriers and foreign air carriers at the airport, any initiatives it proposes to foster opportunities for enhanced competition between and among such carriers, and the expected results of such initiatives; or

(ii) For any terminal development project at a covered airport, the public agency shall submit a competition plan in accordance with § 158.17.

(8) Detailed cost information, in a form and manner acceptable to the Administrator.

(9) The charge to be imposed for each project.

(10) The proposed charge effective date.

(11) The estimated charge expiration date.

(12) Information on the consultation with air carriers and foreign air carriers having a significant business interest at the airport and the public comment process, including:

(i) A list of such carriers and those notified;

(ii) A list of carriers that acknowledged receipt of the notice provided under § 158.23(a);

(iii) Lists of carriers that certified agreement and that certified disagreement with the project;

(iv) Information on which method under § 158.24(b) the public agency used to meet the public notice requirement; and

(v) A summary of substantive comments by carriers contained in any certifications of disagreement with each project and disagreements with each project provided by the public, and the public agency's reasons for continuing despite such disagreements.

(13) If the public agency is also filing a request under § 158.11—

(i) The request;

(ii) A copy of the information provided to the carriers under § 158.23(a)(3);

(iii) A copy of the carriers' comments with respect to such information;

(iv) A list of any class or classes of carriers that would not be required to collect a PFC if the request is approved; and

(v) The public agency's reasons for submitting the request in the face of opposing comments.

(14) A copy of information regarding the financing of the project presented to the carriers and foreign air carriers under § 158.23 of this part and as revised during the consultation.

(15) A copy of all comments received as a result of the carrier consultation and public comment processes.

(16) For an application not accompanied by a concurrent application for authority to use PFC revenue:

(i) A description of any alternative methods being considered by the public agency to accomplish the objectives of the project;

(ii) A description of alternative uses of the PFC revenue to ensure such revenue will be used only on eligible projects in the event the proposed project is not ultimately approved for use of PFC revenue;

(iii) A timetable with projected dates for completion of project formulation activities and submission of an application to use PFC revenue; and

(iv) A projected date of project implementation and completion.

(17) A signed statement certifying that the public agency will comply with the assurances set forth in appendix A to this part.

(18) Other information as required by the Administrator.

(c) * * *

(1) * * *

(i) The information required under paragraphs (b)(1) through (18) of this section;

(ii) An FAA Form 5500–1 and applicable attachments:

* * * * *

(iii) The information required by §§ 158.25(b)(17) and 158.25(b)(18).

(2) * * *

(iii) * * *

(C) For any project that has changed since receiving impose authority, the public agency must file updated project information for that project clearly describing the changes to the project.

(iv) An FAA Form 5500–1 and applicable attachments:

* * * * *

(v) The information required by §§ 158.25(b)(17) and 158.25(b)(18).

■ 15. Amend § 158.29 by:

■ a. Revising paragraphs (a)(1)(ii), (iii) and (viii);

■ b. Adding paragraph (a)(1)(ix); and

■ c. Revising paragraphs (a)(2), (b)(1)(ii) and (iii), (b)(1)(iv)(2), and (d).

The revisions and addition read as follows:

§ 158.29 The Administrator's decision.

(a) * * *

(ii) The project will achieve the objectives and criteria set forth in § 158.15 except for those projects approved under § 158.13(e).

(iii) If a PFC level above \$3 is being approved, the project meets the criteria set forth in § 158.15(d);

* * * * *

(viii) If applicable, the public agency has submitted a competition plan in accordance with § 158.17.

(ix) The public agency has demonstrated compliance with the Reporting, Recordkeeping and Audit requirements of subpart D of this part in a form and manner acceptable to the Administrator.

(2) The Administrator notifies the public agency in writing of the decision on the application. The notification will list the projects and alternative uses that may qualify for PFC financing under § 158.15, and (if a PFC level above \$3 is being approved) § 158.15(d), PFC level, total approved PFC revenue including the amounts approved at \$3 and less, \$4, \$4.50, or any combination thereof, duration of authority to impose and earliest permissible charge effective date.

(b) * * *

(1) * * *

(ii) The project will achieve the objectives and criteria set forth in § 158.15 except for those projects approved under § 158.13(e).

(iii) If a PFC level above \$3 is being approved, the project meets the criteria set forth in § 158.15(d); and

(iv) * * *

(2) The Administrator notifies the public agency in writing of the decision on the application. The notification will list the approved projects, PFC level, total approved PFC revenue, total approved for collection, including the amounts approved at \$3 and less, \$4, or \$4.50, or any combination thereof and any limit on the duration of authority to impose a PFC as prescribed under § 158.34.

* * * * *

(d) The FAA provides notice of PFC approvals and disapprovals on the FAA internet website.

■ 16. Amend § 158.30 by:

■ a. Revising the section heading;

■ b. Revising paragraphs (a), (b) introductory text, (b)(1) and (2), and (b)(3)(ii) and (iii);

■ c. Adding paragraph (b)(3)(iv);

■ d. Revising paragraphs (b)(7), (c) introductory text, (c)(1)(ii), and (c)(2)(i); and

■ e. Removing paragraphs (d) through (h).

The revisions and addition read as follows:

§ 158.30 Notices of intent.

(a) *General.* A public agency may notify the FAA of its intent to impose a PFC prior to or concurrently with a notice of intent to use PFC revenue. A public agency must file a notice of intent in the manner and form prescribed by the Administrator and

must include the information required under paragraphs (b), (c), or both, of this section.

(b) *Notice of intent to impose a PFC.*

The public agency must file a separate notice of intent for each airport at which the public agency plans on imposing a PFC. An authorized official of the public agency must sign the notice of intent. Unless otherwise directed by the Administrator, the notice of intent must include:

(1) A completed FAA Form 5500–1, PFC Application (current version) without attachments except as required below;

(2) Project information including the project title, amount of PFC funds sought, PFC level sought, and the grant agreement number if an existing FAA awarded airport grant already covers this project.

(3) If the project is not funded by an existing FAA awarded airport grant, the notice of intent must include the information in paragraph (b)(2) of this section in addition to the following:

* * * * *

(ii) A description of how the project meets one of the PFC objectives in § 158.15(a),

(iii) A description of how the project meets the adequate justification requirement in § 158.15(c), and

(iv) Detailed cost information, in a form and manner acceptable to the Administrator.

* * * * *

(7) Other information as required by the Administrator.

(c) *Notice of intent to use PFC revenue.* A public agency must file:

(1) * * *

* * * * *

(ii) All applicable requirements pertaining to the Airport Layout Plan (ALP) for the airport, airspace studies for the project, and the National Environmental Policy Act of 1969 (NEPA), have been satisfied for all projects not included in an existing Federal airport program grant.

(2) * * *

(i) Follow further consultation with air carriers and the opportunity for public comment under §§ 158.23 and 158.24 of this part. A meeting with the air carriers is optional if all information is the same as that provided with the impose authority notice;

* * * * *

■ 17. Revise § 158.31 to read as follows:

§ 158.31 Review of notices of intent.

(a) The FAA will review the notice of intent to identify projects ineligible for notice of intent consideration. The FAA will notify the public agency in writing

within 30 days if the FAA determines that projects involving the following are ineligible for notice of intent procedures as a result of:

(1) Significant policy precedent.

(2) Significant legal issues.

(3) Significant controversy, as evidenced by significant opposition to the FAA's proposed action by the applicant or other airport authorities, airport users, Federal, State or local agencies, elected officials, or communities.

(4) Multimodal projects.

(5) Significant airport noise, access, or revenue diversion issues, including compliance with 49 U.S.C. 47521 and 49 U.S.C. 47111(e).

(6) Debt Service on otherwise ineligible projects.

(7) Blending of two or more PFC decisions to obtain a uniform collection level.

(8) Terminal building projects in excess of \$25 million, except stand-alone passenger boarding bridges.

(b) The FAA will review the notice of intent to determine that:

(1) The amount and duration of the PFC will not result in revenue that exceeds the amount necessary to finance the project(s);

(2) Each proposed project meets the requirements of § 158.15;

(3) Each project proposed at a PFC level above \$3.00 meets the requirements of § 158.15(d);

(4) All applicable airport layout plan, airspace, and environmental requirements have been met for each project;

(5) Any request by the public agency to exclude a class of carriers from the requirement to collect the PFC is reasonable, not arbitrary,

nondiscriminatory, and otherwise complies with the law; and

(6) The consultation and public comment processes complied with §§ 158.23 and 158.24.

(7) The public agency has complied with the Reporting, Recordkeeping and Audit requirements of subpart D of this part.

(c) The FAA will also make a determination regarding the public agency's compliance with 49 U.S.C. 47524 and 47526 governing airport noise and access restrictions and 49 U.S.C. 47107(b) governing the use of airport revenue. Finally, the FAA will review all comments filed during the air carrier consultation and public comment processes.

■ 18. Add § 158.32 to read as follows:

§ 158.32 FAA acknowledgment of notices of intent.

(a) Within 30 days of receipt of the public agency's notice of intent about its

PFC program, the FAA will issue a written acknowledgment of the public agency's notice. The FAA's acknowledgment may concur with all proposed projects, may object to some or all proposed projects, or may object to the notice of intent in its entirety. The FAA's acknowledgment will include the reason(s) for any objection.

(b) If the FAA does not object to a project or the notice of intent in its entirety, the public agency may implement its PFC program. The public agency's implementation must be consistent with the information specified in its notice of intent. If the FAA objects to a project, the public agency may not collect or use PFC revenue on that project. If the FAA objects to the notice of intent in its entirety, the public agency may not implement the PFCs proposed in that notice. When implementing a PFC under this section, a public agency must comply with all sections of part 158, except for § 158.25.

(c) An FAA acknowledgment issued under this section is not considered an order issued by the Secretary for purposes of 49 U.S.C. 46110 (Judicial Review).

■ 19. Revise § 158.33 to read as follows:

§ 158.33 Duration of authority to impose a PFC after project implementation.

A public agency that has begun implementing an approved project may impose a PFC until—

(a) The charge expiration date is reached;

(b) The total PFC revenue collected plus interest earned thereon equals the allowable cost of the approved project;

(c) The authority to collect the PFC is terminated by the Administrator under subpart E of this part; or

(d) The public agency is determined by the Administrator to be in violation of 49 U.S.C. 47524 and 47526, and the authority to collect the PFC is terminated under that statute's implementing regulations under this title.

■ 20. Add § 158.34 to read as follows:

§ 158.34 Duration of authority to impose a PFC before implementation.

(a) A public agency shall not impose a PFC beyond the lesser of the following—

(1) 2 years after approval to use PFC revenue on an approved project if the project has not been implemented;

(2) 5 years after the charge effective date; or

(3) 5 years after the FAA's decision on the application (if the charge effective date is more than 60 days after the decision date) if an approved project is not implemented.

(b) If, in the Administrator's judgment, the public agency has not made sufficient progress toward implementation of an approved project within the times specified in paragraph (a) of this section, the Administrator begins termination proceedings under subpart E of this part.

(c) The authority to impose a PFC following approval shall automatically expire without further action by the Administrator on the following dates:

(1) 3 years after the charge effective date; or 3 years after the FAA's decision on the application if the charge effective date is more than 60 days after the decision date unless—

(i) The public agency has filed an application for approval to use PFC revenue for an eligible project that is pending before the FAA;

(ii) An application to use PFC revenue has been approved; or

(iii) A request for extension (not to exceed 2 years) to submit an application for project approval, under § 158.35, has been granted; or

(2) 5 years after the charge effective date; or 5 years after the FAA's decision on the application (if the charge effective date is more than 60 days after the decision date) unless the public agency has obtained project approval.

(d) If the authority to impose a PFC expires under paragraph (c) of this section, the public agency must provide the FAA with a list of the air carriers and foreign air carriers operating at the airport and all other collecting carriers that have remitted PFC revenue to the public agency in the preceding 12 months. The FAA notifies each of the listed carriers to terminate PFC collection no later than 30 days after the date of notification by the FAA.

(e) Restriction on reauthorization to impose a PFC. Whenever the authority to impose a PFC has expired or been terminated under this section, the Administrator will not grant new approval to impose a PFC in advance of implementation of an approved project.

§ 158.35 [Amended]

■ 21. Amend § 158.35, in paragraph (d), by removing the citation “§ 158.33” and adding in its place the citation “§ 158.34”.

■ 22. Amend § 158.37 by revising paragraphs (b)(1) introductory text, (b)(1)(i), (b)(6) and (7), and (c) to read as follows:

§ 158.37 Amendment of approved PFC.

* * * * *

(b) * * *

(1) The public agency has demonstrated compliance with the Reporting, Recordkeeping and Audit

requirements of subpart D of this part in a form and manner acceptable to the Administrator.

(i) Further consultation with the air carriers and foreign air carriers and seek public comment in accordance with §§ 158.23 and 158.24 when applying for those requests to:

* * * * *

(6) A description of how each project meets the requirements of § 158.15(d), for each project proposed for an increase of the PFC level above \$3.00 at a medium or large hub airport;

(7) A signed statement certifying that the public agency has met the requirements of § 158.15(d), if applicable, for any amendment proposing to increase the PFC level above \$3.00 at a medium or large hub airport; and

* * * * *

(c) The Administrator will approve, partially approve or disapprove the amendment request and notify the public agency of the decision within 30 days of receipt of the request. If a PFC level of more than \$3.00 is approved, the Administrator must find the project meets the requirements of §§ 158.15(d) and 158.17, if applicable, before the public agency can implement the new PFC level.

* * * * *

■ 23. Amend § 158.43 by revising paragraph (c) and adding paragraph (e) to read as follows:

§ 158.43 Public agency notification to collect PFCs.

* * * * *

(c) The public agency must notify air carriers required to collect PFCs at its airport and the FAA of changes in the charge expiration date at least 30 days before the existing charge expiration date or new charge expiration date, whichever comes first.

* * * * *

(e) Each notified air carrier must notify its agents, including other issuing carriers, of such changes.

■ 24. Amend § 158.45 by revising paragraph (c) to read as follows:

§ 158.45 Collection of PFCs on tickets issued in the U.S.

* * * * *

(c) For each one-way trip shown on the complete itinerary of an air travel ticket, issuing air carriers and their agents shall collect a PFC from a passenger only for the first two airports where PFCs are imposed. For each round trip, a PFC shall be collected only for enplanements at the first two enplaning airports and the last two

enplaning airports on the return where PFCs are imposed.

* * * * *

■ 25. Amend subpart D by revising the subpart heading to read as follows:

Subpart D—Reporting, Accounting, and Audits

■ 26. Amend § 158.63 by revising paragraph (a)(2) to read as follows:

§ 158.63 Reporting requirements: Public agency.

(a) * * *

(2) Cumulative actual PFC revenue received, interest earned, project expenditures, reimbursements, and the amount committed for use on currently approved projects, including the quarter;

* * * * *

■ 27. Amend § 158.67 by:

- a. Revising the section heading;
- b. Revising paragraphs (c)(1) through (3); and
- c. Adding paragraphs (c)(4) through (6) and (d) through (g).

The revisions and additions read as follows:

§ 158.67 Accounting and auditing: Public agency.

* * * * *

(c) Each public agency shall provide for an audit of its PFC account for the period the PFC is collected, held or used, as follows:

(1) The public agency must conduct an audit of its PFC account annually;

(2) The annual audit must be performed by an accredited independent public accountant and may be of limited scope;

(3) The accountant shall express an opinion of the fairness and reasonableness of the public agency's procedures for receiving, holding, and using PFC revenue;

(4) The accountant shall also express an opinion on whether the quarterly report required under § 158.63 fairly represents the net transactions within the PFC account;

(5) The public agency must provide a schedule of revenue and expenditures of the PFC account including: balance in the account on the first day of the fiscal year, PFC Collections for each Quarter, PFC Interest Earned for each Quarter, disbursements on projects by application for each quarter, closing balance; and

(6) The audit must be performed on actual basis, unless the audit is accompanied by reconciliation documentation in a manner and form acceptable to the Administrator.

(d) The audit may be—

(1) Performed specifically for the PFC account; or

(2) Conducted as part of an audit under the Single Audit Act, 31 U.S.C. 75, provided the auditor specifically addresses the PFC.

(e) Upon request, a copy of the audit shall be provided to each collecting carrier that remitted PFC revenue to the public agency in the period covered by the audit.

(f) A copy of the audit shall be provided to the Administrator within 30 calendar days after receipt of the audit or 9 months after the end of the audit period, whichever is less.

(g) Each public agency that combines PFC revenue and Federal grant funds to carry out an approved project is subject to the recordkeeping and auditing requirements of this part, as well as the reporting, recordkeeping, and auditing requirements imposed by 49 U.S.C. 47107 Airport and Airway Improvement Act of 1982 (AAIA).

■ 28. Revise the section heading to § 158.69 to read as follows:

§ 158.69 Accounting and auditing: Collecting carriers.

* * * * *

§ 158.71 [Removed and Reserved]

■ 29. Remove and reserve § 158.71.

■ 30. Revise the subpart heading to subpart E to read as follows:

Subpart E—Federal Oversight of Compliance, Informal Resolution, and Termination

■ 31. Revise § 158.81 to read as follows:

§ 158.81 General.

This subpart contains the procedures for Federal oversight of compliance, informal resolution, and termination of PFCs, and loss of Federal airport grant funds for violations of this part or 49 U.S.C. 40117. This subpart does not address the circumstances under which the authority to collect PFCs may be terminated for violations of 49 U.S.C. 47523 through 47528.

■ 32. Revise § 158.83 to read as follows:

§ 158.83 Federal oversight of compliance.

(a) The Administrator may periodically audit, review, or both audit and review, the receipt and use of PFC revenue by a public agency. The purpose of the audit or review is to ensure that the public agency is in compliance with the requirements of this part and 49 U.S.C. 40117. The Administrator may take further action including, but not limited to, informal resolution, termination, or other action, as appropriate.

(b) The Administrator may periodically audit, review, or both audit

and review the collection and remittance by the collecting carriers of PFC revenue. The purpose of the audit or review is to ensure collecting carriers are in compliance with the requirements of this part and 49 U.S.C. 40117. The Administrator may take further, as appropriate.

(c) Public agencies and carriers shall allow any authorized representative of the Administrator, the Secretary of Transportation, or the Comptroller General of the U.S., access to any of its books, documents, papers, and records pertinent to PFCs.

■ 33. Revise § 158.85 to read as follows:

§ 158.85 Informal resolution.

The Administrator may undertake informal resolution with the public agency or any other affected party if the Administrator cannot determine that PFC revenue is being collected, used, or both collected and used on an approved application for the approved projects in accordance with the terms of the Administrator's approval to impose a PFC for those projects or in compliance with the requirements of this part and with 49 U.S.C. 40117.

■ 34. Revise § 158.87 to read as follows:

§ 158.87 Termination of authority to impose PFCs.

(a) The FAA begins proceedings to terminate the public agency's authority to impose a PFC only if the Administrator determines that informal resolution is not successful.

(b) The Administrator publishes a notice of proposed termination in the **Federal Register** and supplies a copy to the public agency. This notice will state the scope of the proposed termination, the basis for the proposed action and the date for filing written comments or objections by all interested parties. This notice will also identify any corrective actions the public agency can take to avoid further proceedings. The due date for comments and corrective action shall be no less than 60 days after publication of the notice.

(c) If corrective action has not been taken as prescribed by the Administrator, the FAA holds a public hearing, and notice is given to the public agency and published in the **Federal Register** at least 30 days prior to the hearing. The hearing will be in a form determined by the Administrator to be appropriate to the circumstances and to the matters in dispute.

(d) The Administrator publishes the final decision in the **Federal Register**. Where appropriate, the Administrator may prescribe corrective action, including any corrective action the public agency may yet take. A copy of

the notice is also provided to the public agency.

(e) Within 10 days of the date of publication of the notice of the Administrator's decision, the public agency shall—

(1) Advise the FAA in writing that it will complete any corrective action prescribed in the decision within 30 days; or

(2) Provide the FAA with a listing of the air carriers and foreign air carriers operating at the airport and all other issuing carriers that have remitted PFC revenue to the public agency in the preceding 12 months.

(f) When the Administrator's decision does not provide for corrective action or the public agency fails to complete such action, the FAA provides a copy of the **Federal Register** notice to each air carrier and foreign air carrier identified in paragraph (e) of this section. Such carriers are responsible for terminating or modifying PFC collection no later than 30 days after the date of notification by the FAA.

■ 35. Add § 158.89 to read as follows:

§ 158.89 Loss of Federal airport grant funds.

(a) If the Administrator determines that revenue derived from a PFC is excessive or is not being used as approved, the Administrator may reduce the amount of funds otherwise payable to the public agency under 49 U.S.C. 47114. Such a reduction may be made as a corrective action under § 158.85 or § 158.87.

(b) The amount of the reduction under paragraph (a) of this section shall equal the excess collected, or the amount not used in accordance with this part.

(c) A reduction under paragraph (a) of this section shall not constitute a withholding of approval of a grant application or the payment of funds under an approved grant within the meaning of 49 U.S.C. 47111(d).

■ 36. Amend § 158.95 by revising paragraph (c) to read as follows:

§ 158.95 Implementation of reduction.

* * * * *

(c) If the projection of PFC revenue in a fiscal year is inaccurate, the reduction in apportioned funds may be increased or decreased in the following fiscal year, except that any further reduction shall not cause the total reduction to exceed either 50 percent or 75 percent of such apportioned amount as would otherwise be apportioned in any fiscal year.

■ 37. Amend appendix A to part 158 by revising paragraphs (A)(2) and (3), and (B)(5) to read as follows:

Appendix A to Part 158 Assurances

A. * * *

2. These assurances are required to be submitted as part of the application for approval or acknowledgment of authority to impose a PFC under the provisions of 49 U.S.C. 40117.

3. Upon approval of an application or acknowledgment of a notice of intent by the Administrator, the public agency is responsible for compliance with these assurances.

B. * * *

5. Non-exclusivity of contractual agreements. It will not enter into an exclusive long-term lease or use agreement with an air carrier or foreign air carrier for projects funded by PFC revenue. Such leases or use agreements will not preclude the public agency from funding, developing, or assigning new capacity at the airport with PFC revenue.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f) and 40117 in Washington, DC.

Shannetta R. Griffin,

Associate Administrator for Airports.

[FR Doc. 2023-20559 Filed 9-26-23; 8:45 am]

BILLING CODE 4910-13-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2023-0330; FRL-4908.1-01-OAR]

RIN 2060-AV20

Review of Final Rule Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to add requirements for sources to reclassify from major source status to area source status under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program. The requirements of this proposal would apply to all sources that choose to reclassify, including any sources which have reclassified since January 25, 2018. The EPA is proposing that sources reclassifying from major source status to area source status under the NESHAP program must satisfy the following criteria: any permit limitations taken to reclassify from a major source of hazardous air pollutants (HAP) under the Clean Air Act to an area source of HAP must be federally enforceable, any such permit limitations must contain safeguards to prevent emission increases

after reclassification beyond the applicable major source NESHAP requirements at time of reclassification, and reclassification will only become effective once a permit has been issued containing enforceable conditions reflecting the requirements proposed in this action and electronic notification has been submitted to the EPA. Additionally, we are proposing clarifications to reporting requirements and updating language regarding submittal of confidential business information.

DATES:

Comments. Comments must be received on or before November 13, 2023. 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 October 27, 2023.

Public hearing: If anyone contacts us requesting a public hearing on or before October 2, 2023, 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-2023-0330, 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-2023-0330 in the subject line of the message.
- **Fax:** (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2023-0330.

• **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2023-0330, 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.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact U.S. EPA, Attn: Nathan Topham, Mail Drop: D243-02, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, North Carolina 27711; telephone number: (919) 541-0483; email address: topham.nathan@epa.gov.

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. 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 hearing will be held via virtual platform on October 12, 2023. The hearing will convene at 10:00 a.m. Eastern Time (ET) and will conclude at 4:00 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/reclassification-major-sources-area-sources-under-section-112>.

If a public hearing is requested, the EPA will begin pre-registering speakers for the hearing no later than 1 business day after a request has been received. To register to speak at the virtual hearing, please use the online registration form available at <https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112> 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 October 10, 2023. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers at: <https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112>.

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 4 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 topham.nathan@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/reclassification-major-sources-area-sources-under-section-112>. 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 special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by October 4, 2023. 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-2023-0330. 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-2023-0330. 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 to <https://www.regulations.gov/> any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted 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>.

Submitting CBI. Do not submit information containing CBI to the EPA through <https://www.regulations.gov/>. 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, note the docket ID, mark the outside of the digital storage media as CBI, and 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 and note the docket ID. 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.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (e.g., Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address oaqpscbi@epa.gov, and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email oaqpscbi@epa.gov to request a file transfer link. If sending CBI information through the postal service, please send it 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-2023-0330. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Preamble acronyms and abbreviations. Throughout this preamble the use of “we,” “us,” or “our” is intended to refer to the EPA. 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:

CAA Clean Air Act
CEDRI Compliance and Emissions Data Reporting Interface
CFR Code of Federal Regulations
D.C. Cir. the United States Court of Appeals for the District of Columbia Circuit
EPA Environmental Protection Agency
FIP Federal Implementation Plan
HAP hazardous air pollutant(s)
MACT maximum achievable control technology
MM2A Major MACT to Area
MRR monitoring, recordkeeping, and reporting
NESHAP national emission standards for hazardous air pollutants
NMA National Mining Association
NSR New Source Review
NTTAA National Technology Transfer and Advancement Act
OIAI Once In, Always In
OMB Office of Management and Budget
PRA Paperwork Reduction Act
PSD prevention of significant deterioration
PTE potential to emit
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
SIP State Implementation Plan
TIP Tribal Implementation Plan

tpy tons per year
UMRA Unfunded Mandates Reform Act

Organization of this document. The information in this preamble is organized as follows:

- I. General Information
 - A. Does this rule apply to me?
 - B. Where can I get a copy of this document and other related information?
- II. Background
 - A. What is the statutory authority for this action?
 - B. History of PTE and Enforceability of Limits in the NESHAP Program
 - C. History of Reclassifications in the NESHAP Program
- III. Proposed Criteria for MM2A Reclassifications
 - A. Electronic Notification and Reclassification Effective Date
 - B. Sufficiency of Limits Taken To Reclassify
 - C. Ministerial Revisions From the 2020 MM2A Final Rule
 - D. What sources will have to ensure all new requirements are met and when will those sources need to comply with the new requirements?
- IV. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act (NTTAA)
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

I. General Information

A. Does this rule apply to me?

Categories and entities potentially impacted by this rule include major sources of HAP that choose to take limitations to restrict their potential to emit in order to reclassify from a major source of HAP to an area source of HAP pursuant to the requirements in 40 CFR part 63, subpart A, implementing section 112 of the CAA. This rule also would impact those sources that have reclassified since January 25, 2018.

Federal, state, local, and tribal governments may be affected by the proposed amendments, once

promulgated, if their current programs do not meet the requirements, and those jurisdictions choose to create potential to emit (PTE) limiting mechanisms that allow sources located within their jurisdiction to reclassify from major to area source status under the NESHAP program. Section 112(l) of the CAA allows for delegation of the implementation and enforcement of NESHAPs to state and local air pollution control agencies and 40 CFR part 63, subpart E contains the regulatory framework for such delegations. Per 40 CFR 63.90(e), programs approved under 40 CFR part 63, subpart E are federally enforceable by the Administrator and citizens under the CAA.¹ Subpart E describes the types of delegations, including straight delegations of NESHAPs (delegation of individual NESHAPs without change), rule adjustment (delegation of individual NESHAPs with changes), rule substitution (delegation of individual NESHAPs through use of a state/local/tribal rule in place of the NESHAP), equivalence by permit (alternative requirements and authorities that take the form of permit terms and conditions for individual facilities instead of source category regulations), and approval of programs that substitute for CAA section 112 requirements (intended for mature air toxics programs with many regulations affecting source categories regulated by Federal section 112 standards). Subpart E describes the necessary components for programs, timing of review and approval by the EPA, and approval or disapproval process for such programs. If federally enforceable HAP PTE limiting mechanisms do not exist in a state, that state can choose to submit mechanisms according to one of the processes provided in 40 CFR part 63, subpart E. In short, this process involves a state submitting authorities to the EPA for review and approval to use in lieu of CAA section 112 requirements. While the specific steps involved in this process depend on the type of HAP PTE limiting mechanism under consideration (e.g., the process for a straight delegation is simpler than the state program approval process), the end result is a federally enforceable mechanism that has been reviewed and approved by the EPA. We are seeking comment on the potential burdens on

¹ This refers to the legal authority granted under the CAA (i.e., under section 113 and section 304(a) of the statute) to the EPA Administrator and citizens to enforce in Federal court all limitations and conditions that implement requirements under the CAA (e.g., issued under an approved program under section 112(l) of the CAA or a SIP or another statute administered by the EPA.).

states and regulated facilities related to the use of 40 CFR part 63, subpart E by states for mechanisms to allow sources to reclassify from major sources to area sources. We are also seeking comment on the time needed should a state choose to submit programs for EPA review and approval under subpart E in order to allow for sources to reclassify from major sources to area sources where no such federally enforceable programs currently exist. This proposal does not require any changes or seek to alter in any way existing state-only enforceable PTE limiting mechanisms that are not used for sources reclassifying from major sources of HAP to area sources of HAP.

The EPA is the permitting authority for issuing, rescinding, and amending permits for sources in Indian country, with four exceptions.² Once promulgated, state, local, or tribal regulatory authorities³ may receive requests to issue new permits or make changes to existing permits for sources in their jurisdiction to address the amended requirements.

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/reclassification-major-sources-area-sources-under-section-112>. 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.

A memorandum showing the rule edits that would be necessary to incorporate the changes to 40 CFR part 63, subpart A proposed in this action is available in the docket (Docket ID No. EPA-HQ-OAR-2023-0330). The EPA

also will post a copy of this document to <https://www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112>.

II. Background

A. What is the statutory authority for this action?

The statutory authority for this action is provided by section 112 of the CAA, as amended (42 U.S.C. 7401 *et seq.*). Section 112 of the CAA requires the EPA to establish emissions standards for “major sources” and “area sources” of HAP to control and reduce their emissions. Section 112(a)(1) defines major source, in relevant part, as “any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants”; and 112(a)(2) defines area source, in relevant part, as “any stationary source of hazardous air pollutants that is not a major source.” 42 U.S.C. 7412(a)(1) and (2).

For major sources, section 112 establishes a two-stage regulatory process to develop standards to control HAP emissions. The first stage requires the EPA to establish technology-based standards based on the maximum achievable control technology (MACT). In this stage the EPA must establish minimum standards based on best performing units in a source category, referred to as the MACT floor, and evaluate whether additional emission reductions are achievable based on the EPA’s consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, referred to as the beyond-the-floor analysis. The second stage requires the EPA to evaluate residual risk from HAP after implementation of the initial standards 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, referred to as the residual risk review; and requires the EPA to evaluate developments in practices, processes, and control technologies to determine if more stringent standards are necessary, referred to as the technology review. Pursuant to CAA section 112(f)(2), the EPA is required to perform residual risk reviews within 8 years of promulgating initial standards; and pursuant to section 112(d)(6), the EPA is required to

perform the technology review no less often than every 8 years.

For area sources, the EPA may elect to promulgate alternative standards than those established for major sources that provide for the use of generally available control technologies (GACT) or management practices to reduce HAP emissions. Unlike MACT standards required for major sources, GACT standards are not required to be updated pursuant to residual risk reviews and unlike the MACT “floor” process, GACT standards may consider costs when establishing the level of the standard.

B. History of PTE and Enforceability of Limits in the NESHAP Program

The potential to emit (PTE) is key to the distinction between major and area sources. PTE refers to the maximum capacity of a stationary source to emit a pollutant under its physical and operational design and is used to determine whether a source qualifies as a major or area source. In 1994, the EPA promulgated the definition of PTE in the General Provisions of the NESHAP at 40 CFR 63.2, which defined PTE in terms based on the major source definition in section 112(a)(1) of the CAA.⁴ As promulgated in 1994, the PTE definition states that PTE “means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.” Under this definition, and consistent with section 112(a)(1), sources that would otherwise qualify as major sources are able to obtain enforceable permit limitations from the EPA or delegated authority containing physical or operational limits to bring their emission below the major source threshold, referred to as synthetic minor sources.

In *National Mining Association (NMA) v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), the D.C. Cir. remanded without vacatur the 40 CFR 63.2 definition to the EPA to justify the requirement that

²Two tribes have approved title V programs or delegation of 40 CFR part 71. The tribes may have sources that request to no longer be covered by title V. Neither of these two tribes have approved minor source permitting programs but may in the future. In the meantime, the tribes will need to coordinate with the EPA, who is the permitting authority in Indian country for these requests. In addition, two other tribes has a major source that would be eligible to request reclassification. If that source requests a new permit, the tribe may issue the minor source permit, but the EPA would need to be made aware of the request, as the EPA is the permitting authority for title V.

³The term regulatory authority is intended to be inclusive of the federal, state, tribal, or local air pollution control agency with authority to process reclassification requests and issuance of enforceable PTE limits.

⁴CAA section 112(a)(1) defines major source, in relevant part, as “any stationary source or group of stationary sources located within a contiguous area and under common control that emits or *has the potential to emit considering controls*, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.” (emphasis added).

physical or operational limits on the capacity to emit a pollutant be “federally enforceable,” *i.e.*, whether limits needed to be enforceable by the EPA and citizen groups under the CAA or other federal statutes. The NMA decision confirmed that the EPA has an obligation to ensure that limits considered in determining a source’s PTE are effective, but it stated that the Agency had not adequately explained how “federal enforceability” furthered effectiveness. 59 F.3d at 1363–1365.⁵

After the NMA decision, the EPA extended a pre-existing transitional policy allowing the use of non-federally enforceable limits (*e.g.*, state-only enforceable limits) for limiting PTE provided those limits are legally enforceable and practicably enforceable.⁶ Legal enforceability means that the reviewing authority has the right to enforce a limit or restriction. As the EPA explained in the transitional policy, practicably enforceable means that limitations and restrictions must be of sufficient quality and quantity to ensure accountability, and specifically, for a permit provision to be practicable enforceable it must specify “(1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting.”⁷

On March 23, 2001, the EPA added recordkeeping requirements for

applicability determinations for sources with a maximum capacity to emit HAP in amounts greater than major source thresholds but with PTE limits to avoid applicability of a standard.⁸ At that time, the EPA also confirmed that until the rules are clarified to address various PTE issues, consistent with the NMA Court decision, any determination of HAP PTE under 40 CFR 63.2 should consider the regulations and also take into consideration the EPA transition policy guidance memoranda. 66 FR 16342 (March 23, 2001).

On November 19, 2020, the EPA issue a final rule titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” 85 FR 73854 (referred to here as the 2020 MM2A final rule), in which the EPA made an interim ministerial revision to the definition of “potential to emit” in 40 CFR 63.2, which is discussed further in section II.C.1. of this preamble. See 85 FR 73875 (November 19, 2020). Specifically, the Agency removed the word “federally” from the phrase “federally enforceable” that was in the 40 CFR 63.2 definition of “potential to emit.”

C. History of Reclassifications in the NESHAP Program

1. What has happened to date in Section 112 of the CAA related to major source reclassifications?

Shortly after the EPA began promulgating individual NESHAP standards following the 1990 CAA Amendments, the Agency received multiple requests to clarify when a major source of HAP could avoid CAA section 112 requirements applicable to major sources by taking enforceable limits on its PTE below the major source thresholds. In response, the EPA issued a 1995 memorandum⁹ that provided guidance on three timing issues related to avoidance of CAA section 112 requirements for major sources:

- “By what date must a facility limit its PTE if it wishes to avoid major source requirements of a MACT standard?”
- “Is a facility that is required to comply with a MACT standard permanently subject to that standard?”
- “In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT

standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?”

In the 1995 Seitz Memorandum, the EPA stated our interpretation of the relevant statutory language that facilities that are major sources of HAP may switch to area source status at any time until the “first compliance date” of the standard.¹⁰ Under this interpretation, facilities that are major sources on the first substantive compliance date of an applicable major source NESHAP were required to comply permanently with that major source standard even if the source was subsequently to become an area source by limiting its PTE. This position was commonly referred to as the “Once In, Always In” (OIAI) policy. The 1995 Seitz Memorandum provided that a source that is major for one MACT standard would not be considered major for a subsequent MACT standard if the source’s potential to emit HAP emissions was reduced to below major source levels by complying with the first major source MACT standard. In the 1995 Seitz Memorandum, the EPA set forth transitional policy guidance that was intended to remain in effect only until the Agency proposed and promulgated amendments to the 40 CFR part 63 General Provisions.

The expressed basis for the OIAI policy was that it would help ensure that required reductions in HAP emissions were maintained over time in a way that was consistent with the language and structure of the statute, and would avoid compromising the emissions reductions that Congress mandated major source to achieve.¹¹ The EPA explained at the time that because the CAA did not directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit, the EPA viewed the OIAI policy as consistent with “the language and structure of the Act . . . that sources should not be allowed to avoid compliance with a standard after the compliance date, even through a reduction in potential to emit.”¹²

Since issuing the OIAI policy, the EPA has twice proposed regulatory

⁵ Two additional cases addressing PTE in different CAA programs were decided after *National Mining*. In *Chemical Manufacturers Ass’n v. EPA*, No. 89–1514, 1995 WL 650098 (D.C. Cir. Sept. 15, 1995), the court, in light of *National Mining*, vacated and remanded to EPA the federal enforceability component in the potential to emit definition in the PSD and NSR regulations (40 CFR parts 51 and 52). In *Clean Air Implementation Project v. EPA*, No. 96–1224, 1996 WL 393118 (D.C. Cir. June 28, 1996), the court vacated and remanded the federal enforceability requirement in the title V regulations (40 CFR part 70). The CMA and the CAIP orders were similar in that they contained no independent legal analysis, but rather relied on the *National Mining* decision.

⁶ See “Third Extension of January 25, 1995 Potential to Emit Transition Policy,” from John S. Seitz and Eric V. Schaeffer to Regional Offices (December 20, 1999). See also “Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act,” from John S. Seitz and Robert I. Van Heuvelen to Regional Offices (January 25, 1995); “Extension of January 25, 1995, Potential to Emit Transition Policy,” from John S. Seitz and Robert I. Van Heuvelen to Regional Offices (August 27, 1997). Copies of these memoranda are available in the docket for this action.

⁷ “Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act,” from John S. Seitz and Robert I. Van Heuvelen to Regional Offices (January 25, 1995)

⁸ See 40 CFR 63.10(b)(3). These requirements became final April 5, 2002. See 67 FR 16582 (April 5, 2002); see also, 66 FR 16342 (March 23, 2001).

⁹ “Potential to Emit for MACT Standards—Guidance on Timing Issues,” from John Seitz to the EPA Regional Air Division Directors (May 16, 1995) (“1995 Seitz Memorandum”) (available in the docket for this action).

¹⁰ The “first substantive compliance date” is defined as the first date a source must comply with an emission limitation or other substantive regulatory requirement (*i.e.*, leak detection and repair programs, work practice measures, etc., but not a notice requirement) in the applicable standard.

¹¹ See 1995 Seitz Memorandum at 9 (“A once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.”).

¹² *Id.* at 6.

amendments that would have altered the OIAI policy. In 2003, the EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention activities but did not finalize the proposed changes relevant to the OIAI policy. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004).

In 2007, the EPA proposed to replace the OIAI policy set forth in the 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, the EPA proposed that a major source that is subject to a major source MACT standard would no longer be subject to that standard if the source were to become an area source through an enforceable limitation on its PTE for HAP. Under the 2007 proposal, major sources could take such limits on their PTE and obtain “area source” status at any time and would not be required to have done so before the “first compliance date,” as the OIAI policy provided. *Id.* at 70 (“The regulatory amendments proposed today, if finalized, would replace the 1995 OIAI policy and allow a major source of HAP emissions to become an area source at any time by limiting its PTE for HAP below the major source thresholds.”).

Many commenters supporting the 2007 proposal expressed the view that, by imposing an artificial time limit on major sources obtaining area source status, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions further. Stakeholders commented to the EPA that the definitions in CAA section 112(a) contain a single factor for distinguishing between major source and area source—the amount of HAP the source “emits” or “has the potential to emit.” Commenters further stated that the temporal limitation imposed by the OIAI policy was inconsistent with the CAA and created an arbitrary date by which sources must determine whether their HAP PTE will exceed either of the major source thresholds. Other commenters opposed the 2007 proposal, arguing that it would contravene Congress’s intent in developing section 112 of the CAA, lead to backsliding in performance of pollution controls and resulting health protections from sources no longer subject to MACT standards, and lacked sufficient rationale to justify overturning long-standing EPA policy regarding major and area sources. The EPA never took final action on the 2007 proposal, and it was later superseded and replaced. Comments on the lack of a temporal

distinction in defining major sources and area sources were re-emphasized in comments received per Executive Order 13777, Enforcing the Regulatory Reform Agenda (February 24, 2017), and the Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017).

On January 25, 2018, the EPA issued a memorandum from William L. Wehrum, Assistant Administrator of the Office of Air and Radiation, to the EPA Regional Air Division Directors titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act” (MM2A Memorandum) withdrawing the OIAI policy.¹³ The MM2A Memorandum discussed the statutory provisions that govern when a major source subject to major source NESHAP requirements under section 112 of the CAA may be reclassified as an area source, and thereby avoid being subject thereafter to major source NESHAP requirements and other requirements applicable to major sources under CAA section 112. In the MM2A Memorandum, the EPA discussed the language of CAA section 112(a) regarding Congress’s definitions of “major source” and “area source,” and determined that the OIAI policy articulated in the 1995 Seitz Memorandum was contrary to the plain language of the CAA and, therefore, must be withdrawn.

In the MM2A Memorandum, the EPA announced the future publication of a proposed rule to receive input from the public on adding regulatory text consistent with the reading of the statute as described in the MM2A Memorandum. On July 26, 2019, the EPA proposed regulatory text to implement the reading of the statute as discussed in the MM2A Memorandum.¹⁴ The 2019 proposal superseded and replaced the 2007 proposal.¹⁵

The 2019 MM2A proposal also addressed questions received after the issuance of the 2018 MM2A Memorandum. In the comments on the 2007 and 2019 proposals, many stakeholders asserted that the implementation of this reading and withdrawal of the OIAI policy would create incentives for stationary sources that have reduced HAP emissions to below major source thresholds to reclassify to area source status by taking enforceable PTE limits and reduce their compliance burden. These stakeholders

also stated that sources with emissions above major source thresholds after complying with CAA section 112 major source requirements could be encouraged to evaluate their operations and consider additional changes that can further reduce their HAP emissions to below the major source thresholds. Other stakeholders raised the concern that allowing sources to reclassify could potentially result in emission increases from sources that have reduced their actual emissions to below the major source thresholds because they have had to comply with major source NESHAP requirements. Some stakeholders contended that federal safeguards (*i.e.*, conditions on reclassification requiring that sources limit emissions to at least the level of control achieved under the major source NESHAP) were required to ensure that the emissions did not increase from sources that reclassified. They noted that some states cannot implement air pollution control requirements that are not derived from Federal regulations, while other stakeholders asserted that only those major sources that had reduced emissions through pollution prevention or removal of equipment should be allowed to reclassify.

Other stakeholders, generally opposed to requiring safeguards, questioned the legal basis for establishing safeguards that would restrict emissions from area sources. These stakeholders stated that the EPA holds no regulatory authority to prohibit or regulate emissions increases from area sources unless EPA lists these area sources under CAA section 112 and then develops standards, or if area sources exceed the major source threshold. They stated that CAA section 112 contains no restrictions on the gross quantity of emissions emitted from any major or area sources, nor does it outright prohibit stationary sources from undertaking activities that increase emissions.

In the 2019 proposal, the EPA proposed specific criteria that PTE limits must meet for these limits to be effective. The EPA also proposed to amend the definition of “potential to emit” in 40 CFR 63.2 by removing the requirement for federally enforceable limits and requiring instead that limits meet the effectiveness criteria of being both legally enforceable and practicably enforceable. The EPA also proposed to amend 40 CFR 63.2 to include the definitions of “legally enforceable” and “practicably enforceable” described in the MM2A proposal. The EPA then took comment on the effectiveness criteria and the proposed amendments to 40 CFR 63.2.

¹³ See notice of issuance of this guidance memorandum at 83 FR 5543 (February 8, 2018).

¹⁴ See 84 FR 36304 (July 26, 2019).

¹⁵ See 72 FR 69 (January 3, 2007).

The EPA received significant comments from many stakeholders on the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. One of the main concerns raised by stakeholders in their comments was the interactions and effects of the proposed amendments with other CAA programs, including Prevention of Significant Deterioration (PSD), New Source Review (NSR), State Implementation Plan (SIP), and title V operating permits, and the impacts of the proposed amendments to existing state, local, and tribal agency rules.

The EPA published the 2020 MM2A final rule (85 FR 73854) on November 19, 2020, which formalized the withdraw of the OIAI policy first introduced in the 2018 MM2A Memorandum. The EPA did not take final action on the proposed amendments to 40 CFR 63.2 as it was still considering the comments received on the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. In the final MM2A rule, the EPA expressed its intention to take action on this aspect of the MM2A proposal in a separate action at a later date. However, as part of the final MM2A rule, the EPA made an interim ministerial revision to the definition of “potential to emit” in 40 CFR 63.2. Specifically, the Agency removed the word “federally” from the phrase “federally enforceable” that was in the 40 CFR 63.2 definition of “potential to emit.”

The EPA explained that this interim ministerial revision was not the EPA’s final decision and should not be read to suggest that the EPA was leaning towards or away from any particular final action on this aspect of the MM2A proposal. The revision was an interim revision to cover the period of time while the EPA continued to consider the comments on this aspect of the MM2A proposal and until the Agency takes final action with respect to the proposed effectiveness criteria and proposed amendments to 40 CFR 63.2. The EPA asserted that this revision was ministerial because it merely reflected the *NMA* decision, which held that the EPA had not explained why a PTE limit had to be “federally enforceable” to be considered as the basis for reclassifying a major source to area source status. See *NMA v. EPA*, 59 F.3d at 1363–1365.¹⁶ So, for the reasons explained in the final MM2A rule preamble, the revision to the PTE definition did not represent a final decision by the EPA.

Further, the interim ministerial revision did not alter any rights or legal consequences and simply preserved the

status quo that has been in effect since the late 1990s. The EPA expressly said that the interim ministerial revision did not change how the EPA applies the transitional policy that the Agency has been following since 1995. This transitional policy allows for any physical or operational limitation on the capacity of the stationary source to emit a pollutant (such as air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed) to be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or legally enforceable by a state or local permitting authority and practicably enforceable. The final MM2A rule became effective on January 19, 2021.

A significant concern raised during the 2020 MM2A rulemaking is that under the current MM2A framework, sources with adjustable controls can obtain PTE limits just below the major source thresholds to reclassify from major source status to area source status and reduce their control efficiency to reduce operational costs, and subsequently increase emissions, in a manner that would not have been allowed under the major source NESHAP. This possibility stems from the differences in stringency in major source rules compared to area source rules for the same source category. In short, major source NESHAPs require MACT standards that reduce emissions from all major sources in a category to the levels achieved by the best performers. In contrast, NESHAP standards for area sources allow for the use of GACT standards that often require less control of HAP than the corresponding MACT standards for major sources. In addition, GACT standards typically apply to a select group of HAP, known as urban HAP, rather than all listed HAP. Finally, unlike the residual risk requirements for sources subject to MACT standards, there is no requirement for the EPA to evaluate the public health risk that remains after implementation of GACT standards. These differences are most concerning for major source categories for which the area source NESHAP applies to fewer emission points and regulates fewer HAP than the major source rule or for which there is no NESHAP applicable to area sources at all. The current MM2A framework does not provide clear requirements for sources reclassifying in a source category with less stringent or no requirements for area sources, creating inconsistencies between sources in a

given category based on their decision to reclassify or not, between sources across source categories based on the existence and stringency of area source NESHAPs, and between sources based on the robustness of the state or local regulations in the area where they are located.

2. What is Executive Order 13990 and how does it impact this proposal?

On January 20, 2021, President Biden issued Executive Order 13990 Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. This E.O. called for the EPA to review actions taken during the prior four years and, as appropriate, consider suspending, revising, or rescinding actions that did not align with the Administration’s policy to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.

III. Proposed Criteria for MM2A Reclassifications

In this action the EPA is proposing to update electronic reporting requirements for sources that reclassify from major to area sources, and to add requirements for sources to reclassify from major source to area source status to improve the effectiveness of PTE limits for these sources. Specifically, the EPA proposes to require safeguards to ensure that reclassified sources cannot increase their emissions as a result of reclassification, and to require PTE limits for reclassified sources be federally enforceable (*i.e.*, enforceable by the EPA and citizens under the CAA or other federal statute). The EPA is proposing these additional criteria for reclassified sources, because of the EPA’s particular concern with this subset of sources which may be able to increase emissions as a result of reclassification.

A. Electronic Notification and Reclassification Effective Date

To provide information to the EPA and the public, 40 CFR 63.9(b) requires sources to notify the EPA when a source becomes subject to a relevant standard

¹⁶ See note 6, *supra*.

and 40 CFR 63.9(j) requires sources to notify the Administrator when there is a change in the information previously submitted to the EPA. The notification requirements of 40 CFR 63.9(j) apply to those sources that reclassify from major source to area source status under CAA section 112 (e.g., by taking production or operation limits to reduce a source's HAP emissions below the applicability threshold). Sources that reclassify are currently required to notify the EPA within 15 days after reclassification. The required notification must include information on the standard the source was reclassifying from and to (if applicable), along with the effective date of the reclassification. To ensure the availability of this information, the EPA requires electronic submission of such notifications. Sources that reclassify to area source status by taking limits to reduce HAP emissions are also currently required under 40 CFR 63.10 to keep records of applicability determinations on-site. We are clarifying that reclassifications that occur after the effective date of this action will be effective upon the date of electronic submittal of the notification to the EPA. This clarification will ensure that sources submit the required notification to the EPA when reclassification occurs. We have become aware of some sources that have reclassified and the required reclassification has not been submitted through CEDRI. In order to prevent this from continuing, we have determined that reclassifications will not be considered effective until notification has been submitted to the EPA. Sources that have already reclassified or reclassify prior to the effective date of this action and have not submitted the required electronic notification must submit electronic notification of reclassification to the EPA within six months of the effective date of this action. Reclassified sources that have already submitted electronic notification to the EPA do not need to resubmit the notification. The EPA expects these notification and recordkeeping requirements under 40 CFR part 63 will assist the EPA in its oversight role under the CAA and be of minimal burden to the regulated community.

Additionally, we are proposing to clarify the original intent of the language in 40 CFR 63.9(j) allowing the use of the application for reclassification to fulfill the requirements of notification to more clearly indicate that it must be submitted to the Compliance and Emissions Data Reporting Interface (CEDRI) and contain the information

required in 40 CFR 63.9(j)(1) through (4). We are also proposing to update the procedures for submittal of confidential business information to include electronic submittal procedures.

B. Sufficiency of Limits Taken To Reclassify

In this proposal, the EPA is revisiting the sufficiency of restrictions on PTE relied upon for reclassification, *i.e.*, what a source must do to be able to reclassify. The EPA proposes to require (1) additional criteria that a PTE limit must meet before it can serve as the basis for reclassification from major to area for CAA section 112 purposes and (2) federal enforceability of permit limits that are taken by sources to reclassify from major to area source status. The proposed additional criteria for PTE (referred to here as “safeguards”) would require a determination that a source reclassifying from major to area source status will not emit beyond what would have been allowed had the source maintained major source status. Federal enforceability would ensure that the EPA and citizens are able to enforce those permit limits taken to reclassify in federal court under the Clean Air Act or other statutes administered by the EPA. In proposing these changes, the EPA seeks to ensure that the opportunity for sources to reclassify from major to area for purposes of CAA section 112 does not undermine the emissions reductions intended by that program.

Hazardous air pollutants pose public health risks at levels well below the major source thresholds (10/25 TPY), at times in very small quantities. Congress understood this fact in enacting CAA section 112 by directing the EPA to further reduce or eliminate HAP emissions where possible.¹⁷ Further, the EPA shares the concerns raised by commenters on the MM2A rulemaking that sources with adjustable controls that can reclassify by reducing emissions just below the major source threshold could subsequently increase emissions under less stringent, or nonexistent, area source regulations for a given source category. For example, if a major source standard had the effect of reducing emissions of a certain

pollutant to 1 ton per year but there is no corresponding area source standard for the same source category, then a source could take a PTE limit of 9.9 tons per year of a single HAP or 24.9 tons per year of combined HAP emissions, thus increasing its emissions, and reclassify under the 2020 MM2A final rule.

Indeed, every source in this hypothetical source category could do the same. In order to protect the public from the health risks of HAPs, and based on Congress' intent to reduce harmful HAP emissions and regulate to the maximum extent achievable, the EPA proposes enhanced oversight, compliance assurance, and that national consistency be required for the reclassified sources via safeguards and federal enforceability of restrictions or limitations taken to otherwise avoid applicable requirements as a major source of HAPs under Part 63 to ensure such concerning scenarios do not occur.

In prior rulemakings and guidance, the EPA has discussed the timing of when a source can reclassify from major to area source. Most recently in the 2020 MM2A rule, the EPA adopted the position that the lack of a temporal limitation on whether a source qualifies as a major source under CAA section 112(a)(1) refuted the EPA's earlier OIAI policy. The EPA does not propose to reopen that conclusion here. However, as the EPA discussed in the 2019 proposal to the MM2A rule, in addition to the timing of reclassification there is a separate question as to the sufficiency of the PTE limit taken to reclassify.

The sufficiency of limitations on PTE taken to reclassify from major to area source status is governed by the definitions of “major source” and “area source” in CAA section 112(a)(1) and (2). Major sources are defined, in relevant part, as sources that can emit or have the potential to emit “considering controls,” 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. Area sources are in turn defined as any stationary source of hazardous air pollutants that is not a major source. Therefore, in determining what qualifies as an area source the EPA must consider the major source definition and how to “consider controls” the facility would rely upon to justify its status as an area source. The EPA proposes the most appropriate interpretation of “considering controls” is one that, on the one hand, does not undermine the purposes of CAA section 112 by allowing sources to potentially increase HAP emissions while on the other hand also recognizes that the statute does not place an absolute time limit on the opportunity to reclassify.

¹⁷ CAA section 112(a)(1) in defining “major source” provides that the EPA may establish a “lesser quantity” threshold for major sources “on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.” In addition, CAA section 112(d)(2) directs the EPA in promulgating emission standards to “require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable).”

The former concern was first articulated in the 1995 OIAI policy, the latter in the 2018 MM2A policy and subsequent rulemaking.

Today's proposal seeks to reconcile these objectives by recognizing that a facility subject to a MACT standard may reclassify at any time, while requiring a determination by the state or local permitting authority that doing so will not undermine the emissions reductions entailed by the MACT standard, and further ensuring limits taken to reclassify are effective by allowing for federal and citizen enforcement. The EPA proposes the best interpretation of the term "considering controls" in the definition of "major source" in CAA section 112 allows for this reconciliation. Specifically, the EPA is proposing that for a facility seeking to reclassify from major to area source status for purposes of a particular MACT standard, the "controls" that are determinative are those that are proven to be at least as effective at reducing emissions as the MACT standard to which the facility has been subject, and which are subject to federal enforcement as defined in 40 CFR 63.2.

This interpretation of CAA section 112(a)(1) is consistent with the D.C. Circuit decision *NMA v. EPA*, which recognized the word "controls" commonly refers to governmental restrictions but is ambiguous as used in the major source definition. 59 F.3d 1351, 1362 (D.C. Cir. 1995) ("It is common ground that Congress meant the word 'controls' to refer to governmental regulations and not, for instance, operational restrictions that an owner might voluntarily adopt. (We note, however, that the word could be read that broadly, which certainly supports the government's position that the term is not clear on its face.)"). Accordingly, in assessing a reclassified source, the EPA would determine whether safeguards and the enforceability of limits taken to reclassify, or governmental restrictions, are sufficient for the source to no longer qualify as a major source.

In considering the term "controls," the *NMA* court settled on the touchstone of "effectiveness," faulting the EPA for not adequately explaining the relationship of federal enforceability to that core criterion. The Court explained that the EPA was "not obliged to take into account controls that are only chimeras and do not really restrain an operator from emitting pollution[.]" 59 F.3d at 1362, but that the EPA's determination of what constitutes appropriate "controls" should be tied to how well a limit actually restrains a facility's operations in accordance with

CAA section 112. Today's proposal is based on this concept of "effectiveness," and specifically on the reasoning that a limit taken to avoid a MACT standard to which a facility is already subject to cannot be considered an "effective" control if it results in the facility emitting more than it would have under the MACT standard. The EPA is also proposing that the enhanced effectiveness brought about by federal enforceability justifies the requirement that limits taken to avoid a MACT standard be federally enforceable. That is, the EPA is bolstering the effectiveness of PTE limits for reclassified sources by requiring sources to maintain historical emission reductions, and increasing the scope of enforcement to ensure PTE limits are met. The proposal thus employs the concept of "effectiveness" to avoid eroding the purposes of the Act, while recognizing the flexibility the EPA continues to believe exists for facilities to reclassify from major to area status for purposes of a MACT standard.

Today's proposal is also consistent with the purpose of the CAA in general and CAA section 112, in particular. The CAA is intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA section 101(b)(1). CAA section 112 was revised with the 1990 Clean Air Act Amendments after Congress was frustrated with the EPA's slow pace of regulation for sources of hazardous air pollutants, which Congress recognized as a serious public health concern.¹⁸ In enacting CAA section 112, Congress set a broad statutory purpose to reduce the volume of HAP emissions with the goal of reducing the risk from HAP emissions to a level that is protective of even the most exposed and most sensitive subpopulations.¹⁹ Congress therefore

¹⁸ See H.R. Rep. No. 101-490, at 315 (1990) ("In theory, [hazardous air pollutants] were to be stringently controlled under the existing Clean Air Act section 112. However, . . . only 7 of the hundreds of potentially hazardous air pollutants have been regulated by EPA since section 112 was enacted in 1970."); *id.* at 151 (noting that in 20 years, the EPA's establishment of standards for only seven HAP covered "a small fraction of the many substances associated . . . with cancer, birth defects, neurological damage, or other serious health impacts.")

¹⁹ For example, CAA section 112(f)(2) requires the EPA to promulgate standards under the risk review if necessary to "reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million." CAA section 112(f)(2). Similarly, the listing and delisting provisions in CAA section 112 focus on *any* adverse effects to human health, evidencing Congress' concerns with protecting even the most exposed individuals. See e.g., CAA section 112(b) and (c). For further

established a program for major and area sources that would lead to continued reductions of HAP by requiring the EPA to set technology-based MACT standards pursuant to CAA section 112(d)(2) and (3), to perform risk reviews under CAA section 112(f)(2) and to update MACT standards where they fail to provide an ample margin of safety, and to perform technology reviews pursuant to CAA section 112(d)(6) to review and update, as necessary, MACT and GACT standards based on new developments in pollution control technology. Relatedly, CAA section 112(c)(6) required the EPA to identify and ensure emissions standards were in place for source categories that emit specific, particularly harmful HAP, and which were not initially covered following promulgation of the 1990 Clean Air Act Amendments. The structure of CAA section 112 thus includes specific points at which progress towards public health goals are to be assessed. These assessments depend in no small part on the extent to which major sources of HAP are regulated by MACT standards. While Congress did not speak directly to reclassification from major to area sources, the EPA proposes to find it would be contrary to the emission reduction and health protection objectives of the CAA and CAA section 112 to allow sources to increase their emissions after reclassification. Doing so would serve to diminish as opposed to enhance air quality and could potentially lead to increased HAP emissions and thus increased public health risk from exposure. Moreover, CAA section 112(d)(2) directs the EPA in promulgating emission standards to "require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)[.]" If a facility subject to the controls of a major source NESHAP can remove those controls by reducing its PTE to below the 10/25 TPY threshold, this substantially reduces the likelihood that Congress' objective of prohibiting emissions can be achieved.

This proposed framework would not apply to a source that has taken restrictions to limit PTE (*i.e.*, a synthetic minor source) before the source's first

discussion of how the statutory design of CAA section 112 is meant to quickly secure large reductions in HAP emissions from stationary sources and Congress' direction to the EPA emphasize that the EPA should regulate with the most exposed and most sensitive members of the population in mind in order to achieve acceptable levels of HAP emissions see 88 FR 13956, 13963–13966 (March 6, 2023).

compliance date of the applicable major MACT standard. The proposed sufficiency criteria for sources that reclassify from major sources to area sources (*i.e.*, safeguards and federal enforceability) would be applicable to reclassified synthetic minor sources, that is sources that are or were subject to a major source NESHAP, have PTE over the major source threshold, and are taking a restriction so as to limit the PTE below the major source threshold. This proposed framework would not apply, however, to reclassified “true” minor sources—that is sources that modify operations such that they are no longer capable of emitting above the major source threshold; nor would it apply to sources that were never subject to a major source NESHAP. The EPA is specifically requesting comment on whether it is appropriate to differentiate between reclassified synthetic minor and true minor sources, particularly given the proposed justification in this proposal.

This proposal for the EPA to introduce safeguards and federal enforceability for sources that reclassify from area to major source status also differs from the EPA’s former OIAI policy because it would continue to allow sources to reclassify consistent with the 2020 MM2A final rule; however, this proposal would introduce conditions that apply to reclassified sources through their permitting authority. The intent is to create flexibility to meet emission reduction goals that did not exist under the OIAI policy while preventing the potential emissions increases allowed under the current MM2A framework.

Further, the EPA seeks comment on its proposed interpretation of “considering controls” to ensure limits taken by sources to reclassify are sufficiently protective.

1. Safeguards

The EPA is proposing that for those sources that reclassify from major source to area source status under the NESHAP program, any limits relied upon as limiting PTE for operations subject to the NESHAP must ensure emissions do not increase beyond what would have been allowed if the reclassifying source had continued to be subject to the major source NESHAP. The proposed safeguards will apply to sources that reclassify after the effective date of this action, as well as those that have reclassified since the 2018 Wehrum memorandum.

Specifically, we are proposing to codify in a new paragraph, 40 CFR 63.1(c)(6)(iv), that any federally enforceable HAP PTE limitations taken

by a major source to reclassify to area source status must include one of the following control methods or a combination: (1) continue to employ the emission control methods (*e.g.*, control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR); (2) control methods prescribed for reclassification under a specific NESHAP subpart; or (3) emission controls that the permitting authority has reviewed and approved as ensuring the emissions of HAP from units or activities previously covered will not increase above the emission standard or level that was acceptable under the major source NESHAP requirements at the time of reclassification. The record of the permitting authority decision should identify the units and methods and include the data and analysis as well as the determination that MRR is adequate to assure compliance.

The EPA proposes the introduction of safeguards, coupled with federal enforceability, will help to ensure the NESHAP program continues to reduce emissions over time, and that sources subject to the NESHAP program are not able to increase their emissions beyond what the major source NESHAP would have allowed as a result of reclassification and/or evade permit limits that would otherwise prevent them from doing so. The EPA proposes safeguards are needed due to differences in EPA and state requirements for certain types of major and area NESHAP sources, which creates instances where it is feasible that two identical sources within a source category could have significantly different emissions requirements for a given pollutant if one remains a major source and the other reclassifies as an area source. This is particularly true in instances where there are no area source requirements for certain industries.

Under this proposed definition, state and local permitting authorities would be charged with ensuring permitting limits taken for sources to reclassify from major to area source satisfy one of the three criteria listed above. That is, the permitting authority will determine that emissions for a reclassified source will not be above what they would have been had the source remained subject to the major source NESHAP. The EPA continues to consider and seeks comment on the specifics of how state and local permitting authorities should implement this definition and make such determinations. We are soliciting

comments on whether the determination that a source will not emit above what would have been allowed under the major source NESHAP must be based on the same units of measure as the NESHAP had been (*e.g.*, tons per year vs. pounds per hour). This will largely be a case-by-case decision that will rest partly on the type of measurements used, the method of control, and quantity of emissions in question. We are also soliciting comment on whether sources should be required to continue to comply with a specific emissions limit using a specific type of control, especially for sources subject to major source NESHAPs that allow for different control options. We are seeking comment on how to best structure safeguards to ensure that flexibility is provided to permitting authorities making these determinations to allow for improvements in control technology effectiveness or efficiency without compromising the emissions reductions achieved by the NESHAP.

The EPA is seeking comment on additional benefits or drawbacks of safeguards for NESHAP reclassifications. The EPA is also seeking comment on other criteria that will improve the process by which sources apply for, and the permitting authority approves, enforceable permit conditions containing safeguard provisions.

In light of the special attention Congress paid to specific pollutants²⁰ in section 112(c)(6) of the CAA, we are specifically seeking comment on whether additional restrictions are warranted for source categories that are subject to MACT standards for the persistent and bioaccumulative HAP listed pursuant to CAA section 112(c)(6). We believe the proposed safeguards are sufficient to prevent emissions increases but we are seeking comment on whether any of the following additional restrictions are warranted to achieve Congress’s directive that source categories emitting these HAP are subjected to MACT standards under CAA section 112(d)(2) or (d)(4). The first possible restriction we are seeking comment on is one that

²⁰CAA section 112(c)(6) states, in part: “With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4).”

would prevent any sources²¹ subject to a major source NESHAP used to reach the EPA's 90 percent threshold for any of the CAA section 112(c)(6) HAP from reclassifying from major source status to area source status. Another restriction we are considering and seeking comment on is one that would require sources subject to a major source NESHAP to remain subject to the major source NESHAP for emissions of the section 112(c)(6) HAP while allowing those sources source to reclassify and no longer remain subject to the major source NESHAP for emissions of non-112(c)(6) HAP. Finally, we are considering a restriction that would allow such sources to reclassify but would only allow them to use the proposed option in 40 CFR 63.1(c)(6)(iv) that requires a source to "continue to employ the emission control methods (e.g., control device and/or emission reduction practices) required under the major source NESHAP requirements, including previously approved alternatives under the applicable NESHAP and associated monitoring, recordkeeping, and reporting (MRR)". We are seeking comment on all of these additional criteria and any other restrictions on sources or source categories emitting 112(c)(6) HAP that may be warranted.

2. Federal Enforceability

In addition to safeguards, the EPA also proposes that limits taken by sources to reclassify from major to area sources must be federally enforceable as a condition of reclassification.²² Specifically, we are proposing to codify in a new paragraph, 40 CFR 63.1(c)(6)(iii), that, as a condition of reclassification, any PTE limitations taken by a major source to reclassify to area source status must be federally enforceable. The general definition of PTE under 40 CFR 63.2 would not be affected by this proposal to codify a new provision specific to reclassified sources, and as discussed in the following subsection, the EPA proposes to maintain interim revisions introduced to the general definition in the 2020 MM2A final rule. That is, under this proposal, sources that reclassify from major to area source status, would need to take federally

enforceable limitations on PTE as a condition of reclassification. However, all other NESHAP sources would continue to be governed by the general PTE definition under 40 CFR 63.2, which does not require federal enforceability.

As discussed above, in *NMA v. EPA*, the D.C. Circuit faulted the EPA for not adequately explaining the relationship of federal enforceability to the core criteria of "effectiveness." In that case, the EPA argued that federal enforceability allowed the EPA to verify that a source's claimed controls were working as they were supposed to, and that federal enforceability provided the EPA with the means to ensure that any operational restrictions intended to limit emissions were actually implemented. In response to these arguments, the *NMA* Court found "EPA's core justification for its federal enforceability policy [was] the need to avoid the administrative burden that EPA would have to bear were it obliged to evaluate the effectiveness of state and local controls and the desirability of uniformity in environmental protection. . . . If there [was] a closer fit between the notion of 'federal enforceability' and § 112's concerns with crediting effective controls," it was "not evident" from the record before the Court. 59 F.3d at 1364. Today's proposal is based on the EPA's assessment that federal enforceability of limits for reclassified sources significantly enhances the effectiveness of controls because limits taken by sources to reclassify that are enforceable by the federal government and citizens, in addition to state and local permitting authorities, are more likely to ensure compliance. Simply put, ensuring that more entities can bring an enforcement action if a source violates a PTE limit, i.e., EPA, States, Tribes, local government agencies, and citizen groups, will make the limit more effective in controlling HAP emissions.

In the absence of federal enforceability for reclassified sources, the public is reliant on state and local permitting authorities, and citizen groups in certain jurisdictions, to ensure sources comply with PTE limits. While the EPA maintains that state and local enforcement can be an effective means for ensuring compliance with PTE limits for other NESHAP sources and CAA programs (e.g., NSR and title V), given the EPA's heightened concerns surrounding reclassified sources, the EPA proposes that additional oversight is appropriate to increase the effectiveness of controls for reclassified sources. PTE limits for reclassified sources are integral to ensure these

sources are properly classified and are subject to the appropriate federal CAA section 112 requirements. While the EPA intends to address PTE limits more generally in a separate rulemaking as discussed further below, this proposed rulemaking is specific to NESHAP sources that have reclassified from major to area sources, or will do so in the future.

In addition to EPA enforcement, citizen enforcement is another important component of federal enforceability that EPA proposes will enhance enforcement for reclassified source limits. There is considerable variability for citizens to participate in the state and local enforcement of permit terms and other measures to limit emissions across state and local jurisdictions. Whereas Congress granted considerable enforcement authority to citizens under the CAA and other environmental statutes, the ability of citizens to participate in state- and local-only enforcement proceedings is, generally speaking, very limited. The EPA's current understanding is that around one third of states allow for general environmental citizen suits, which are in addition to various media-specific state citizen suit statutes, which provide varying degrees of effectiveness for enforcing permit limits for reclassified sources at issue in this proposal.²³ Accordingly, in many instances, state and local permitting authorities are the only means of enforcement. To help ensure that reclassifying sources do not erode the goals of the CAA section 112 program, the EPA proposes the ability for citizens to enforce permits for such sources is needed. The EPA is seeking comment on the prevalence and effectiveness of citizen suit provisions in state and local enforceable HAP PTE limiting programs. Further, because of limitations on the EPA's and state and local enforcement authorities' budgets and resources and variability in priorities between state and local regulators and the EPA, the ability for citizen enforcement of limits for reclassified sources adds an important component of an effective enforcement regime.

The potential for federal enforcement for reclassified source limits provides an additional incentive for facilities to comply, ensures consistency in protection across jurisdictions, and thereby enhances the effectiveness of controls. This is evidenced in the broad

²¹ See EPA-HQ-OAR-2004-0505-0010 for a list of source categories and corresponding NESHAP subparts used to reach the 90% threshold. See table 1.1 of EPA-HQ-OAR-2004-0505-0006 for the 112(c)(6) emission inventory.

²² 40 CFR 63.2 defines "federally enforceable" in relevant part as "all limitations and conditions that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator."

²³ See P. Flynn & M. Barsa, *State Citizen Suits, Standing, and the Underutilization of State Environmental Law*, 52 *Env'tl. L. Rep.* 10473 (June 2022) (noting that 17 states have general, non-media specific citizen suit statutes, in addition to dozens of media specific state citizen suit laws).

oversight authority to enforce the CAA that Congress granted to the EPA. Courts have recognized the EPA's ability to act to enforce the CAA even when a state has already acted.²⁴ The greater number of agencies or persons that can enforce the requirements, the greater the likelihood is that some action will be brought.²⁵ Indeed, federal enforceability enables the EPA to ensure that sources are abiding by the conditions they have adopted to opt out of federal major source standards; and grants citizens the ability to use the tools Congress provided in the CAA for the same goal. Federal enforcement for reclassified sources creates a clear regulatory structure for EPA and citizen enforcement through the CAA and produces a level playing field on which sources are subject to the same enforcement mechanisms regardless of the state in which they are located.

In contrast, state-only enforceability for reclassified source limits creates significant burdens on the EPA if it were to attempt to enforce a violation of such a limit. In such instances, the EPA would either have to (1) litigate any enforcement issues of PTE limits taken to reclassify to an area source as a general citizen in the state forum (which is only available in states with citizen suit provisions that the EPA could utilize) or (2) only bring cases for violations of major source requirements (as opposed to permit limit exceedances that do not cross the major source threshold). State-only enforcement

eliminates the EPA's use of the administrative enforcement powers granted by Congress that have been an effective and resource-saving means to bring sources into compliance without mounting a full effort enforcing a violation of the major source requirements. Enforcing the requirements of a major source MACT in the face of a facially valid state-only enforceable permit or permit limit that grants the same source area source status by saying a source cannot exceed 9.9 tpy of any HAP (which the EPA does not consider enforceable as a practical matter as a blanket emission limit alone) could create conflicts between what limits a state interprets as sufficient to avoid major source MACT requirements and what limits the EPA interprets as enforceable as a practical matter (e.g., a limit of 9.9 tpy on total HAP by itself is not enforceable as a practical matter). In such an instance a federal court may not be willing to entertain the conflict between the state and EPA in the permit challenge and e.g., dismiss the claim on the grounds of abstention, or remove the permit challenge to state court which may defeat the goal of national consistency of this federal program envisioned by Congress through federal court oversight. Furthermore, challenges to a facially-valid, state-only enforceable permit or permit term could create fairness issues (e.g., reliance on a state's permitting decision) that a source could use in its defense that may prevent the EPA or citizens from even pursuing the enforcement.²⁶ Federal enforceability will help ensure that the safeguard provisions being proposed in this action are enforced for sources that reclassify.

The public notice and comment requirements included in 40 CFR part 63, subpart E provide an additional layer of transparency and accountability in creating HAP PTE limiting mechanisms used to measure compliance after reclassification to ensure they will contain sufficient information to assure compliance. The subpart E process does include requirements for public notice and comment when programs are submitted to the EPA for review and approval. The EPA is seeking comment on the need,

associated burdens, and time required for public notice and comment beyond the process already present in 40 CFR part 63, subpart E. Specifically, we are seeking comments on whether the EPA should require, as an additional condition of reclassification, that every permit containing the provisions required in this proposal used to reclassify from a major source of HAP to an area source of HAP should undergo an individual public notice and comment period. Additionally, we are seeking comment on the public's understanding of the public notice and comment process involved in 40 CFR part 63, subpart E.

For these reasons, we are proposing that limits taken by sources to reclassify from major source to area source must be federally enforceable as defined in 40 CFR 63.2. We are seeking comment on additional benefits or drawbacks of federal enforceability for NESHAP reclassifications.

C. Ministerial Revisions From the 2020 MM2A Final Rule

In the 2020 MM2A final rule, the EPA introduced an interim ministerial revision to the definition of "potential to emit" in 40 CFR 63.2 to remove the word "federally" from the phrase "federally enforceable." As the EPA noted at the time, the revisions did not represent a final decision by the EPA or signal any direction that the EPA is intending to take in a future final action. The EPA is not revisiting this interim revision at this time. As noted in the previous section, the EPA's proposal to introduce federal enforceability for reclassified sources is being proposed as a separate provision from the 40 CFR 63.2 "potential to emit" definition, such that it would only apply to reclassified sources.

In this proposal, the EPA is solely focused on ensuring the sufficiency of permit limits for sources that reclassify from major to area sources. Accordingly, the EPA is not revisiting the interim ministerial revision to the definition of "potential to emit" in 40 CFR part 63 and will address the definition of PTE under 40 CFR part 63 in a separate rulemaking or guidance. Nor is the EPA addressing federal enforceability of PTE limits taken by other NESHAP sources (i.e., sources that are not reclassified sources), nor sources in other programs such as NSR or title V, for which the EPA previously introduced federally enforceable limits, but which may currently be subject to legally and practically enforceable state-law PTE limits. See *NMA v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (remanding but not vacating federal enforceability of PTE

²⁴ See e.g., *Murphy Oil v. EPA*, 143 F.Supp.2d 1054 (W.D. Wis. 2001) (holding in part, the EPA was entitled to pursue an enforcement action under the CAA against a facility despite a prior settlement with the state for a related violation); *United States v. SCM Corp.*, 615 F. Supp. 411 (D. Md. 1985) (holding the EPA could pursue enforcement against a facility for CAA violations after the same facility reached a settlement with the state regulator for related violations, explaining "[i]n a federal system, each person and entity is subject to simultaneous regulation by state and national authority"); see also *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 167 (6th Cir. 1973) ("it is important to note [delegation to the state] does not detract from the Administrator's primary ability to enforce federally the provisions of every state plan against citizens of that state which drew the plan."); cf. *U.S. v. Power Engineering Co.*, 3030 F.3d 1232 (10th Cir. 2002) (deferring to the EPA's reasonable interpretation that the Resource Recovery and Conservation Act (RCRA) allows for the EPA to pursue an enforcement action despite the existence of a separate state enforcement proceeding).

²⁵ Increased enforcement leading to improvements in compliance is supported by the scientific literature. Gray and Shimshack (2011) survey the literature and find that rigorous monitoring and enforcement is a primary motivator for compliance with environmental regulatory requirements. The authors find that enforcement activities can lead to less violations and reductions in emissions. Gray, W.B., & Shimshack, J. P. (2011). The effectiveness of environmental monitoring and enforcement: A review of the empirical evidence. *Review of Environmental Economics and Policy*.

²⁶ For example, courts may exercise the "*Burford* doctrine" under which a federal court may decline to interfere with state proceedings: "(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (internal citations omitted).

limits for NESHAP sources); *CMA v. EPA*, 70 F.3d 637 (D.C. Cir. 1995) (remanding and vacating federal enforceability of PTE limits for NSR sources); *Clean Air Implementation Project v. EPA*, 1996 WL 393118 (D.C. Cir. June 28, 1996) (remanding and vacating federal enforceability of PTE limits for title V sources). The EPA plans to address the definition of PTE in the NESHAP, NSR, title V, and related programs in separate rulemaking or guidance. In the interim, before the EPA completes the future rulemaking or guidance on the definition of PTE across affected programs, the EPA's longstanding interpretation of the court decisions cited previously, and associated policy, remains in effect. Specifically, pursuant to the EPA's guidance the terms "federally enforceable" or "enforceable" as used in general definitions of "potential to emit" and related terms should be read to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency."²⁷ Note, this interpretation does not apply to the term "federally enforceable" as it is being introduced in this proposal as a condition for NESHAP sources to reclassify from major to area source status. Furthermore, to be eligible for consideration in determining PTE, any limitations, whether federally enforceable or not, must be enforceable as a practical matter, meaning both legally and practicably enforceable. To be practicably enforceable, limitations or standards used to constrain PTE must: (1) be technically accurate and specify the portions of the source subject to the limitation or standard; (2) specify the time period for the limitation or standard (e.g., hourly, daily, monthly and/or annual limits such as rolling annual limits); and (3) include a method for determining compliance, including appropriate monitoring, recordkeeping, and reporting.²⁸

²⁷ John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996).

²⁸ See, e.g., John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996); John S. Seitz, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (January 25, 1995); Kathie Stein, "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits" (January 25, 1995); and Terrell E. Hunt and John S. Seitz, "Limiting Potential to Emit in New Source Permitting" (June 13, 1989); "In the Matter of Salt River Project Agricultural Improvement and Power District Aqua Fria Generating Station," Order on Petition No. IX–2022–4 (July 28, 2022); "In the matter of: Yuhuang

The EPA acknowledges that terminology referring to enforceability principles in EPA rules and guidance—such as the Agency's use of the terms "federally enforceable," "enforceable as a practical matter," and "legally and practicably enforceable"—has varied somewhat historically. The EPA specifically solicits comment on terminology used both in this notice and historically and welcomes suggestions for maximizing clarity for regulated entities and the public.

D. What sources will have to ensure all new requirements are met and when will those sources need to comply with the new requirements?

The proposed requirements, once finalized, will apply to any sources that reclassify from major source status to area source status under the NESHAP program, including those that have already reclassified since issuance of the January 25, 2018, Wehrum Memorandum. For sources that have reclassified from major source status to area source status since January 25, 2018, under the NESHAP program and prior to the effective date of the final rule, the changes to 40 CFR part 63 proposed in this action will be effective within 3 years of publication of the final rule. Specifically, sources who reclassified from major source status to area source status since January 25, 2018 must have federally enforceable permit conditions including the safeguards proposed in this action within three years of publication of the final rule in order to maintain area source status. We are specifically seeking comment on whether to apply the proposed requirements to sources that have reclassified since the January 2018 Wehrum memo or whether this action should only apply to sources that reclassify after the effective date of the final rule. We request comments on the impacts of coming into compliance with the proposed requirements for sources that have reclassified since the January 2018 Wehrum memo. For those sources that reclassify after the effective date of the final rule, the proposed requirements will be effective upon reclassification. The process by which state air pollution control agencies can submit HAP PTE limiting mechanisms, such as rule adjustments, rule substitutions, equivalency by permit, or other mechanisms is described in 40 CFR part 63, subpart E for EPA review and approval. Programs that are

Chemical Inc. Methanol Plant," Order on Petition No. VI–2015–03 (Aug. 31, 2016). See also 40 CFR 49.167, definition of "Enforceable as a Practical Matter."

approved pursuant to subpart E are federally enforceable and subpart E describes the necessary criteria for state programs that contain adjustments to CAA section 112 rules, state programs that substitute for CAA section 112 rules, and permit terms and conditions that substitute for CAA section 112 rules. We are seeking comment on the experience state agencies have had getting federally enforceable HAP PTE limiting mechanisms approved under subpart E and any potential hurdles that have prevented or would prevent state air pollution control agencies from submitting mechanisms for approval under 40 CFR part 63, subpart E. We are also seeking comment on the cost incurred by state air pollution control agencies to obtain subpart E approved programs. Given the timelines for EPA review and approval of state programs seeking approval for federally enforceable HAP PTE limiting mechanisms in subpart E, the EPA proposes that three years from publication of the final rule is sufficient time for sources who have chosen to reclassify to obtain federally enforceable HAP PTE limiting permit conditions. The EPA is seeking comment on the time needed for sources that have already reclassified to add such provisions as enforceable permit conditions, to the extent that they do not already exist.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a "significant regulatory action" as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket.

The EPA has not prepared a quantitative analysis of the potential costs and benefits associated with this action because it is highly uncertain which facilities may reclassify in the future as a result of the proposed rule, and any potential emissions changes that result from the added reclassification requirements will also

be highly uncertain.²⁹ Furthermore, the EPA does not expect substantial costs for sources that have already reclassified and have not observed emission changes following a reclassification for this subset of facilities. Based on data available to the agency at this time, sources that have reclassified are unlikely to remove control devices to reduce HAP or take other actions that would increase HAP emissions. However, under the current framework, sources that reclassify in the future could operate in a manner that would increase emissions. This would be inconsistent with the aim of CAA section 112 to achieve lasting emissions reductions across a wide range of industries to protect public health and the environment.

Prior to 2018, the OIAI policy prevented major sources of HAP from reclassifying to area sources of HAP after the first substantive compliance date of a major source NESHAP. The OIAI policy was initially replaced by a January 25, 2018, guidance document, then was formally codified by the 2020 MM2A final rule wherein EPA advocated for a reading of the CAA that suggests that there should be no temporal restrictions on reclassifications.

The 2018 guidance memo and 2020 MM2A final rule allow facilities to reclassify from major sources of HAP to area sources of HAP at any time. Since 2018, about 200 facilities have reclassified, far short of the roughly 2,700 facilities we estimated might reclassify at the time of the 2020 final rule. Due to limited data available to the agency at the time of this proposal, the EPA does not have information regarding whether or how much emissions may have increased at any individual reclassified facilities—though we seek comment on that in this proposal. However, the current framework allows for emissions increases and decreased compliance assurance as all sources are required to

do is obtain a PTE limit below the major source thresholds. We are requesting comment on specific examples of facilities that have had changes in actual emissions since reclassifying. The EPA has not heard about specific additional facilities' plans to reclassify that have not yet done so, but we seek comment on facilities that have considered reclassification but not yet done so and their reasons for waiting. However, it is reasonable to assume that additional reclassifications will occur over time. In the first half of 2023, there have been between zero and two reclassifications per month. We have added the list of reclassifications that have occurred to date at the time of this proposal to the docket for this action.

Currently, sources that reclassify are only required to remain below the major source threshold unless they become subject to an area source NESHAP, which they would have to comply with if it requires more stringent controls than would be needed to keep emissions below the major source threshold. That could lead to increased HAP emissions from sources whose emissions were well below the major source threshold due a major source NESHAP prior to reclassification in the absence of this rule. The EPA seeks to ensure that a reclassified source does not increase emissions because we find that scenario runs counter to CAA section 112's goal of achieving lasting reductions of HAP emissions from major sources, as described earlier in this preamble.

We do not expect significant costs and whether any costs or savings are incurred due to reclassification is very case-specific. We do not possess sufficient information to quantify costs or cost savings for individual facilities but seek comment on costs or cost savings. The costs incurred for a given facility are better attributed to the individual NESHAP rules the facility was subject to prior to reclassification rather than the General Provisions of part 63. Any potential costs for facilities in the future that may choose to reclassify are expected to be negligible for sources that have not yet reclassified and we do not expect sources to reclassify if it will increase their costs.

The final MM2A rule already required electronic notification to the EPA and we are not requiring those sources who have already submitted notifications to resubmit their notification. We are seeking comments from sources who have already reclassified and information about changes in air pollution control devices at these facilities such that costs would be incurred to maintain emissions at a level that was achieved when the source

was previously subject to a major source NESHAP.

We expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. The only potential costs that would be incurred by sources and regulatory authorities would be the costs of preparing and reviewing a source's application for area source status and issuing enforceable PTE limits, respectively, as appropriate.³⁰ In addition, any potential costs associated with the reclassification of major sources as area sources (*i.e.*, application reviews and PTE issuance) may be offset by reduced reporting and recordkeeping obligations for sources that no longer must meet major source NESHAP requirements, depending on case-specific circumstances. Whether any cost or cost savings is incurred by any source choosing to reclassify is highly case specific and we are not providing quantitative estimates of costs in this proposal, however, we have included technical memoranda (*e.g.*, MM2A Cost Memorandum) for the 2020 final MM2A rule and the regulatory impact analysis (RIA) from that rulemaking in the docket for this action to provide illustrative examples of the types of costs and costs savings that may occur due to reclassifications. We are seeking comments on the potential costs or cost savings associated with this proposal and our assumption that any changes to the costs associated with reclassification will be negligible.

While the EPA does not expect this action to directly impact the level of control of any particular NESHAP standards, this proposal is expected to enhance transparency, promote national consistency in EPA and citizen enforcement, and improve compliance assurance through clearer criteria for NESHAP reclassifications. The processes by which state programs and permits are approved under 40 CFR subpart E, includes requirements for public notice and comment as well as creating programs and permits that are federally enforceable by the EPA and citizens. These additional layers of oversight increase the likelihood that sources will continue to effectively operate HAP pollution control equipment and create a framework for the EPA and citizens to pursue enforcement actions if they do not. Additionally, the EPA finds that the safeguards proposed in this action will ensure that HAP emissions reductions

²⁹ In the Regulatory Impact Analysis for the 2020 MM2A Final Rule, the EPA assumed in the primary scenario that all facilities under 75% of the major source HAP emissions threshold that could potentially reclassify would over a 5-year time period from promulgation (2,700 facilities). While we are still within that time frame, the EPA has not seen nearly that many reclassifications occurring since the rule was promulgated. At the time of this proposal, around 200 facilities have reclassified. This represents over 90% fewer reclassifications than our estimate in the 2020 final rule. A list of facilities that have reclassified from major source to area source status at the time of proposal is available in the docket for this action. Therefore, we find the uncertainty in attempting to predict facility reclassification behavior to be too great to warrant an illustrative quantitative assessment of the proposed rule.

³⁰ Illustrative example costs for a regulatory authority reviewing a source's application for area source status was estimated in the 2020 MM2A final rule, which is available in the docket for this action.

are achieved, and the corresponding public health and environmental benefits from decreased HAP emissions, are maintained at sources that reclassify from major sources of HAP to area sources of HAP.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. The proposed amendments to the General Provisions relate to voluntary actions taken by a source after consideration of the net impacts of the action. Therefore, this action would not impose any new information collection burden. The General Provisions do not themselves require any reporting and recordkeeping activities, and no ICR was submitted in connection with their original promulgation or their subsequent amendment. Any recordkeeping and reporting requirements are imposed only through the incorporation of specific elements of the General Provisions in the individual NESHAP, which are promulgated for particular source categories that have their own ICRs. The PRA costs for sources that reclassify will be properly accounted for in the ICRs for the NESHAPs they were subject to.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule relieves regulatory burden or has no net burden on the small entities subject to the rule.

Small entities that are subject to major source NESHAP requirements would not be required to take any action under this proposed rule; any action a source takes to reclassify as an area source would be voluntary. We expect that sources that reclassify will experience cost savings that will outweigh any additional cost of achieving area source status. We do not expect substantial costs for sources that have already reclassified. Sources that reclassify are unlikely to remove control devices to reduce HAP or take other actions that would increase HAP emissions, however, the possibility does exist under the current framework. The final MM2A rule already required electronic notification to the EPA and we are not requiring those sources who have already submitted notifications to

resubmit their notification. We are seeking comments on whether sources who have already reclassified have indeed removed control devices such that costs would be incurred to maintain emissions at a level that was achieved when the source was previously subject to a major source NESHAP. The only potential cost that would be incurred by regulatory authorities would be the cost of reviewing a sources' application for area source status and issuing enforceable PTE limits, as appropriate. No small government jurisdictions operate their own air pollution control permitting agencies, so none would be required to incur costs under the proposed rule. In addition, any costs associated with the reclassification of major sources as area sources (*i.e.*, application reviews and PTE issuance) are expected to be offset by reduced reporting and recordkeeping obligations for sources that no longer must meet major source NESHAP requirements. Whether any cost or cost savings is incurred by any source, including those owned by a small parent company, choosing to reclassify is highly case specific and we are not providing quantitative estimates of costs in this proposal, however, we have included technical memoranda from the 2020 final MM2A rule and the regulatory impact analysis (RIA) from that rulemaking in the docket for this action to provide illustrative examples of the types of costs and cost savings that can occur due to reclassifications. We are seeking comments on the potential costs or cost savings associated with this proposal and our assumption that the any changes to the costs associated with reclassification will be negligible.

Based on the considerations above, we have, therefore, concluded that this action will relieve regulatory burden on net for any regulated small entities that choose to reclassify to area source status.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and

responsibilities among the various levels of government.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. There are two tribes that currently implement title V permit programs and one that implements an approved TIP for minor source permitting, the latter of which also has a major source. As a result, these tribes may have additional permit actions if sources in their jurisdiction seek reclassification to area source status. Any tribal government that owns or operates a source subject to major source NESHAP requirements would not be required to take action under this final rule; the reclassification provisions in the final rule would be strictly voluntary. In addition, achieving area source status would result in reduced burden on any source that no longer must meet major source NESHAP requirements. Under the proposed rule, a tribal government with an air pollution control agency to which we have delegated CAA section 112 authority would be required to review permit applications and to modify permits as necessary. However, any burden associated with the review and modification of permits will be offset by reduced Agency oversight obligations for sources no longer required to meet major source requirements.

For sources located within Indian country, where the EPA is the reviewing authority, unless the EPA has approved a non-federal minor source permitting program or a delegation of the Federal Indian Country Minor NSR Rule, the Federal Indian Country Minor NSR Rule at 40 CFR 49.151 through 49.165 provides a mechanism for an otherwise major source to voluntarily accept restrictions on its PTE to become a synthetic source, among other provisions. The Federal Indian Country Minor NSR Rule applies to sources located within the exterior boundaries of an Indian reservation or other lands as specified in 40 CFR part 49, collectively referred to as "Indian country." See 40 CFR 49.151(c) and 49.152(d). This mechanism may also be used by an otherwise major source of HAP to voluntarily accept restrictions on its PTE to become a synthetic area HAP source. The EPA's Federal Implementation Plan (FIP) program, which includes the Federal Indian Country Minor NSR Rule, provides additional options for particular

situations, such as general permits for specific source categories, to facilitate minor source emissions management in Indian country. Existing sources in Indian country may have PTE limits that preceded the EPA's FIP for minor sources and, for that reason, were issued in a 40 CFR part 71 permit or FIP permitting provision applicable to Indian country.

Consistent with EPA policy, the EPA will offer to consult with the potentially impacted tribes and other tribes upon their request.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not directly regulate any emission source and will not have any direct impact on children's health. The emissions reductions achieved by individual NESHAP are properly accounted for in those individual NESHAP rather than the General Provisions. This action will not change the level of emissions reductions achieved by those NESHAP. While we do not expect this action to have any direct impact on children's health, preventing emissions increases will ensure protections achieved via any NESHAP that a source was subject to at the time of reclassification will provide continued protection achieved by any NESHAP that source was formerly subject to.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We have concluded that this action is not likely to have any adverse energy effects.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that this action does not have disproportionate and adverse human health or environmental effects on communities with environmental justice concerns because it does not establish an environmental health or safety standard. The proposed amendments to the General Provisions are procedural changes and do not impact the technology performance nor level of control of the NESHAP governed by the General Provisions.

While the EPA does not expect this action to directly impact the level of control of any particular NESHAP standards, this proposal is expected to enhance transparency, promote national consistency in EPA and citizen enforcement, and improve compliance assurance through clearer criteria for NESHAP reclassifications. The processes by which state programs and permits are approved under 40 CFR subpart E, includes requirements for public notice and comment as well as creating programs and permits that are federally enforceable by the EPA and citizens. These additional layers of oversight increase the likelihood that sources will continue to effectively operate air pollution control equipment and create a framework for the EPA and citizens to pursue enforcement actions if they do not. Additionally, the EPA finds that the safeguards proposed in this action will ensure that HAP emissions reductions are achieved, and the corresponding public health and environmental benefits from decreased HAP emissions, are maintained at sources that reclassify from major sources of HAP to area sources of HAP.

List of Subjects in 40 CFR Part 63

Environmental protection, Area sources, General provisions, Hazardous air pollutants, Major sources, Potential to emit.

Michael S. Regan,
Administrator.

[FR Doc. 2023–21041 Filed 9–26–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2019–0069; FF09E21000 FXES11110900000 234]

RIN 1018–BE14

Endangered and Threatened Wildlife and Plants; Reclassifying the Virgin Islands Tree Boa From Endangered to Threatened With a Section 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), withdraw the proposed rule to reclassify the Virgin Islands tree boa (listed as *Epicrates monensis granti*) from endangered to threatened under the Endangered Species Act of 1973 (Act), as amended. This withdrawal is based on new information we received during the proposed rule's public comment periods, specifically new survey results that indicate that the Virgin Islands tree boa is likely extirpated from Cayo Ratones. We also realized an error in calculations that reduced the resiliency of the Cayo Diablo population. After evaluating the status of the species following these changes, we find that the species still meets the Act's definition of an endangered species. We have, therefore, determined that reclassification of this species is not appropriate at this time. Accordingly, we also withdraw the proposed 4(d) rule for the Virgin Islands tree boa.

DATES: The proposed rule that published on September 30, 2020 (85 FR 61700), to reclassify the Virgin Islands tree boa as threatened with a rule issued under section 4(d) of the Act is withdrawn on September 27, 2023.

ADDRESSES: This withdrawal, comments on our September 30, 2020, proposed rule, and supplementary documents are available for public inspection on the internet at <https://www.regulations.gov> at Docket No. FWS–R4–ES–2019–0069 and on the Service's website at <https://www.fws.gov/office/caribbean-ecological-services/library>.

FOR FURTHER INFORMATION CONTACT: Edwin E. Muñiz, Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office, P.O. Box 491, Boquerón, PR 00622; telephone 787–405–3641; email: Caribbean_es@fws.gov. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY,

TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

Please refer to the September 30, 2020, proposed rule (85 FR 61700) to reclassify the Virgin Islands tree boa (which we refer to below as “Virgin Islands boa”) for a detailed description of previous Federal actions concerning this species. The September 30, 2020, proposed rule opened a 60-day public comment period, ending November 30, 2020. We then reopened the public comment period for an additional 30 days, from April 26 to May 26, 2021, and held a public hearing on May 12, 2021 (see 86 FR 22005; April 26, 2021). During both comment periods and at the public hearing, we accepted submission of new information and comments on the proposed reclassification.

Summary of Justification for Withdrawal

Based on the comments we received during both of the September 30, 2020, proposed rule’s public comment periods and at the May 12, 2021, public hearing, we made several changes and corrections throughout the species status assessment (SSA) report for the Virgin Islands boa (Service 2022, entire). We received substantive comments regarding the probable extirpation of Virgin Islands boas due to colonization of rats on Cayo Ratonés, and we have included that information in all descriptions of that population and addressed it in our analysis. Results from a survey effort in September 2021 by Puerto Rico Department of Natural and Environmental Resources (DNER) and other boa experts were provided to the Service; no boas or indirect evidence of boas were observed (Puente-Rolón et al. 2021, p. 1) and the DNER affirms that the Cayo Ratonés population is most likely extirpated (DNER 2019, p. 3). We also received comments on the characterization of the resiliency of the Cayo Diablo population, and upon reexamination of the current resiliency score, we realized we made an error in our calculations and subsequently have changed the resiliency of that population from moderately high resiliency to moderate resiliency. Upon incorporating these changes, we have determined that there are not sufficient data to support reclassifying the Virgin Islands boa from an endangered species to a threatened species. Accordingly, we

are withdrawing our proposed rule to reclassify the Virgin Islands boa as a threatened species with a rule issued under section 4(d) of the Act (16 U.S.C. 1531 *et seq.*).

Proposal to Update the Scientific Name of the Virgin Islands Tree Boa

In the September 30, 2020, proposed rule (85 FR 61700), we proposed to correct the Federal List of Endangered and Threatened Wildlife (List) to change the scientific name of the Virgin Islands tree boa from *Epicrates monensis granti* to *Chilabothrus granti* to reflect the currently accepted taxonomy. Virgin Islands boa is a distinct species, not a subspecies, and *Epicrates* is no longer the scientifically accepted genus for this species. However, because we are withdrawing the September 30, 2020, proposed rule (85 FR 61700), the Virgin Islands boa’s scientific name will remain *Epicrates monensis granti* in the List until we, in the future, publish a final rule recognizing the new taxonomy.

Background

A thorough review of the taxonomy, life history, ecology, and overall viability of the Virgin Islands boa is presented in the SSA report (Service 2022, entire; available at <https://www.regulations.gov> under Docket No. FWS–R4–ES–2019–0069). A summary of this information follows.

The Virgin Islands boa is endemic to Puerto Rico and the Virgin Islands (U.S. and British). The Virgin Islands boa is a medium-length, slender, nonvenomous snake. The largest snout-vent lengths (SVL) recorded for the species were 1,066 millimeters (mm; 42 inches (in)) for females and 1,112 mm (44 in) for males (total body lengths 1,203 mm (47 in) and 1,349 mm (53 in), respectively; Tolson 2005, entire), although most specimens range between 600 and 800 mm (24 and 31 in) SVL, with an average mass of 165 grams (6 ounces) (USVI Division of Wildlife, unpublished data). Adults are gray-brown with dark-brown blotches that are partially edged with black, and feature a blue-purple iridescence on their dorsal surface; the ventral surface is creamy white or yellowish white. Newborns, on the other hand, have an almost grayish-white body color with black blotches and weigh 2.0–7.2 grams (0.07–0.25 ounces) with SVLs of 200–350 mm (approx. 8–14 in) (Tolson 1992, entire; Tolson 2018, pers. comm.).

The Virgin Islands boa occurs in subtropical dry forest and subtropical moist forest (Service 2009, p. 11). Subtropical dry forest covers approximately 14 percent (128,420

hectares (ha); 317,332 acres (ac)) of Puerto Rico and the U.S. Virgin Islands (USVI), typically receives less than 750 mm (29 in) rainfall annually (Ewel and Whitmore 1973, pp. 9–20), and is characterized by small (less than 5 meter (m); 16 feet (ft)) deciduous trees with high densities of interlocking branches and vines connecting adjacent tree canopies (Ewel and Whitmore 1973, p. 10). Subtropical moist forest covers approximately 58 percent (538,130 ha; 1,329,750 ac) of Puerto Rico and USVI and typically receives more than 1,100 mm (43 in) of annual rainfall. It is dominated by semi-evergreen and evergreen deciduous trees up to 20 m (66 ft) tall with rounded crowns. The Virgin Islands boa has also been reported to occur in mangrove forest, thicket/scrub, disturbed lower vegetation, and artificial structures (Harvey and Platenberg 2009, p. 114; Tolson 2003, entire).

Habitat needs for Virgin Islands boa can be divided into those for foraging and those for resting. Factors contributing to foraging habitat quality are tree density and connectivity, presence of arboreal and ground-level refugia, prey density, and rat presence/density (Tolson 1988, pp. 234–235). Tree density is more important than tree species or diversity; Virgin Islands boas do not appear to prefer a particular tree species after accounting for availability and structure (Platenberg 2006, pers. comm.). The highest densities of Virgin Islands boas are found where there are few or no exotic predators and high densities of lizard prey (Tolson 1988, p. 233). Resting habitat includes refugia for inactive boas to use during the day. Refugia can be the axils (angles between trunk and branches) of *Cocos* or *Sabal* species, tree holes, termite nests, or under rocks and debris (Tolson 1988, p. 233).

The Virgin Islands boa forages at night by gliding slowly along small branches in search of sleeping lizards (Service 1986, p. 6). The primary prey for the Virgin Islands boa is the Puerto Rican crested anole (*Anolis cristatellus*), and the greatest concentrations of Virgin Islands boas are found where *Anolis* densities exceed 60 individuals/100 m² (1,076 ft²; Tolson 1988, p. 233). Other prey species include ground lizard (*Ameiva exsul*), house mouse (*Mus musculus*), small birds, iguana (*Iguana iguana*) hatchlings, and likely other small animals encountered (MacLean 1982, pp. 30–31, 37; Tolson 1989, p. 165; Tolson 2005, p. 9; Platenberg 2011, p. 3). The Virgin Islands boa may also compete for prey and other niche components with the green iguana (*Iguana iguana*) and the Puerto Rican

racer (*Borikenophis portoricensis*), a snake native to Puerto Rico, USVI, the British Virgin Islands, and surrounding cays (small, low islands).

Much of what is known about the Virgin Islands boa's life history comes from studies in captivity. Lifespans in captivity often exceed 20 years, and sometimes exceed 30 years (7 percent of captive Virgin Islands boas exceeded 30 years of age; Smith 2018c, pers. comm.), but typical lifespans in the wild are not known. Sexual maturity is reached at 2 to 3 years of age (Tolson 1989, pp. 165–166; Tolson and Piñero 1985, pp. 5–6), and boas are still reproductive at up to 20 years of age (Tolson 2018, pers. comm.). Females breed biennially, but studies have suggested that annual breeding may occur in some conditions (Tolson and Piñero 1985, pp. 6–7). Courtship behaviors and copulation occur from February through May, and interaction with conspecifics of the opposite sex appears to be necessary for reproductive cycling (Tolson 1989, p. 165). The gestation period, observed from a single known copulation between two individuals, is about 132 days (Tolson 1989, p. 165). Virgin Islands boas give birth to live young from late August through October to litters of 2 to 10 young, and litter size increases with female body size (Tolson 2018, pers. comm.).

The exact historical distribution of the Virgin Islands boa is unknown, but its present disjointed distribution suggests that it was once more widely distributed across small islands within its range. In the 1970s, when the Virgin Islands boa was listed under the Endangered Species Conservation Act of 1969, its range was identified as three islands: Puerto Rico (no specific site); St. Thomas, USVI (from a single record); and Tortola in the British Virgin Islands (BVI) (from one report) (44 FR 70677; December 7, 1979). When the recovery plan was written (1986), 71 individuals were reported in two populations: one on the eastern side of St. Thomas in the USVI, and one at Cayo Diablo, an offshore islet in Puerto Rico (Service 2009, p. 6).

Currently, the Virgin Islands boa occurs on six islands between Puerto Rico, USVI, and BVI: the eastern Puerto Rican islands of Cayo Diablo and Culebra; Río Grande on the Puerto Rican main island; eastern St. Thomas and an offshore cay in USVI (USVI Cay; an introduced population); and Tortola. The occurrence of a seventh population (also an introduced population) on the Puerto Rican cay of Cayo Ratones is considered uncertain after the reestablishment of rats on this island possibly sometime after 2004 (Service

2022, p. 24). Surveys in April 2018 and September 2021 did not find Virgin Islands boas on Cayo Ratones (Island Conservation 2018, pp. 5, 17; DNER 2021, unpublished data; Puente-Rolón et al. 2021, entire), indicating this population is likely extirpated. Lastly, there is also one report from 2004 that the species occurs on Greater St. James Island in St. Thomas, but nothing is known about that potential population (Dempsey 2019, pers. comm.). In 2009, based on all known populations in Puerto Rico and the USVI, an estimated 1,300–1,500 Virgin Islands boas were thought to occur (Service 2009, p. 8). However, some population numbers used for that estimate are speculative. The current overall estimate of the species is unknown, particularly with the likely extirpation of the Cayo Ratones population. Based on the 2022 SSA report (Service 2022, entire), current population trend estimates for Puerto Rico and USVI are either declining, potentially declining, considered rare, or unknown, and most populations are small or considered rare (Service 2022, p. 30).

The population on Tortola Island, BVI, was confirmed in 2018, but there are no specific data regarding the status of that population (McGowan 2018, pers. comm.). In addition, according to anecdotal reports, the species is thought to occur on Jost Van Dyke, Guana Island, Necker Cay, Great Camanoe, and Virgin Gorda of the BVI (Mayer and Lazell 1988, entire), but data and confirmed observations are limited. There is not enough information to reliably assess the status of Virgin Islands boa populations on those islands, and they are not included in our analysis.

Regulatory and Analytical Framework

Regulatory Framework

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

threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

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

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

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

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

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

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

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

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an “endangered species” or a “threatened species.” In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its

expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the Act's definition of an "endangered species" or a "threatened species" only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

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

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

Analytical Framework

The SSA report (Service 2022, entire) documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing

regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS-R4-ES-2019-0069 on <https://www.regulations.gov>.

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

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision. Our SSA was revised to reflect the comments and new information we received during both of the September 30, 2020, proposed rule's public comment periods and at the May 12, 2021, public hearing.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. In the SSA report (Service

2022, pp. 12–18), we reviewed all factors (*i.e.*, threats, stressors) that could be affecting the Virgin Islands boa now or in the future. However, in this document, we will focus our discussion only on those factors that could meaningfully impact the status of the species. The risk factors affecting the status of the Virgin Islands boa vary from location to location, but generally include habitat loss and degradation from development, introduced predators, sea level rise (SLR) and a changing climate, and public attitudes towards snakes. Where habitat is available but the species is not present (*i.e.*, most of the small islands in the eastern Puerto Rico bank and USVI), it is believed that absences are due to local extirpation resulting from habitat degradation and colonization of exotic species (Service 2009, p. 11). We discuss each of the risk factors below.

Habitat Loss and Degradation—Development

Virgin Islands boas occur on both privately and publicly owned land. Virgin Islands boas have been observed living in developed areas around residences and can persist within developed areas if habitat patches are available, but only if no cats or rats are around (Platenberg and Harvey 2010, p. 552; Platenberg 2011, p. 11). Development continues to impact populations via habitat destruction, especially in St. Thomas, Río Grande (Puerto Rico), and Culebra Island where habitat has declined over decades. In St. Thomas, available habitat has declined due to development for resorts, condos, and related infrastructure, and habitat has become more constricted and isolated (Platenberg and Harvey 2010, p. 552). In Puerto Rico, human populations are decreasing, but residential development continues to increase island-wide, including around protected areas (Castro-Prieto et al. 2017, entire). Consequences of human development on the boa and its habitat not only include habitat loss and fragmentation due to deforestation, but also mortality from vehicular strikes, an increase in predators such as cats and rats, and an increase in human–boa conflicts that results in snakes being killed because of fear of snakes (Service 2022, pp. 13–14).

Predation and Competition

One of the primary threats to Virgin Islands boa populations is predation by exotic mammalian predators, mainly cats and rats, and possibly, to a lesser degree, mongoose. Mongoose are not likely a major predator of Virgin Islands boa because mongoose are terrestrial and active during the day, while Virgin

Islands boas are arboreal and active primarily at night, although not exclusively (Service 2022, p. 14). Feral cats are known to prey upon boas (Tolson 1996b, p. 409), and cat populations around human development are further bolstered by cat feeding stations set up by residents. There has not been direct evidence of rats preying upon Virgin Islands boas, but boas are not present on islands with high densities of rats (Tolson 1986ab, unpaginated; Tolson 1988, p. 235). Rats likely negatively impact Virgin Islands boas by competing for prey, or by inducing behavioral changes in *Anolis* prey that make them less likely to be encountered by boas (Tolson 1988, p. 235). However, rats may also predate on neonate boas (Service 1986, p. 12). Complete predator removal on large, developed islands is challenging, but is feasible on smaller cays. Prior to reintroduction of the boas, rats were eliminated from Cayo Ratones and the USVI Cay using anticoagulant poison (Tolson 1996b, p. 410), although Cayo Ratones was recolonized by rats sometime after August 2004, highlighting the importance of ongoing monitoring for rat presence after a removal project. Cayo Ratones was thought to harbor one of the most robust Virgin Islands boa populations, but during the April 2018 survey (Island Conservation 2018, p. 20) and more recent September 2021 survey (DNER 2021, unpublished data; Puente-Rolón et al. 2021, entire), no boas were found.

Effects of Climate Change, Including Sea Level Rise

Climate change will continue to influence the Virgin Islands boa's viability into the future. Species such as the Virgin Islands boa, that are dependent on specialized habitat types or limited in distribution, are the most susceptible to the impacts of climate change (Byers and Norris 2011, p. 22).

The climate in the southeastern United States and Caribbean has warmed about 2 degrees Fahrenheit (°F) from a cool period in the 1960s and 1970s, and temperatures are expected to continue to rise (Carter et al. 2014, pp. 398–399). Projections for future precipitation trends in this area are less certain than those for temperature, but they suggest that overall annual precipitation will decrease and tropical storms will occur less frequently but with more force (*i.e.*, more category 4 and 5 hurricanes) than historical averages (Carter et al. 2014, pp. 398–399; Knutson et al. 2010, pp. 161–162). With increasing temperatures and decreasing precipitation, drought could negatively influence Virgin Islands boa

populations. After a severe drought in eastern Puerto Rico, *Anolis* populations crashed on Cayo Diablo, and body condition indices of the boas plummeted (Tolson 2018, pers. comm.).

Sea levels are expected to rise globally, ranging from 0.2 m (7.9 in) to over 1 m (3 ft) of SLR by the end of the century (Reynolds et al. 2012, p. 3; Service 2022, p. 38). Local SLR impacts in the Caribbean will depend on how much the ocean level itself rises, and on land subsidence or changes in offshore currents, but are predicted to range from 0.17 m (6.7 in) to 0.38 m (15.0 in) by 2065 (Carter et al. 2014, p. 400; Service 2022, p. 38). Impacts on terrestrial ecosystems can be temporary, via submergence of habitat during storm surges, or permanent, via saltwater intrusion into the water table, inundation of habitat, and erosion. SLR and hurricane storm surges in the Caribbean are predicted to inundate low-lying islands and parts of larger islands (Bellard et al. 2014, pp. 203–204). The low-lying islands of Cayo Diablo and the USVI Cay, which support Virgin Islands boa populations, and the island of Cayo Ratones, where we are uncertain if the island still supports a population, are all vulnerable to SLR and storm surges in the future. Boa populations on Río Grande, Culebra, and St. Thomas are not considered at risk from SLR; however, the three cays (Cayo Diablo, Cayo Ratones, and USVI Cay) could see 10–23 percent loss of low-lying habitat due to SLR over the next 30 years (Service 2022, pp. 38–46). Past and current observations suggest that the species can survive major hurricane events, although lasting impacts to habitat, particularly die-off of vegetation inundated by storm surges, have been observed (Platenberg 2018, pers. comm.; Smith 2018c, pers. comm.; Tolson 1991, pp. 12, 16; Yrigoyen 2018, pers. comm.). Loss of habitat due to storm surge impacts is similar to loss of habitat due to development; loss of low-lying forest habitat could result in decreased habitat availability for the Virgin Islands boas and their prey.

Persecution by Residents

Intentional killing of the more common and larger sized Puerto Rican boa (*Chilabothrus inornatus*) due to fear or superstitious beliefs has been well documented (Bird-Picó 1994, p. 35; Puente-Rolón and Bird-Picó 2004, p. 343; Joglar 2005, p. 146). Thus, Virgin Islands boas in proximity to developed areas where people fear snakes are susceptible to intentional killings. Public encounters with Virgin Islands boas in the more populated Río Grande

and Culebra locations are considered questionable because of the rarity of boas in those populations, and there are only a couple of anecdotal records of intentional killings in those areas (Service 2009, pp. 15–16). In the highly developed east side of St. Thomas, about 10 percent of the Virgin Islands boa records in St. Thomas are from boas killed by humans on private property (Platenberg 2006, unpublished data). We have no further information to assess the magnitude of this threat, but it is likely that intentional killings of Virgin Islands boas still occur, are not being documented, and would be particularly detrimental to rare populations such as in Río Grande. The Service is not aware of a law enforcement case related to the boa in Puerto Rico or the USVI. Populations that occur within protected areas are not expected to be exposed to this threat.

Conservation Measures and Regulatory Mechanisms That Affect the Species

Positive influences on the Virgin Islands boa's viability have been habitat protection, predator control, and captive breeding and reintroduction. Two populations of Virgin Islands boa were reintroduced to protected cays after predators had been removed, one on Cayo Ratones (Puerto Rico) in 1993, and another on USVI Cay in 2002. Founders for these reintroductions came largely from a cooperative captive-breeding program initiated in 1985 between the Service, Puerto Rico DNER, U.S. Virgin Islands Department of Planning and Natural Resources (VIDPNR), and Toledo Zoological Garden. Cayo Diablo provided the founding individuals for the captive population that was reintroduced to Cayo Ratones (6 kilometers (3.5 miles) away from Cayo Diablo), and St. Thomas provided the founding individuals for the captive population that was reintroduced to the USVI Cay (4 kilometers (2.5 miles) away from St. Thomas).

The Cayo Ratones population originated from 41 captive-born boas (offspring of Cayo Diablo boas) released between 1993 and 1995. Post-release survival was high: 82.6 percent of individuals and 89 percent of neonates survived at least 1 year (Tolson 1996a, unpaginated). By 2004, the population had grown to an estimated 500 boas (Tolson et al. 2008, p. 68). Unfortunately, since 2004, Cayo Ratones has been recolonized by rats, and no boas were found during surveys in April 2018 (Island Conservation 2018, pp. 5, 20) and September 2021 (DNER 2021, unpublished data; Puente-Rolón et al. 2021, entire). However, because Virgin Islands boas are difficult to find,

additional surveys are needed to confirm whether a few individuals still persist or to conclude that the population is extirpated.

The USVI Cay reintroduction was initiated with the release of 42 Virgin Islands boas in 2002 and 2003, 11 from captivity and 31 from St. Thomas. Follow-up surveys in 2003–2004 provided an estimate of 168 boas (202 boas per hectare), which researchers suspected was near carrying capacity for the island (Tolson 2005, p. 9). More recent surveys in March 2018 detected 20 boas over 2 nights and 44 boas over 3 nights in November and December 2018 (Smith 2018ab, entire). These recent surveys revealed a potential decline in abundance and the loss of two prey species (Smith 2018ab, entire), possibly as a result of density dependence as the population approached carrying capacity after reintroduction. Differences in survey and analysis methodologies complicate direct comparisons of population size between the surveys. Recent surveys also indicate that there are no rats on the island. Additional surveys are being conducted by the VIDPNR that will help continue to monitor this population and refine current estimates. Factors for consideration for future reintroduction sites include the presence and amount of suitable habitat (*e.g.*, appropriate forest structure, adequate prey base, available refugia), protection status or threat of development, the presence/absence/eradication of exotic predators, and geomorphology that provides protection from SLR and hurricane storm surges that are likely to affect the persistence of low-lying habitat. Potential sites for new introductions have been suggested (Reynolds *et al.* 2015, p. 499) and need to be further assessed, with one offshore island in St. Thomas as one of the primary sites. Some areas may require that predators be removed before boas are reintroduced and future monitoring is ensured to prevent recolonization by predators. In addition to reintroductions to new sites, augmentation of existing populations may prove beneficial or necessary for the persistence of existing populations, particularly on developed islands and cays where predators have become reestablished.

Both Puerto Rico and the USVI have regulatory mechanisms established to protect the species and its habitat through consultation processes for the authorization of development projects. Presently, the Virgin Islands boa is legally protected under Puerto Rico's Commonwealth Law No. 241–1999 (see title 12 of the Laws of Puerto Rico at section 107 *et seq.* (12 L.P.R.A. sec. 107

et seq.)), known as Nueva Ley de Vida Silvestre de Puerto Rico (New Wildlife Law of Puerto Rico). This law has provisions to protect habitat for all wildlife species, including plants and animals. In addition, the species is protected by Puerto Rico DNER's Regulation 6766 (Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extincio'n en el Estado Libre Asociado de Puerto Rico (Regulation 6766: To govern the management of threatened and endangered species in the Commonwealth of Puerto Rico)). Article 2.06 of Regulation 6766 prohibits collecting, cutting, and removing, among other activities, listed plant and animal individuals within the jurisdiction of Puerto Rico (DRNA 2004, entire). In the USVI, Act No. 5665, known as the Virgin Islands' Indigenous and Endangered Species Act, which is enforced by the VIDPNR, protects the species.

Despite these regulations being in place, including the requirement for developers to conduct environmental assessments and mitigate damage to the species and habitat, the regulations have proved difficult to enforce, they are often ignored by developers, and they do not cover all development activities in all Virgin Islands boa habitat (Platenberg 2011, pp. 11–13). For example, in St. Thomas, major permit applications submitted for projects in the coastal zone require an environmental impact assessment that addresses endangered species and protected habitat, but these requirements do not apply to smaller projects or those outside of the coastal zone. Furthermore, as noted in one study, even though a protocol was developed and applied to delineate habitat on protected sites and identify mitigation strategies, the absence of a legal mechanism to enforce mitigation has led to varying success as developers are slow to accept, and often ignore, the mitigation process (Platenberg and Harvey 2010, pp. 551–552).

Most offshore cays within the species' range are part of the Territorial Government or protected as wildlife refuges, thus formally protecting Virgin Islands boa habitat for three of the six populations (*i.e.*, Cayo Diablo, Cayo Ratones, and USVI Cay). Cayo Ratones and Cayo Diablo are included in La Cordillera Natural Reserve managed by the Puerto Rico DNER, and the offshore cay in USVI is managed and protected by the VIDPNR. Furthermore, even though Virgin Islands boa habitat on privately owned land on Culebra Island is currently under pressure from urban and tourism development and

deforestation, more than 1,000 acres of suitable habitat on the island are protected within the Service's Culebra National Wildlife Refuge.

In conclusion, the Virgin Islands boa still faces the threat of development on St. Thomas, Río Grande, and Culebra Island, and regulatory mechanisms addressing this threat are difficult to enforce or do not cover all development actions affecting the species. Human development results in habitat loss from deforestation and fragmentation, mortality from vehicular strikes, and increased predation by cats and rats. In addition, impacts from changes in climate could affect habitat. Drought could negatively influence Virgin Islands boa populations through loss of prey. SLR and storm surges are expected to inundate low-lying islands, such as Cayo Diablo, Cayo Ratones, and the USVI Cay, which currently support Virgin Islands boa populations. Finally, persecution of boas by citizens, due to fear or superstition, can affect individual boas, although there has never been a systematic study of the impact of these events on the overall population.

When considering conservation actions and how they influence the viability of Virgin Islands boa, about half of known localities where Virgin Islands boas occur are on small offshore islets managed for conservation. In addition, predator removal has been successful at smaller cays, such as USVI Cay, although the reestablishment of rats on Cayo Ratones illustrates the need for continued monitoring and removal efforts. Lastly, successful reintroductions of Virgin Islands boas occurred on these islands after the eradication of predators.

Current Condition

For the Virgin Islands boa to maintain viability, its populations, or some portion thereof, must be resilient. For the SSA report (Service 2022, entire), our classification of resiliency relied heavily on habitat characteristics in the absence of a certain population size for most populations or trend estimates. The habitat characteristics we assessed were degree of habitat protection (or, conversely, development risk), presence of introduced predators, and vulnerability to storm surges (Service 2022, p. 31).

Representation can be measured by the breadth of genetic or environmental diversity within and among populations and gauges the probability that a species is capable of adapting to environmental changes. A rangewide genetic analysis of the Virgin Islands boa showed there was little genetic variation; however, the

same study found that each sampled locality had unique mtDNA haplotypes, indicating a lack of gene flow between islands (Rodríguez-Robles et al. 2015, entire). Therefore, in the SSA report we used genetics to delineate representative units.

The species also needs to exhibit some degree of redundancy in order to maintain viability. Catastrophic events that could affect both single and multiple populations of the Virgin Islands boa include drought, hurricanes, and colonization or recolonization of exotic predators. This species occurs in geographically isolated groups and does not disperse from island to island to interact and interbreed; therefore, for purposes of analyzing redundancy, all boas within each island were considered to be individual populations.

Resiliency

Because resiliency is a population-level attribute, the key to assessing it is the ability to delineate populations. As discussed above, we considered all boas within each island to be single populations. On small offshore cays, what we define as a population might consist of a single interbreeding deme

(or subdivision) of Virgin Islands boas. On larger islands, what we define as a population functions more as a metapopulation, with multiple interbreeding groups in isolated habitat patches that may interact weakly via dispersal and recolonization of extirpated patches. Alternately, multiple occupied patches on large islands may be completely isolated from one another (Service 2022, p. 20).

Six island populations were considered: Cayo Diablo, Cayo Ratones, Culebra Island, Río Grande (Puerto Rico), St. Thomas, and USVI Cay (USVI). Further, one or more populations exist in the BVI (e.g., Tortola), but data are severely limited, and for the SSA report, we lacked sufficient data from these islands to incorporate them into our viability analysis. In addition, other populations may occur on other offshore islands in Puerto Rico and USVI, but most have not been searched for Virgin Islands boas and we could not confirm any to be extant at the time we completed our analysis.

Resiliency scores for each population were generated by combining scores for three habitat metrics ((1) protection/development risk, (2) exotic mammals,

and (3) storm surge risk) and one population metric (population size and/or trend, dependent on availability). Each metric was weighted equally, with the overall effect that habitat (three metrics) was weighted three times higher than population size/trend (one metric). For each metric, populations were assigned a score of -1 , 0 , or 1 , as described below in table 1.

The scores were based on the best available information for each population, gathered from the literature and species experts. Monitoring data are scarce. The Virgin Islands boa recovery plan (Service 1986, pp. 16–19) called for periodic monitoring to estimate population sizes and trends, but surveys since then have been few and far between. Survey methodology and reporting have varied from population to population, with survey results given as estimated abundances, estimated densities, or encounter rates per person-hour of searching. The above-described factors in combination contribute to high levels of uncertainty in current and past population sizes, and how they have changed over time. Accordingly, resiliency classifications relied more heavily on habitat conditions than population size and trend estimates.

TABLE 1—DESCRIPTION OF HABITAT AND POPULATION FACTOR SCORES TO DETERMINE THE VIRGIN ISLANDS BOA'S POPULATION RESILIENCY

Score	Habitat metrics			Population metric
	Habitat protection/development risk	Exotic mammals	Storm surge risk	Population Size/Trend *
-1	Habitat not protected, at risk of being developed.	Exotic mammals present	Topography and elevation leaves population vulnerable to storm surges.	Relatively low population size and/or declining trend.
0	Some habitat protected, some at risk of being developed.	Not applicable (not present).	Not applicable (not an issue) ...	• Relatively moderate population size and stable trend, or • High degree of uncertainty in population size/trends.
1	Habitat protected in identified protected area.	Exotic mammals absent	Protected by topography and elevation.	Relatively high population size and/or growth.

* Population size/trend scores are relative and were based on the best available information for each population, gathered from the literature and species experts.

The scores for each population across all metrics were summed, and final population resiliency categories were assigned as follows:

Low Resiliency: -4 to -2

Moderately Low Resiliency: -1

Moderate Resiliency: 0

Moderately High Resiliency: 1

High Resiliency: 2 to 4

Applying these resiliency categories to the six populations of Virgin Islands boa, we determined that two populations have moderate resiliency (Cayo Diablo and USVI Cay), one has moderately low resiliency (Culebra),

two have low resiliency (Río Grande and St. Thomas), and one has no resiliency because it is presumed to be extirpated (Cayo Ratones).

One of the populations classified as having moderate resiliency (Cayo Diablo) occurs on a small offshore island that is free of exotic rats and cats and is protected for conservation. Boas have been consistently found on Cayo Diablo, with an April 2018 survey detecting 10 boas (Island Conservation 2018, entire), one in November 2018 that detected 14 boas (DNER 2018, unpublished data), and one in April

2022 that detected 2 boas (Smith 2022, unpublished data). Using the April 2018 data, extrapolating the density within the transect area (2.9 boas per hectare) to the entire island, the model provides an estimate of 20 boas on the island (95 percent confidence interval 13–39). This number is lower than earlier unpublished survey results; however, direct comparisons cannot be made with past surveys because of different survey and analytical methodologies (Service 2022, p. 23). The previous efforts in 1993 had marked over 250 snakes in Cayo Diablo (Tolson 1996b, p. 411),

with an estimate of approximately 500 boas in the cay. Because of the protected and exotic-mammal-free state of the habitat, but with potentially declining numbers, this Cayo Diablo population is considered to have moderate resiliency to demographic and environmental stochastic events and disturbances (e.g., fluctuations in demographic rates, variation in climatic conditions, illegal human activities).

The USVI Cay population, also on a protected offshore island with no exotic mammals, was also determined to have moderate resiliency. Previous survey efforts from 2004 resulted in a population estimate of 168 snakes (Tolson 2005, p. 9). Recent surveys have revealed a potential decline in abundance and the loss of two prey species (Smith 2018ab, entire), possibly as a result of density dependence as the population approached carrying capacity after reintroduction. Over two separate survey efforts in 2018, researchers found a total of 64 boas, including 10 recaptures (Smith 2018ab, entire). Additional surveys are being conducted by the VIDPNR, and although we do not have the results, additional boas have been detected (VIDPNR 2022, unpublished data).

The Culebra population, with some portions of habitat protected as part of Culebra National Wildlife Refuge, was determined to have moderately low resiliency. Surveys in 2018 found no boas (Island Conservation 2018, p. 20); however, two individuals were documented in February 2019 within the Culebra National Wildlife Refuge (Puente-Rolón and Vega-Castillo 2019, p. 18). In October 2019, another individual was confirmed in an area outside of the refuge (Román 2019, pers. comm.).

Three of the populations (Río Grande, Culebra, and St. Thomas) with moderately low or low resiliency occur on larger and higher elevation islands,

which provide more protection from storm surges, but have more human–boa interactions, habitat loss and fragmentation from development, and exotic cats and rats. Recent surveys in 2018 on Río Grande found three boas (three survey nights) (Island Conservation 2018, p. 20). For St. Thomas, there have been no recent systematic surveys for the species as much of eastern St. Thomas is inaccessible due to private ownership or impenetrable habitat. Previous uncertain conservative estimates for this population ranged from 300 to 400 individuals (Tolson 1991, p. 12) to fewer than 100 individuals based on effective population size estimates (Reynolds et al. 2015, p. 498).

The remaining Cayo Ratones population is classified as not having resiliency because of the recolonization of rats on the island and subsequent declining trend of boas, which we presume to be extirpated, as no boas were detected during recent survey efforts conducted in April 2018 and September 2021.

Representation

A rangewide genetic analysis of Virgin Islands boa showed that there was little genetic variation within the species (Rodríguez-Robles et al. 2015, p. 150), supporting the idea that there is only one representative unit of Virgin Islands boa. However, each sampled island, and each sampled locality within the same island, had unique mtDNA haplotypes, indicating a lack of gene flow between islands/populations (Rodríguez-Robles et al. 2015, p. 150). These results suggest that each population has a different genetic signature, perhaps as a result of genetic adaptations to their local environment, or genetic drift with increasing isolation of small populations. The reintroduction program took this view, and managed captive populations

sourced from Cayo Diablo and St. Thomas separately (Tolson 1996b, p. 412). To minimize the chances of introducing individuals poorly suited to their new environment, the captive population sourced from Cayo Diablo founded the reintroduced population on nearby Cayo Ratones, and the captive St. Thomas population founded the reintroduced population on the nearby USVI Cay (Tolson 1996b, p. 412).

In addition to genetic differences, the six populations also have noticeable phenotypic differences. These are not just limited to coloration differences between USVI and Puerto Rican populations (Tolson 1996b, p. 412); Cayo Diablo reportedly has lighter coloration than the Río Grande and Culebra populations (Tolson 2018, pers. comm.). The Río Grande population also occurs in a different habitat type (subtropical moist forest) than the others (subtropical dry or littoral forest; Tolson 1996b, p. 410).

In light of this information, we considered each of the four natural populations in Puerto Rico and USVI as a representative unit (see table 2, below). The Cayo Diablo population is considered to have moderate resiliency. As this was the source for the now presumed extirpated Cayo Ratones population, there is only one population representing the Cayo Diablo genetic signature. The USVI Cay population was sourced from St. Thomas, so there are two populations with St. Thomas representation, with neither considered to have high resiliency. The other two natural populations, Culebra and Río Grande, both characterized as having moderately low or low resiliency, have not been used for captive breeding and reintroduction, and so have no additional populations on other islands with the same genetic characteristics. Overall, two of four representative units have at least one moderately resilient population.

TABLE 2—REPRESENTATION: NUMBER OF VIRGIN ISLANDS BOA POPULATIONS OF EACH RESILIENCY CLASS IN EACH REPRESENTATIVE UNIT, CORRESPONDING TO NATURAL (NOT INTRODUCED) POPULATIONS, WHICH THEMSELVES CORRESPOND TO UNIQUE GENETIC SIGNATURES

Natural population (genetic signature)	High or moderately high resilience populations	Moderate resilience populations	Low or moderately low resilience populations or extirpated
Cayo Diablo	0	1	1
Culebra	0	0	1
Río Grande	0	0	1
St. Thomas	0	1	1

While currently we could consider the USVI Cay reintroduced population

(currently with moderate resiliency) to be a redundant population sharing the

same genetic signature and adaptive potential as its source population, all

islands occupied by Virgin Islands boa are isolated from each other. Without human-mediated movement of boas between islands, reintroduced populations are expected to diverge genetically from their source populations over time, and may at some point in the future (decades to centuries; Reynolds et al. 2015, entire) be different enough to be considered their own unique representative unit.

Redundancy

Redundancy describes the ability of a species to withstand catastrophic events. Measured by the number of populations, their resiliency (ability of a species to withstand environmental and demographic stochasticity (e.g., wet or dry years)) and their distribution (and connectivity), redundancy gauges the probability that the species has a margin of safety to withstand or return from catastrophic events (such as a rare destructive natural event or episode involving many populations).

The exact historical distribution of the Virgin Islands boa is unknown, but its present disjointed distribution suggests that it was once more widely distributed across small islands within its range, which have been subject to local extirpations from habitat degradation, invasive species, and historical climate and sea level changes. However, for current redundancy, we identified the five populations in Puerto Rico and USVI. As discussed above, two of these populations are considered to have a moderate level of resiliency, which provides some ability to withstand the effects of catastrophic events. However, these populations are considered small and potentially declining or trend unknown. Therefore, overall redundancy for the species is low.

Current Condition Summary

Of the six assessed populations, the Cayo Diablo population and the USVI Cay population have moderate resiliency and the Culebra population has moderately low resiliency. The other three assessed populations currently have low resiliency or are likely extirpated (Cayo Ratones). Redundancy for the species includes populations on five islands in Puerto Rico and USVI, and possibly more in the BVI, although islands in the BVI are not part of this assessment. Representation consists of four representative units, one of which has two populations representing its genetic signature, and two of the four units have populations with moderate levels of resiliency.

The Virgin Islands boa has demonstrated some ability to adapt to

changing environmental conditions over time from both anthropogenic threats (e.g., habitat disturbance due to development) and natural disturbances (e.g., predation and hurricanes). Compared to the species' distribution at the time of listing (see 35 FR 16047; October 13, 1970), which included three locations (Puerto Rico, St. Thomas, and Tortola), the species currently has five populations (potentially more if others are eventually confirmed). Two of the five current populations exhibit moderate levels of resiliency, whereas three exhibit moderately low to low resiliency. One other assessed population is presumed extirpated (Cayo Ratones).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Future Conditions

Because we determined that the current condition of the Virgin Islands boa is consistent with an endangered species (see *Determination of Status*, below), we are not presenting the results of the future scenarios in this withdrawal. For more information on the future condition, future threats, and future scenarios for the Virgin Islands boa, see the SSA report (Service 2022, pp. 36–60).

Determination of Virgin Islands Boa's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of “endangered species” or “threatened species.” The Act defines an “endangered species” as a species that is in danger of extinction throughout all or a significant portion of

its range, and a “threatened species” as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of “endangered species” or “threatened species” because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

Compared to the species' distribution at the time of listing (see 35 FR 16047; October 13, 1970), which included three locations (Puerto Rico, St. Thomas, and Tortola), Virgin Islands boa currently has five extant populations (potentially more if others are eventually confirmed), and one presumed extirpated population. None of the populations exhibit high resiliency; only two of the six current populations exhibit moderate level of resiliency (Cayo Diablo and USVI Cay), one has moderately low resiliency (Culebra), two exhibit low resiliency (Rio Grande and St. Thomas), and one is considered presumed extirpated (Cayo Ratones). Recent surveys indicate that current population trend estimates are either declining, potentially declining, considered rare, or unknown and most populations are small or considered rare (Service 2022, p. 30). Three of the populations are currently impacted by habitat loss and degradation by development, three populations are at high risk from storm surges, and three of five populations are under imminent threat by exotic mammal predation. The species does not have enough current redundancy, lacking highly resilient populations and having only two moderately resilient populations; thus, the species is at risk from catastrophic events. In addition, as the species lacks multiple resilient populations that contribute to the genetic diversity of the species, thus limiting species representation or overall future adaptive capacity.

In summary, due to the new information we received during both of the September 30, 2020, proposed rule's public comment periods and at the May 12, 2021, public hearing, we find that there is no longer sufficient evidence to justify reclassifying the Virgin Islands boa as a threatened species, and the

species still meets the Act's definition of an endangered species. The new information included the probable extirpation of Virgin Islands boas due to colonization of rats on Cayo Ratonés, and an error in calculations affecting the current resiliency score for the Cayo Diablo population. Based on our revised SSA report (Service 2022, entire) incorporating this new information, estimates of current resiliency for the Virgin Islands boa are low, as are estimates for representation and redundancy. The Virgin Islands boa faces a variety of ongoing threats from habitat loss and degradation from development, introduced predators, SLR and a changing climate, and public attitudes towards snakes. Given current rates of resiliency, populations are vulnerable to extirpation from stochastic events, in turn, resulting in concurrent losses in representation and redundancy. For these reasons, the Virgin Islands boa is in danger of extinction throughout its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or

likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Virgin Islands boa is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the Virgin Islands boa warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37578; July 1, 2014) providing that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Virgin Islands boa continues to meet the Act's definition of

an endangered species. Therefore, in accordance with section 4(b)(6)(A)(i)(IV) of the Act, we withdraw our proposed rule to reclassify the Virgin Islands boa as a threatened species with a rule issued under section 4(d) of the Act.

References Cited

A complete list of references cited in this document is available on the internet at <https://www.regulations.gov> and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this document are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Caribbean Ecological Services Field Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023-20946 Filed 9-26-23; 8:45 am]

BILLING CODE 4333-15-P

Notices

Federal Register

Vol. 88, No. 186

Wednesday, September 27, 2023

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

DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID FSA–2023–0011]

Notice of Funds Availability; Emergency Livestock Relief Program (ELRP) 2022

AGENCY: Farm Service Agency, USDA.

ACTION: Notification of funding availability.

SUMMARY: The Farm Service Agency (FSA) is issuing this notice announcing ELRP 2022. This document provides the eligibility requirements and payment calculation for ELRP 2022 assistance. ELRP 2022 will provide payments to producers who faced increased supplemental feed costs as a result of forage losses due to a qualifying drought or wildfire in calendar year 2022, using data already submitted to FSA through the Livestock Forage Disaster Program (LFP).

DATES: *Funding availability:* Implementation will begin September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Kathy Sayers; telephone: (202) 720–6870; email: Kathy.Sayers@usda.gov. Individuals who require alternative means of communication for program information should contact the USDA Target Center at (202) 720–2600 (voice) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Background

Title I of the Disaster Relief Supplemental Appropriations Act, 2023 (Division N of the Consolidated Appropriations Act, 2023; Public Law 117–328) provides \$3,741,715,000 for necessary expenses related to losses of revenue, quality, or production losses of crops (including milk, on-farm stored

commodities, crops prevented from planting in 2022, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of droughts, wildfires, hurricanes, floods, derechos, excessive heat, tornadoes, winter storms, freeze, including a polar vortex, smoke exposure, and excessive moisture occurring in calendar years 2022. From that amount, the Secretary of Agriculture is to use up to \$494.5 million to provide assistance to livestock producers for losses incurred during calendar year 2022 due to qualifying droughts or wildfires. The livestock producers who suffered losses due to drought are eligible for assistance if any area within the county in which the loss occurred was rated by the U.S. Drought Monitor as having a D2 (severe drought) for eight consecutive weeks or a D3 (extreme drought) or higher level of drought intensity during the applicable year.

FSA will assist livestock producers through ELRP 2022. This document provides the eligibility requirements and payment calculation for ELRP 2022, which will assist eligible livestock producers who faced increased supplemental feed costs as a result of forage losses due to a qualifying drought or wildfire in calendar year 2022. For eligible producers, ELRP 2022 will pay for a portion of the increased feed costs in 2022 based on the number of animal units (AU), limited by available grazing acreage, in eligible drought counties. Although LFP payments do not have a direct correlation to the increased feed costs incurred, in order to deliver this assistance quickly, FSA is using certain LFP data and a percentage of the payment made through LFP applications will be used as a proxy for these increased supplemental feed costs to eliminate the requirement for producers to resubmit information for ELRP 2022. The ELRP 2022 payment percentage will be 90 percent for historically underserved farmers and ranchers, and 75 percent for all other producers.

According to the US Drought Monitor, more than one-third of the country was categorically in a “D2 Severe” to “D4 Exceptional” drought throughout the entire calendar year 2022. Extreme drought predominately affected areas highly concentrated with rangeland needed for livestock production. Therefore, drought and wildfire caused

economic hardship on producers that were reliant on rangeland, requiring them to purchase supplemental feed at elevated prices to sustain production throughout 2022 and not just during the normal grazing periods. Due to the excessive and expansive drought and wildfires in 2022, livestock participants experienced the following, they:

- Suffered extreme grazing losses;
- Incurred related costs to purchase feed in the grazing period;
- Purchased feed, beyond normal for a drought year, to supplement grazing and to support livestock outside of the grazing period because forage was not available for harvest and storage; and
- Were faced with higher feed costs during 2022 due to less availability of feed resulting from drought severity and feed cost inflation.

LFP provided payments to eligible owners and contract growers of covered livestock who suffered livestock grazing losses due to qualifying drought or fire¹ not to exceed 5 months during the grazing period based on the documented livestock inventory eligible for LFP. The gross LFP calculated payment represented a 60 percent reimbursement of monthly feed costs for a maximum of 5 months, based on a feed grain equivalent that is calculated according to 7 CFR 1416.207 as specified in 7 U.S.C. 9081(c), which uses the higher of the national average corn price per bushel for the 12- or 24-month period immediately preceding March 1 of the calendar year. Because LFP requires the use of this period, it does not take into account any increases in price paid for supplemental feed during 2022. For LFP, the 2022 monthly value of forage, resulted in an LFP payment rate of \$28.37 per month per eligible animal unit for drought. The rate for fire is

¹ A grazing loss due to drought qualifies for LFP only if the grazing loss occurs on land that is native or improved pastureland with permanent vegetative cover or is planted to a crop planted specifically for the purpose of providing grazing for covered livestock, and the land is physically located in a county rated by the U.S. Drought Monitor as having a D2 intensity for at least 8 consecutive weeks or D3 or D4 intensity at any time during the normal grazing period for the specific type of grazing land or pastureland.

A grazing loss due to fire qualifies for LFP only if the grazing loss occurs on rangeland that is managed by a Federal agency and the eligible livestock producer is prohibited by the Federal agency from grazing the normal permitted livestock on the managed rangeland due to a fire.

See 7 CFR 1416.205 for further information on eligible grazing losses under LFP.

based on the number of fire-restricted days and was not a single rate.

LFP does not compensate for the increased costs of supplemental feed, including during 2022 due to drought and wildfires in 2022.

The actual cost of supplemental feed prices, based on corn, alfalfa, and

soybean meal, increased substantially in 2022, compared to previous years. Using the Dairy Margin Coverage (DMC)² program model for an adequate supplemental feed ratio, the 5-year average cost to maintain 1 AU for one month was \$66.79, compared to the actual average cost from January

through December, 2022 of \$107.51 per month, an increase of 61 percent.

The cost of feeding one AU per month increased in 2022 compared to the 5-year average by \$40.72 (\$107.51 – \$66.79) for livestock producers affected by drought and wildfires, which was not covered by LFP. See Table 1.

TABLE 1—2022 CALCULATED COSTS (DMC MODEL) TO MAINTAIN 1 AU/MONTH

5 Year avg. cost (corn, alfalfa, soybean meal)	2022 Cost (corn, alfalfa, soybean meal)	2022 Increase in cost	2022 LFP payment rate *	ELRP 2022 payment percentage	Gross ELRP 2022 calculated benefit/ month/eligible AU prior to factor	Percentage of increased supplemental feed costs in 2022 compensated by ELRP 2022 prior to factor
\$66.79	\$107.51	\$40.72	\$28.37	75 90	\$21.28 25.53	52.2 62.7

* The 2022 LFP payment rate may be adjusted according to LFP provisions in 7 CFR 1416.207 for mitigated livestock and restricted grazed animal units due to a qualifying fire.

The ELRP 2022 calculated benefit is based on using the LFP payment rate of \$28.37 per animal unit per month, calculated as follows:

75 percent $\times$ \$28.37 = \$21.28
(equivalent to 52.2 percent of increased supplemental feed costs in 2022) and
90 percent $\times$ \$28.37 = \$25.53
(equivalent to 62.7 percent of increased supplemental feed costs in 2022).

To stay within the available funding, ELRP 2022 payments for increased supplemental feed costs in 2022 will be factored initially by 25 percent. If funds remain available after initial payments, a second payment of up to 75 percent may be issued.

Because FSA is using LFP information to generate a reasonable approximation for the costs covered by ELRP 2022, no action is required for eligible producers to receive ELRP 2022 payments.

Definitions

The definitions in 7 CFR parts 718, 1400, and 1416 apply to ELRP 2022, except as otherwise provided in this document. The following definitions also apply.

Average adjusted gross farm income means the average of the person or legal entity's adjusted gross income derived from farming, ranching, and forestry operations for the 3 taxable years preceding the most immediately preceding complete taxable year.

(a) If the resulting average adjusted gross farm income derived from items 1 through 12 of the definition below for "income derived from farming, ranching and forestry operations" is at least 66.66

percent of the average adjusted gross income of the person or legal entity, then the average adjusted gross farm income may also take into consideration income or benefits derived from the following:

(1) The sale of equipment to conduct farm, ranch, or forestry operations; and
(2) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(b) The relevant tax years for ELRP 2022 are 2018, 2019, and 2020.

Beginning farmer or rancher means a farmer or rancher who has not operated a farm or ranch for more than 10 years and who materially and substantially participates in the operation. For a legal entity to be considered a beginning farmer or rancher, at least 50 percent of the interest must be beginning farmers or ranchers.

Income derived from farming, ranching, and forestry operations means income of an individual or entity derived from:

(1) Production of crops, specialty crops, and unfinished raw forestry products;
(2) Production of livestock, aquaculture products used for food, honeybees, and products derived from livestock;
(3) Production of farm-based renewable energy;
(4) Selling (including the sale of easements and development rights) of farm, ranch, and forestry land, water or hunting rights, or environmental benefits;

(5) Rental or lease of land or equipment used for farming, ranching, or forestry operations, including water or hunting rights;

(6) Processing, packing, storing, and transportation of farm, ranch, or forestry commodities including for renewable energy;

(7) Feeding, rearing, or finishing of livestock;

(8) Payments of benefits, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;

(9) Sale of land that has been used for agricultural purposes;

(10) Payments and benefits authorized under any program made available and applicable to payment eligibility and payment limitation rules;

(11) Income reported on Internal Revenue Service (IRS) Schedule F or other schedule used by the person or legal entity to report income from such operations to the IRS;

(12) Wages or dividends received from a closely held corporation, and IC-DISC (Interest Charge Domestic International Sales Corporation) or legal entity comprised entirely of family members when more than 50 percent of the legal entity's gross receipts for each tax year are derived from farming, ranching, and forestry activities as defined in this part; and

(13) Any other activity related to farming, ranching, and forestry, as determined by the Deputy Administrator for Farm Programs (Deputy Administrator).

² ELRP 2022 uses the DMC model to calculate actual feed costs producers experienced in 2022. The DMC formula aims to calculate feed costs to maintain a dairy cow to produce one hundredweight of milk, however FSA is using this model, and converting to maintain 1 animal unit.

DMC, as outlined in 7 CFR part 1430, calculates a national average feed cost using the following three items and are added together:

(1) The product determined by multiplying 1.0728 by the price of corn per bushel;

(2) The product determined by multiplying 0.00735 by the price of soybean meal per ton; and

(3) The product determined by multiplying 0.0137 by the price of alfalfa hay per ton.

LFP means the Livestock Forage Disaster Program under section 1501 of the Agricultural Act of 2014 (7 U.S.C. 9081) and 7 CFR part 1416, subpart C.

Limited resource farmer or rancher means a farmer or rancher who is both of the following:

(1) A person whose direct or indirect gross farm sales did not exceed \$179,000 (the amount applicable to the 2022 program year) in each of the 2019 and 2020 calendar years; and

(2) A person whose total household income was at or below the national poverty level for a family of four in each of the same 2 previous years referenced in paragraph (1) of this definition. Limited resource farmer or rancher status can be determined using a website available through the Limited Resource Farmer and Rancher Online Self Determination Tool through National Resources and Conservation Service at <https://lrftool.sc.egov.usda.gov>.

For an entity to be considered a limited resource farmer or rancher, all members who hold an ownership interest in the entity must meet the criteria in paragraphs (1) and (2) of this definition.

Ownership interest means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering ELRP 2022, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is considered to have a beneficial ownership interest in such legal entity.

Socially disadvantaged farmer or rancher means a farmer or rancher who is a member of a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. For entities, at least 50 percent of the ownership interest must be held by individuals who are members of such a group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

- (1) American Indians or Alaskan Natives;
- (2) Asians or Asian-Americans;
- (3) Blacks or African Americans;
- (4) Hispanics or Hispanic Americans;

(5) Native Hawaiians or other Pacific Islanders; and

(6) Women.

Underserved farmer or rancher means a beginning farmer or rancher, limited resource farmer or rancher, socially disadvantaged farmer or rancher, or veteran farmer or rancher.

U.S. Drought Monitor is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

Veteran farmer or rancher means a farmer or rancher who has served in the Armed Forces (as defined in 38 U.S.C. 101(10)³) and:

(1) Has not operated a farm or ranch for more than 10 years; or

(2) Has obtained status as a veteran (as defined in 38 U.S.C. 101(2)⁴) during the most recent 10-year period.

For an entity to be considered a veteran farmer or rancher, at least 50 percent of the ownership interest must be held by members who have served in the Armed Forces and meet the criteria in paragraph (1) or (2) of this definition.

Wildfire for ELRP 2022 means fire as used in 7 CFR part 1416, subpart C.

Eligible Livestock Producers

Eligible livestock producers for ELRP 2022 are producers with an approved 2022 LFP application. For ELRP 2022, the eligibility criteria applicable to LFP (7 CFR part 1416, subparts A and C) also applies to ELRP 2022, excluding the LFP average adjusted gross income (AGI) limitation. FSA will use livestock inventories, forage acreage, restricted animal units, and grazing days due to fire, and drought intensity levels already reported to FSA for the 2022 Livestock Forage Disaster Program Application⁵ (on form number CCC-853), to determine eligibility and calculate an ELRP 2022 payment, if applicable. Eligible livestock producers are not required to submit an application for ELRP 2022; however, they must have the following additional forms on file

³ The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components.

⁴ The term "veteran" means a person who served in the active military, naval, air, or space service, and who was discharged or released under conditions other than dishonorable.

⁵ As provided in 7 CFR 1416.206 and publicized by FSA, the LFP application deadline for the 2022 program year was January 30, 2023.

with FSA within 60-days of ELRP 2022 deadline announced by the Deputy Administrator to be eligible to receive a payment:

- Form AD-2047, Customer Data Worksheet;
- Form CCC-902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;
- Form CCC-901, Member Information for Legal Entities (if applicable); and
- A highly erodible land conservation (sometimes referred to as HELC) and wetland conservation certification as provided in 7 CFR part 12 (form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification) for the ELRP 2022 producer and applicable affiliates.

For a producer to be eligible for a payment based on the higher payment rate for eligible underserved farmers or ranchers or increased payment limitation as described below, the following must be submitted within 60-days of the ELRP 2022 deadline announced by the Deputy Administrator:

- Form CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, applicable for the 2022 program year⁶; or
- FSA-510, Request for an Exception to the \$125,000 Payment Limitation for Certain Programs, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification, for a legal entity and all members of that entity.

Payment Calculation

The initial ELRP 2022 payment will be equal to the eligible livestock producer's gross 2022 LFP calculated payment⁷ multiplied by the applicable

⁶ An individual who has filed CCC-860 certifying their status as a socially disadvantaged, beginning, or veteran farmer or rancher for a prior program year is not required to submit a subsequent certification of their status for the 2022 program year because an individual's status as socially disadvantaged would not change in different years, and their certification as a beginning or veteran farmer or rancher includes the relevant date needed to determine for what programs years the status would apply. An entity that has filed CCC-860 certifying its status as a socially disadvantaged, beginning, or veteran farmer or rancher for a prior program year is not required to submit a subsequent certification of its status for a later program year unless the entity's status has changed due to changes in membership. Because a producer's status as a limited resource farmer or rancher may change annually depending on the producer's direct and indirect gross farm sales, those producers must submit CCC-860 for each applicable program year.

⁷ The gross LFP calculated payment is the amount calculated according to 7 CFR 1416.207, prior to

ELRP 2022 payment percentage of 90 percent for underserved farmers and ranchers and 75 percent for all other producers multiplied by a 25 percent factor to stay within available funding.⁸ If funds remain available after initial payments, a second payment of up to 75 percent may be issued. For example, an underserved eligible livestock producer's gross 2022 LFP calculation payment is \$10,000 multiplied by the 90 percent ELRP 2022 payment percentage multiplied by the 25 percent factor results in an initial ELRP 2022 payment of \$2,250. The ELRP 2022 payment is intended to represent a reasonable approximation of 63 percent, factored by 25 percent, of the increased supplemental feed costs for that producer in 2022.

Form CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, must be on file with FSA with a certification applicable for the 2022 program year to receive the higher ELRP 2022 payment rate of 90 percent.

FSA will issue ELRP 2022 payments as 2022 LFP applications are processed and approved. If a producer files the CCC-860 or FSA-510 form and the accompanying certification by the deadline announced by the Deputy Administrator but after their ELRP 2022 payment is issued, FSA will recalculate the ELRP 2022 payment and issue the additional calculated amount as applicable.

Payment Limitation

The payment limitation for ELRP 2022 is determined by the person's or legal entity's average adjusted gross farm income (as defined above). Specifically, a person or legal entity, other than a joint venture or general partnership, cannot receive, directly or

indirectly, more than \$125,000 in payments under ELRP 2022 if their average adjusted gross farm income is less than 75 percent of their average AGI for tax years 2018, 2019, and 2020. If at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, and forestry related activities and the participant provides the required certification and documentation, as discussed below, the person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to \$250,000 in ELRP 2022 payments. To receive more than \$125,000 in ELRP 2022 payments, producers must submit form FSA-510, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification. If a producer requesting the \$250,000 payment limitation is a legal entity, all members of that entity must also complete FSA-510 and provide the required certification according to the direct attribution provisions in 7 CFR 1400.105, "Attribution of Payments." If a legal entity would be eligible for the \$250,000 payment limitation based on the legal entity's average adjusted gross farm income but a member of that legal entity either does not complete an FSA-510 and provide the required certification or is not eligible for the \$250,000 payment limitation, the payment to the legal entity will be reduced for the limitation applicable to the share of the ELRP 2022 payment attributed to that member.

A payment made to a legal entity will be attributed to those members who have a direct or indirect ownership interest in the legal entity unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility.

Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

- **First level of ownership:** Any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-level or payment legal entity;
- **Second level of ownership:** Any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part

by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;

- **Third and fourth levels of ownership:** Except as provided in the second-level of ownership bullet above and in the fourth-level of ownership bullet below, any payments made to a legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in the second level of ownership bullet above; and

- **Fourth level of ownership:** If the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that represents the indirect ownership in the first-level or payment legal entity by the fourth-level legal entity.

Payments made directly or indirectly to a person who is a minor child will not be combined with the earnings of the minor's parent or legal guardian.

A producer that is a legal entity must provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members holding an ownership interest in the legal entity. Payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of less than 10 percent, at the first through fourth levels of ownership in the business structure, is not provided to FSA. A legal entity is not eligible to receive ELRP 2022 payments when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of 10 percent or more, at the first through fourth levels of ownership in the business structure, is not provided to FSA.

If an individual or legal entity is not eligible to receive ELRP 2022 payments due to the individual or legal entity failing to satisfy payment eligibility provisions, the payment made either directly or indirectly to the individual or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible individual or ineligible legal entity. Like other programs administered by FSA, payments made to an Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education

any payment reductions for reasons including, but not limited to, sequestration, payment limitation, and the applicant or member of an applicant that is an entity exceeding the average AGI limitation.

⁸ FSA calculates payments based on a higher payment factor for underserved farmers and ranchers (or specific groups included in that term) in several programs, such as Emergency Conservation Program, Emergency Assistance for Livestock, Honeybees, and Farm-raised Fish Program (also known as ELAP), and the Tree Assistance Program. FSA has also used higher payment factors for these producers in several recently announced programs: the Food Safety Certification for Specialty Crops Program, the Organic and Transitional Education and Certification Program, previous ELRP Phase 1, and ERP. In addition, NAP provides a reduced service fee and premium for underserved farmers and ranchers. This approach supports the equitable administration of FSA programs, as underserved farmers and ranchers are more likely to lack financial reserves and access to capital that would allow them to cope with losses due to unexpected events outside of their control.

Assistance Act (25 U.S.C. 5304), will not be subject to payment limitation.

Provisions Requiring Refund to FSA

In the event that any ELRP 2022 payment resulted from erroneous information reported by the producer or if the producer's 2022 LFP payment is recalculated after the ELRP 2022 payment is issued, the ELRP 2022 payment will be recalculated, and the producer must refund any excess payment to FSA, including interest to be calculated from the date of the disbursement to the producer. If FSA determines that the producer intentionally misrepresented information used to determine the producer's ELRP 2022 payment amount, the application will be disapproved and the producer must refund the full payment to FSA with interest from the date of disbursement. Any required refunds must be resolved in accordance with debt settlement regulations in 7 CFR part 3.

General Provisions

General requirements that apply to other FSA-administered commodity programs also apply to ELRP 2022, including compliance with the provisions of 7 CFR part 12, "Highly Erodible Land and Wetland Conservation," and the provisions of 7 CFR 718.6, which address ineligibility for benefits for offenses involving controlled substances. Appeal regulations in 7 CFR parts 11 and 780 and equitable relief and finality provisions in 7 CFR part 718, subpart D, apply to determinations under ELRP 2022. The determination of matters of general applicability that are not in response to, or result from, an individual set of facts are not matters that can be appealed. Such matters of general applicability include, but are not limited to, the ELRP 2022 eligibility criteria and payment calculation.

Participants are required to retain documentation in support of their application for 3 years after the date of approval. Participants receiving ELRP 2022 payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

The Deputy Administrator has the discretion and authority to waive or modify filing deadlines and other

requirements or program provisions not specified in law, in cases where the Deputy Administrator determines it is equitable to do so and where the Deputy Administrator finds that the lateness or failure to meet such other requirements or program provisions do not adversely affect the operation of ELRP 2022. Although producers have a right to a decision on whether they filed applications by the deadline or not, producers have no right to a decision in response to a request to waive or modify deadlines or program provisions. The Deputy Administrator's refusal to exercise discretion to consider the request will not be considered an adverse decision and is, by itself, not appealable.

Any payment under ELRP 2022 will be made without regard to questions of title under State law and without regard to any claim or lien. The regulations governing offsets in 7 CFR part 3 apply to ELRP 2022 payments.

In either applying for or participating in ELRP 2022, or both, the producer is subject to laws against perjury and any penalties and prosecution resulting therefrom, with such laws including but not limited to 18 U.S.C. 1621. If the producer willfully makes and represents as true any verbal or written declaration, certification, statement, or verification that the producer knows or believes not to be true, in the course of either applying for or participating in ELRP 2022, or both, then the producer is guilty of perjury and, except as otherwise provided by law, may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or outside the United States.

For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under ELRP 2022 but only as to beneficiaries who, as a condition of the waiver, agree to apply the ELRP 2022 payments to reduce the amount of the judgment lien. In addition to any other Federal laws that apply to ELRP 2022, the following laws apply: 15 U.S.C. 714; and 18 U.S.C. 286, 287, 371, and 1001.

Paperwork Reduction Act Requirements

In compliance with the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the information collection request has been approved by OMB under the control number of 0503-0028. FSA will collect the information from the livestock producers to qualify for the payment to assist with increased

supplemental feed costs. This NOFA is the one-time announcement of the new ELRP 2022 federal financial assistance funding.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321-4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

As previously stated, ELRP 2022 is providing payments to eligible livestock producers who faced increased supplemental feed costs as a result of forage losses due to a qualifying drought or wildfire in calendar year 2022. The limited discretionary aspects of ELRP 2022 do not have the potential to impact the human environment as they are administrative. Accordingly, these discretionary aspects are covered by the FSA Categorical Exclusions specified in § 799.31(b)(6)(iv) that applies to individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) that applies to safety net programs.

No Extraordinary Circumstances (§ 799.33) exist. As such, the implementation of ELRP 2022 and the participation in ELRP 2022 do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this action and this document serves as documentation of the programmatic environmental compliance decision for this federal action.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Assistance Listing,⁹ to which this document applies is 10.980—Emergency Livestock Relief Program 2022.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender

⁹ See <https://sam.gov/content/assistance-listings>.

expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

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

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

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Zach Ducheneaux,

Administrator, Farm Service Agency.

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DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID FSA-2023-00015]

Notice of Funds Availability; 2021 Emergency Livestock Relief Program (ELRP) Phase 2

AGENCY: Farm Service Agency, USDA.

ACTION: Notification of funding availability.

SUMMARY: The Farm Service Agency (FSA) is issuing this notice announcing ELRP Phase 2. This document provides the eligibility requirements and payment calculation for the second

phase of ELRP assistance. ELRP Phase 2 will provide assistance to eligible livestock producers for the loss of the value of winter forage from the deterioration of grazing cover due to a qualifying drought or wildfire during the 2021 normal grazing period, which has been exacerbated by a continued lack of precipitation. This document also makes a correction and amendment to ELRP Phase 1.

DATES: *Funding availability:*

Implementation will begin September 27, 2023.

FOR FURTHER INFORMATION CONTACT:

Kathy Sayers, telephone: (202) 720-7649; email: Kathy.Sayers@usda.gov. Individuals with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720-2600 (voice) or (844) 433-2774 (toll-free nationwide).

SUPPLEMENTARY INFORMATION:

Background

The Extending Government Funding and Delivering Emergency Assistance Act, (Division B, Title I, Pub. L. 117-43) provides \$10 billion for necessary expenses related to losses of crops (including milk, on-farm stored commodities, crops prevented from planting in 2020 and 2021, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of droughts, wildfires, hurricanes, floods, derechos, excessive heat, winter storms, freeze, including a polar vortex, smoke exposure, quality losses of crops, and excessive moisture occurring in calendar years 2020 and 2021. From the \$10 billion, the Secretary of Agriculture is to use \$750 million to assist producers of livestock for losses incurred during calendar year 2021 due to qualifying droughts or wildfires. The livestock producers who suffered losses due to drought are eligible for assistance if any area within the county in which the loss occurred was rated by the U.S. Drought Monitor as having a D2 (severe drought) for eight consecutive weeks or a D3 (extreme drought) or higher level of drought intensity during the applicable year.

On April 4, 2022, FSA announced that assistance for livestock producers would be provided through ELRP (87 FR 19465-19470).¹ ELRP Phase 1 paid for a portion of eligible producers' increased supplemental feed costs in 2021 based on the number of animal units (AU), limited by available grazing

acreage, in eligible drought counties. In order to deliver this assistance quickly, FSA used certain 2021 Livestock Forage Disaster Program (LFP) data and a percentage of the payment made through LFP applications as a proxy for these increased supplemental feed costs to eliminate the requirement for producers to resubmit information for ELRP Phase 1.

To stay within the available funding, ELRP Phase 1 payments were calculated at 90 percent of the gross LFP calculated payment for underserved farmers and ranchers and 75 percent of the gross LFP calculated payment for all other producers.²

This document provides the eligibility requirements and payment calculation for ELRP Phase 2 assistance. It also corrects an error in the ELRP Phase 1 provisions related to payment eligibility and amends ELRP Phase 1 to be consistent with LFP and ELRP Phase 2.

ELRP Phase 2

For each eligible livestock producer who previously received an ELRP Phase 1 payment, FSA will issue an ELRP Phase 2 payment to assist with losses in the value of winter forage from the deterioration of grazing cover due to a qualifying drought or wildfire during the 2021 normal grazing period, which has been exacerbated by the continued lack of precipitation, using the ELRP Phase 1 payment as a proxy to calculate those losses. ELRP Phase 2 assistance is subject to the same ELRP payment limitation provided in the previous notice of funds availability. Because FSA is using LFP and ELRP Phase 1 information to calculate a producer's ELRP Phase 2 payment and determine eligibility due to a qualifying drought or wildfire during the 2021 normal grazing period, no action is required for eligible

² "Underserved farmer or rancher" means a beginning farmer or rancher, limited resource farmer or rancher, socially disadvantaged farmer or rancher, or veteran farmer or rancher. FSA calculates payments based on a higher payment factor for underserved farmers and ranchers (or specific groups included in that term) in several programs, such as Emergency Conservation Program; Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program; and the Tree Assistance Program. FSA has also used higher payment factors for these producers in several recently announced programs: the Food Safety Certification for Specialty Crops Program, the Organic and Transitional Education and Certification Program, Emergency Relief Program, and Pandemic Assistance Revenue Program. In addition, the Noninsured Crop Disaster Assistance Program provides a reduced service fee and premium for underserved farmers and ranchers. This approach supports the equitable administration of FSA programs, as underserved farmers and ranchers are more likely to lack financial reserves and access to capital that would allow them to cope with losses due to unexpected events outside of their control.

¹ In addition, a clarification to the notice of funds availability for ELRP Phase 1 was published on August 18, 2022 (87 FR 50828-50830).

producers to receive ELRP Phase 2 payments.

For eligible producers, ELRP Phase 2 will provide assistance for a portion of the loss in value of winter grazing in 2021 based on the Phase 1 payment which used the number of AU, limited by available grazing acreage, in eligible drought and wildfire counties. In order to deliver this assistance quickly, FSA is using the ELRP Phase 1 payment calculation data as a proxy to issue an additional payment equal to 20 percent of the ELRP Phase 1 payment to pay for a percentage (44 percent or 52 percent) of the estimated losses in the value of winter forage to eliminate the requirement for producers to resubmit information for ELRP Phase 2.

According to the US Drought Monitor, more than one-third of the country was categorically in a “D2 Severe” to “D4 Exceptional” drought throughout the entire calendar year 2021. Extreme drought predominately affected areas highly concentrated with rangeland needed for livestock production, therefore drought and wildfire caused economic hardship on producers that were reliant on rangeland, requiring them to purchase supplemental feed at elevated prices to sustain production throughout 2021 and not isolated to during the normal grazing periods.

For eligible producers, ELRP Phase 1 compensated 57 to 69 percent of the calculated increased supplemental feed costs. Due to the excessive and expansive drought and wildfires in 2021, these livestock participants suffered extreme grazing losses that were not concentrated only to the normal grazing periods which directly impacted winter grazing. According to

USDA’s September 28, 2021, Weekly Weather and Crop Bulletin (see <https://www.fsa.usda.gov/programs-and-services/emergency-relief/index>), “on August 29, rangeland and pastures were rated more than one-half very poor to poor in every state along and northwest of a line from California to Minnesota,” that is generally the same area that was determined eligible for 2021 LFP and ELRP Phase 1. According to the report, pasture and range conditions for the week ending September 25, 2021, for the states that triggered for LFP in 2021 and received ELRP Phase 1 assistance, rated 46 percent poor to very poor conditions going into the winter grazing months. The weekly weather data in the bulletin indicated the percentage of normal precipitation at that time in those areas was 79.4 percent, which results as a direct indicator of a 20.6 percent negative impact to winter forage availability beginning in October 2021. LFP calculated the monthly value of forage in 2021, which based on corn prices was \$31.18 per AU per month. A 20.6 percent decrease to normal precipitation equates to a \$6.42 impact (\$31.18 × 20.6 percent) per AU per month.

An additional factor that contributed to the lack of winter grazing availability during the 2021 drought was the lack of optimal grazing use. Recommended grazing use rates or percentages commonly used by the Natural Resource Conservation Service and university extension services provide that a grazing plan should allow for vigorous plant regrowth following a period of grazing and never have more than 50 percent use during the major growing season,

and not more than 65 percent use during the dormant season or slowed growth period to maintain or improve range ecological condition and rangeland health, reduce soil erosion, as well as improve livestock performance. The drought and wildfire impact to the losses to winter grazing were not considered when developing ELRP Phase 1 but have been determined to be significant and, after considering funding limitations, FSA will compensate for the estimated impact of winter forage availability on eligible livestock producers at 52 percent and 44 percent for underserved farmers and ranchers and for all other farmers and ranchers, respectively.

Therefore, for eligible producers, the ELRP Phase 2 payment will be equal to 20 percent of the 2021 gross ELRP Phase 1 payment to compensate for the loss of winter grazing directly affected by the drought and wildfire conditions during the normal grazing period that continued to be exacerbated by conditions in the final quarter of 2021, which was not compensated by LFP or ELRP Phase 1. The payment per AU per month is calculated as follows:

- 20 percent of \$16.84 = \$3.37 (equivalent to 52 percent of the calculated winter grazing loss per month per AU based on percentage of normal precipitation as of October 1, 2021) for underserved farmers and ranchers, and
- 20 percent of \$14.03 = \$2.81 (equivalent to 44 percent of the calculated winter grazing loss per month per AU based on percentage of normal precipitation as of October 1, 2021) for all other farmers and ranchers.

TABLE 1—REVIEW OF 2021 ELRP PHASE 1 CALCULATED ASSISTANCE

ELRP Phase 1 assistance for increased supplement feed costs			
2021 LFP monthly value of forage	2021 LFP payment rate—60% per month (max 5 months) *	2021 ELRP Phase 1 payment percentage	Gross 2021 ELRP Phase 1 calculated benefit per month per eligible AU
\$31.18	\$18.71	75 90	\$14.03 16.84

TABLE 2—2021 ELRP PHASE 2 CALCULATED ASSISTANCE

ELRP Phase 2 assistance for winter grazing losses in relation to % of normal precipitation on October 1, 2021				
Gross 2021 ELRP Phase 2 calculated benefit (20% of Phase 1 payment) per month per eligible AU	Oct 1% of normal precipitation	Result of % impact to winter grazing beginning Oct 1	\$ Impact to winter grazing per month per AU on Oct 1 (\$31.18 × 20.6%)	% 2021 ELRP Phase 2 assistance coverage of winter grazing loss per month per eligible AU
\$2.81	79.4	20.6	\$6.42	44

TABLE 2—2021 ELRP PHASE 2 CALCULATED ASSISTANCE—Continued

ELRP Phase 2 assistance for winter grazing losses in relation to % of normal precipitation on October 1, 2021				
Gross 2021 ELRP Phase 2 calculated benefit (20% of Phase 1 payment) per month per eligible AU	Oct 1% of normal precipitation	Result of % impact to winter grazing beginning Oct 1	\$ Impact to winter grazing per month per AU on Oct 1 (\$31.18 × 20.6%)	% 2021 ELRP Phase 2 assistance coverage of winter grazing loss per month per eligible AU
3.37				52

* The 2021 LFP payment rate may be adjusted according to LFP provisions in 7 CFR 1416.207 for mitigated livestock and restricted grazed AU due to a qualifying fire.

Because FSA is using ELRP Phase 1 payment information to generate a reasonable approximation for the loss covered by ELRP Phase 2, no action is required for eligible producers to receive these payments. If funding remains available after initial payments, an additional payment(s) may be issued, not to exceed 80 percent of the calculated winter grazing loss per AU per month based on the percentage of normal precipitation data as of October 1, 2021.³

Definitions

The definitions in 7 CFR parts 718, 1400, and § 1416.202 apply to ELRP Phase 2, except as otherwise provided in this document. The following definitions also apply.

Average adjusted gross farm income means the average of the person or legal entity's adjusted gross income derived from farming, ranching, and forestry operations for the 3 taxable years preceding the most immediately preceding complete taxable year.

(a) If the resulting average adjusted gross farm income derived from items 1 through 12 of the definition of income derived from farming, ranching and forestry operations is at least 66.66 percent of the average adjusted gross income of the person or legal entity, then the average adjusted gross farm income may also take into consideration income or benefits derived from the following:

- (1) The sale of equipment to conduct farm, ranch, or forestry operations; and
- (2) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(b) The relevant tax years for the 2021 program year are 2017, 2018, and 2019.

Beginning farmer or rancher means a farmer or rancher who has not operated a farm or ranch for more than 10 years and who materially and substantially

participates in the operation. For a legal entity to be considered a beginning farmer or rancher, at least 50 percent of the interest must be beginning farmers or ranchers.

Income derived from farming, ranching, and forestry operations means income of an individual or entity derived from:

- (1) Production of crops, specialty crops, and unfinished raw forestry products;
- (2) Production of livestock, aquaculture products used for food, honeybees, and products derived from livestock;
- (3) Production of farm-based renewable energy;
- (4) Selling (including the sale of easements and development rights) of farm, ranch, and forestry land, water or hunting rights, or environmental benefits;
- (5) Rental or lease of land or equipment used for farming, ranching, or forestry operations, including water or hunting rights;
- (6) Processing, packing, storing, and transportation of farm, ranch, forestry commodities including renewable energy;
- (7) Feeding, rearing, or finishing of livestock;
- (8) Payments of benefits, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;
- (9) Sale of land that has been used for agricultural purposes;
- (10) Payments and benefits authorized under any program made available and applicable to payment eligibility and payment limitation rules;
- (11) Income reported on Internal Revenue Service (IRS) Schedule F or other schedule used by the person or legal entity to report income from such operations to the IRS;
- (12) Wages or dividends received from a closely held corporation, and Interest Charge Domestic International Sales Corporation (IC-DISC) or legal entity comprised entirely of family members when more than 50 percent of

the legal entity's gross receipts for each tax year are derived from farming, ranching, or forestry activities as defined in this part; and

(13) Any other activity related to farming, ranching, and forestry, as determined by the Deputy Administrator for Farm Programs (Deputy Administrator).

LFP means the Livestock Forage Disaster Program under section 1501 of the Agricultural Act of 2014 (7 U.S.C. 9081) and 7 CFR part 1416, subpart C.

Limited resource farmer or rancher means a farmer or rancher who is both of the following:

- (1) A person whose direct or indirect gross farm sales did not exceed \$179,000 (the amount applicable to the 2021 program year) in each of the 2018 and 2019 calendar years; and
- (2) A person whose total household income was at or below the national poverty level for a family of four in each of the same two previous years referenced in paragraph (1) of this definition. Limited resource farmer or rancher status can be determined using a website available through the Limited Resource Farmer and Rancher Online Self Determination Tool through National Resources and Conservation Service at <https://lrftool.sc.egov.usda.gov>.

For an entity to be considered a limited resource farmer or rancher, all members who hold an ownership interest in the entity must meet the criteria in paragraphs (1) and (2) of this definition.

Ownership interest means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering ELRP, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a

³ FSA is using an 80 percent threshold similar to the Coronavirus Food Assistance Program 2 (also known as CFAP 2) which provided pandemic assistance payments to livestock contract growers to cover not more than 80 percent of revenue losses.

beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is considered to have a beneficial ownership interest in such legal entity.

Socially disadvantaged farmer or rancher means a farmer or rancher who is a member of a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. For entities, at least 50 percent of the ownership interest must be held by individuals who are members of such a group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

- (1) American Indians or Alaskan Natives;
- (2) Asians or Asian-Americans;
- (3) Blacks or African Americans;
- (4) Hispanics or Hispanic Americans;
- (5) Native Hawaiians or other Pacific Islanders; and
- (6) Women.

Underserved farmer or rancher means a beginning farmer or rancher, limited resource farmer or rancher, socially disadvantaged farmer or rancher, or veteran farmer or rancher.

Veteran farmer or rancher means a farmer or rancher who has served in the Armed Forces (as defined in 38 U.S.C. 101(10))⁴ and:

- (1) Has not operated a farm or ranch for more than 10 years; or
- (2) Has obtained status as a veteran (as defined in 38 U.S.C. 101(2))⁵ during the most recent 10-year period.

For an entity to be considered a veteran farmer or rancher, at least 50 percent of the ownership interest must be held by members who have served in the Armed Forces and meet the criteria in paragraph (1) or (2) of this definition.

Wildfire for ELRP Phase 2 means fire as used in 7 CFR part 1416, subpart C.

Eligible Livestock Producers

Eligible livestock producers for ELRP Phase 2 are producers with an approved 2021 LFP application who received an ELRP Phase 1 payment. For ELRP Phase 2, the eligibility criteria applicable to LFP (7 CFR part 1416, subparts A and C) also applies, excluding the LFP average adjusted gross income (AGI) limitation. FSA will use livestock inventories, forage acreage, restricted

AU and grazing days due to fire, and drought intensity levels already reported to FSA for the 2021 Livestock Forage Disaster Program Application⁶ (form number CCC-853), and the ELRP Phase 1 payment to determine eligibility and calculate a ELRP Phase 2 payment. Eligible livestock producers are not required to submit an application for ELRP Phase 2; however, if not already on file, they must have the following additional forms on file with FSA within 60-days of ELRP Phase 2 deadline announced by the Deputy Administrator to be eligible to receive a payment:

- Form AD-2047, Customer Data Worksheet;
- Form CCC-902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;
- Form CCC-901, Member Information for Legal Entities (if applicable); and
- A highly erodible land conservation (sometimes referred to as HELC) and wetland conservation certification as provided in 7 CFR part 12 (form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification) for the ELRP Phase 2 producer and applicable affiliates.

For a producer to be eligible for a payment based on the higher payment rate for eligible underserved farmers or ranchers or increased payment limitation as described below, the following must be submitted within 60-days of the ELRP Phase 2 deadline announced by the Deputy Administrator:

- Form CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, applicable for the 2021 program year;⁷ or
- FSA-510, Request for an Exception to the \$125,000 Payment Limitation for Certain Programs, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification, for a legal entity and all members of that entity.

⁶ As provided in 7 CFR 1416.206 and publicized by FSA, the LFP application deadline for the 2021 program year was January 31, 2022.

⁷ A producer who has filed CCC-860 certifying their status as a socially disadvantaged, beginning, or veteran farmer or rancher for a prior program year is not required to submit a subsequent certification of their status for the 2021 program year because a producer's status as socially disadvantaged would not change in different years, and their certification as a beginning or veteran farmer or rancher includes the relevant date needed to determine for what programs years the status would apply. Because a producer's status as a limited resource farmer or rancher may change annually depending on the producer's direct and indirect gross farm sales, those producers must submit CCC-860 for each applicable program year.

Payment Calculation

The ELRP Phase 2 payment will be equal to the eligible livestock producer's gross 2021 ELRP Phase 1 payment⁸ multiplied by 20 percent. The same percentage will be applied to underserved farmers and ranchers and all other producers. If funding remains available after initial payments, an additional payment(s) may be issued, not to exceed 80 percent of the calculated winter grazing loss per AU per month based on the percentage of normal precipitation data as of October 1, 2021.

For example, a livestock producer's gross 2021 ELRP Phase 1 calculated payment of \$10,000 is multiplied by 20 percent, resulting in an ELRP Phase 2 payment of \$2,000. This ELRP Phase 2 payment is intended to represent a reasonable approximation of 44 to 52 percent of the calculated winter grazing loss per AU per month based on the percentage of normal precipitation data as of October 1, 2021.

FSA will issue ELRP Phase 2 payments as 2021 ELRP Phase 1 payments are processed and approved. If a producer files the CCC-860 Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification or FSA-510 form and the accompanying certification by the deadline announced by the Deputy Administrator but after their ELRP Phase 2 payment is issued, FSA will recalculate the ELRP Phase 1 and Phase 2 payment and issue the additional calculated amount as applicable until the ELRP deadline announced by the Deputy Administrator.

Payment Limitation

The payment limitation for ELRP is determined by the person's or legal entity's average adjusted gross farm income (as defined above). Specifically, a person or legal entity, other than a joint venture or general partnership, cannot receive, directly or indirectly, more than \$125,000 in payments under ELRP if their average adjusted gross farm income is less than 75 percent of their average AGI for tax years 2017, 2018, and 2019. If at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry related activities and the participant provides the required certification and documentation, as discussed below, the person or legal

⁸ The gross ELRP Phase 1 calculated payment is the amount calculated according to the ELRP Phase 1 NOFA, prior to any payment reductions for reasons including, but not limited to, sequestration, payment limitation, and the applicant or member of an applicant that is an entity exceeding the average AGI limitation.

⁴ The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components.

⁵ The term "veteran" means a person who served in the active military, naval, air, or space service, and who was discharged or released under conditions other than dishonorable.

entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to \$250,000 in ELRP payments.

To receive more than \$125,000 in ELRP payments, producers must submit form FSA-510, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification. If a producer requesting the \$250,000 payment limitation is a legal entity, all members of that entity must also complete FSA-510 and provide the required certification according to the direct attribution provisions in 7 CFR 1400.105, "Attribution of Payments." If a legal entity would be eligible for the \$250,000 payment limitation based on the legal entity's average adjusted gross farm income but a member of that legal entity either does not complete an FSA-510 and provide the required certification or is not eligible for the \$250,000 payment limitation, the payment to the legal entity will be reduced for the limitation applicable to the share of the ELRP payment attributed to that member.

A payment made to a legal entity will be attributed to those members who have a direct or indirect ownership interest in the legal entity unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility.

Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

- *First level of ownership:* Any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-level or payment legal entity;

- *Second level of ownership:* Any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;

- *Third and fourth levels of ownership:* Except as provided in the second-level of ownership bullet above and in the fourth-level of ownership bullet below, any payments made to a

legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in the second level of ownership bullet above; and

- *Fourth level of ownership:* If the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that represents the indirect ownership in the first-level or payment legal entity by the fourth-level legal entity.

Payments made directly or indirectly to a person who is a minor child will not be combined with the earnings of the minor's parent or legal guardian.

A producer that is a legal entity must provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members holding an ownership interest in the legal entity. Payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of less than 10 percent, at the first through fourth levels of ownership in the business structure, is not provided to FSA. A legal entity is not eligible to receive ELRP payments when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of 10 percent or more, at the first through fourth levels of ownership in the business structure, is not provided to FSA.

If an individual or legal entity is not eligible to receive ELRP payments due to the individual or legal entity failing to satisfy payment eligibility provisions, the payment made either directly or indirectly to the individual or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible individual or ineligible legal entity. Like other programs administered by FSA, payments made to an Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304), will not be subject to payment limitation.

Provisions Requiring Refund to FSA

If any ELRP payment resulted from erroneous information reported by the producer or if the producer's 2021 LFP payment is recalculated after the ELRP Phase 1 payment or ELRP Phase 2 payment is issued, the ELRP payment will be recalculated, and the producer must refund any excess payment to

FSA. This includes interest to be calculated from the date of the disbursement to the producer. If FSA determines that the producer intentionally misrepresented information used to determine the producer's ELRP payment amount, the application will be disapproved and the producer must refund the full payment to FSA with interest from the date of disbursement. Any required refunds must be resolved in accordance with debt settlement regulations in 7 CFR part 3.

General Provisions

General requirements that apply to other FSA-administered commodity programs also apply to ELRP, including compliance with the provisions of 7 CFR part 12, "Highly Erodible Land and Wetland Conservation," and the provisions of 7 CFR 718.6, which address ineligibility for benefits for offenses involving controlled substances. Appeal regulations in 7 CFR parts 11 and 780 and equitable relief and finality provisions in 7 CFR part 718, subpart D, apply to determinations under ELRP. The determination of matters of general applicability that are not in response to, or result from, an individual set of facts are not matters that can be appealed. Such matters of general applicability include, but are not limited to, the ELRP eligibility criteria and payment calculation.

Participants are required to retain documentation in support of their application for 3 years after the date of approval. Participants receiving ELRP payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

The Deputy Administrator has the discretion and authority to waive or modify filing deadlines and other requirements or program provisions not specified in law, in cases where the Deputy Administrator determines it is equitable to do so and where the Deputy Administrator finds that the lateness or failure to meet such other requirements or program provisions do not adversely affect the operation of ELRP. Although producers have a right to a decision on whether they filed applications by the deadline or not, producers have no right to a decision in response to a request to waive or modify deadlines or program

provisions. The Deputy Administrator's refusal to exercise discretion to consider the request will not be considered an adverse decision and is, by itself, not appealable.

Any payment under ELRP will be made without regard to questions of title under State law and without regard to any claim or lien. The regulations governing offsets in 7 CFR part 3 apply to ELRP payments.

In either applying for or participating in ELRP, or both, the producer is subject to laws against perjury and any penalties and prosecution resulting therefrom, with such laws including but not limited to 18 U.S.C. 1621. If the producer willfully makes and represents as true any verbal or written declaration, certification, statement, or verification that the producer knows or believes not to be true, in the course of either applying for or participating in ELRP, or both, then the producer is guilty of perjury and, except as otherwise provided by law, may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or outside the United States.

For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under ELRP but only as to beneficiaries who, as a condition of the waiver, agree to apply the ELRP payments to reduce the amount of the judgment lien.

In addition to any other Federal laws that apply to ELRP, the following laws apply: 15 U.S.C. 714; and 18 U.S.C. 286, 287, 371, and 1001.

ELRP Phase 1

FSA announced ELRP Phase 1 in a NOFA published on April 4, 2022 (87 FR 19465–19470). This document corrects an error in that NOFA and amends ELRP Phase 1 related to the requirement to provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members holding an ownership interest in a legal entity. The ELRP Phase 1 NOFA provided that “the eligibility criteria applicable to LFP . . . also applies to ELRP Phase 1,” which would include notification of interest provisions applicable to LFP.

LFP is subject to the payment eligibility provisions of 7 CFR part 1400, including the notification of interest requirements. When the ELRP Phase 1 NOFA was published, the provisions in § 1400.107 required a legal entity to provide the names, addresses, ownership share, and valid taxpayer

identification numbers of the members holding an ownership interest in order to receive any LFP payment. This is how FSA has been implementing ELRP Phase 1, consistent with LFP prior to January 2023, despite certain conflicting language in the ELRP Phase 1 NOFA that appears to permit partial ELRP payments to be issued after reduction in proportion to a member's share if the required information was not provided to FSA.

On January 11, 2023, FSA published a final rule (88 FR 1862–1892) that removed § 1400.107 and added a new § 1400.10, which specified that for certain FSA programs, including LFP, payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of less than 10 percent, at or above the fourth level of ownership in the business structure, is not provided to USDA. The provisions in § 1400.10 also specify that a legal entity will not be eligible to receive payment when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest of 10 percent or greater at, or above the fourth level of ownership in the business structure, is not provided to USDA. This change was made retroactive to the 2020 program year for LFP.

This document amends ELRP Phase 1 to be consistent with these provisions of § 1400.10 that currently apply to LFP for the 2021 program year, and which also apply to ELRP Phase 2.

Paperwork Reduction Act Requirements

In compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35), the information collection request for ELRP Phase 2 has been approved by OMB under the control number 0503–0028. FSA will collect the information from the livestock producer to qualify for the payment to assist with the loss of winter grazing. This NOFA is the one-time announcement of the new ELRP Phase 2 federal financial assistance. For the ELRP Phase 1 correction, there is no new information collection required.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

As previously stated, ELRP Phase 2 is providing payments to eligible livestock producers for loss of the value of winter forage from the deterioration of grazing cover due to a qualifying drought or wildfire during the 2021 normal grazing period, which has been exacerbated by a continued lack of precipitation. The limited discretionary aspects of ELRP do not have the potential to impact the human environment as they are administrative. Accordingly, these discretionary aspects are covered by the FSA categorical exclusions specified in § 799.31(b)(6)(iv) that applies to individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) that applies to safety net programs.

No Extraordinary Circumstances exist under § 799.33. As such, the implementation of ELRP and the participation in ELRP do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this action and this document serves as documentation of the programmatic environmental compliance decision for this federal action.

Federal Assistance Programs

The title and number of the Federal assistance program, as found in the Assistance Listing⁹ (formerly referred to as the Catalog of Federal Domestic Assistance), to which this document applies is 10.148—Emergency Livestock Relief Program.

USDA Non-Discrimination Policy

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

⁹ See <https://sam.gov/content/assistance-listings>.

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

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

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

Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2023-21088 Filed 9-26-23; 8:45 am]

BILLING CODE 3410-05-P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS-2023-0021]

Notice of Request to Renew an Approved Information Collection: Egg Products Hazard Analysis and Critical Control Point and Sanitation Standard Operating Procedures

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to request renewal of the approved information collection regarding egg products Hazard Analysis and Critical Control Point (HACCP) and Sanitation Standard Operating Procedures (Sanitation SOPs). There are no changes to the information

collection. The approval for this information collection will expire on January 31, 2024.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- **Federal eRulemaking Portal:** This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to <https://www.regulations.gov>. Follow the on-line instructions at that site for submitting comments.

- **Mail:** Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250-3700.

- **Hand- or courier-delivered submittals:** Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350-E, Washington, DC 20250-3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS-2023-0021. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to <https://www.regulations.gov>.

Docket: For access to background documents or comments received, call (202) 937-4272 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250-3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250-3700; (202) 937-4272.

SUPPLEMENTARY INFORMATION: *Title:* Egg Products Hazard Analysis and Critical Control Point and Sanitation Standard Operating Procedures

OMB Number: 0583-0172.

Expiration Date of Approval: January 31, 2024.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). This statute mandates that FSIS protect the public by verifying that egg products are safe, wholesome, and properly labeled and packaged.

FSIS is requesting renewal of the approved information collection regarding egg products HACCP and Sanitation SOPs. There are no changes to the information collection. The approval for this information collection will expire on January 31, 2024.

FSIS requires official plants to develop and maintain HACCP plans and Sanitation SOPs, as well as various transaction records. The plant maintains on file the name and a brief resume of the HACCP trained individuals who participate in the hazard analysis and subsequent development of the HACCP plans. Plants develop written HACCP plans that include: identification of hazards reasonably likely to occur in the production process; identification and description of the critical control point (CCP) for each identified hazard; specification of the critical limit which may not be exceeded at the CCP, and, if appropriate, a target limit; description of the monitoring procedure or device to be used; description of the corrective action to be taken if the limit is exceeded; description of the records which would be generated and maintained regarding this CCP; and description of the facility verification activities and the frequency at which they are to be conducted. The adequacy of a plant's HACCP plan must be reassessed at least annually and whenever changes occur that could affect the hazard analysis or alter the HACCP plan.

Each processor is also required to develop and maintain a Sanitation SOP. The Sanitation SOP specifies the cleaning and sanitizing procedures for all equipment and facilities involved in the production of every product. As part of the Sanitation SOP, a plant employee records results of daily sanitation checks at the frequencies stated in the Sanitation SOP. The burden of documenting the adherence to the Sanitation SOP is based on three factors: Recording, reviewing, and storage. Recording encompasses conducting and inscribing the finding from an observation and filing of the document produced.

FSIS has made the following estimates based upon an information collection assessment:

Respondents: Official egg products plants.

Estimated No. of Respondents: 132.

Estimated No. of Responses: 138,596.

Estimated Total Annual Burden on Respondents: 76,280 hours.

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. Copies of this information collection

assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 937–4272.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: <https://www.fsis.usda.gov/federal-register>.

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update*, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: <https://www.fsis.usda.gov/subscribe>. Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights

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

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; the USDA TARGET Center at (202) 720–2600 (voice and TTY); or the Federal Relay Service at (800) 877–8339.

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

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

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

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

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Paul Kiecker,

Administrator.

[FR Doc. 2023–21053 Filed 9–26–23; 8:45 am]

BILLING CODE 3410–DM–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a meeting via ZoomGov on Wednesday, December 6, 2023, from 12 p.m.–1 p.m. Mountain Time, for the purpose of reviewing the latest draft of their report on education adequacy on Native American students.

DATES: The meeting will take place on:

- Wednesday, December 6th from 12 p.m.–1 p.m. MT.

ADDRESSES: Zoom Link to Join (Audio/Visual): <https://www.zoomgov.com/meeting/register/vJlscuupqj4sEoFQejzbCiKrTbUtS7VZ28>.

FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO), at bpeery@usccr.gov or (202) 701–1376.

SUPPLEMENTARY INFORMATION:

Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Specialist, at atrevino@usccr.gov at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Brooke Peery at bpeery@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 701–1376.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlGAAQ>.

Please click on the “Meeting Details” and “Documents” links. Persons interested in the work of this Committee are also directed to the Commission’s website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or street address.

Agenda

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Committee Discussion
- IV. Public Comment
- V. Adjournment

Dated: September 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–21085 Filed 9–26–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a meeting via ZoomGov on Tuesday, November 14, 2023, from 12 p.m.–1 p.m. Mountain Time, for the purpose of reviewing the latest draft of their report on education adequacy on Native American students.

DATES: The meeting will take place on:

- Tuesday, November 14th from 12:00 p.m.–1:00 p.m. MT.

ADDRESSES: Zoom Link to Join (Audio/Visual): <https://www.zoomgov.com/meeting/register/vJltd-GgqzkiE6wNel8wNiMQd6Dd7xsKcaw>.

FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO), at bpeery@usccr.gov or (202) 701–1376.

SUPPLEMENTARY INFORMATION:

Committee meetings are available to the public through the videoconference link

above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Specialist, at atrevino@usccr.gov at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Brooke Peery at bpeery@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 701–1376.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlGAAQ>.

Please click on the “Meeting Details” and “Documents” links. Persons interested in the work of this Committee are also directed to the Commission’s website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or street address.

Agenda

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Committee Discussion
- IV. Public Comment
- V. Adjournment

Dated: September 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–21084 Filed 9–26–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Wednesday, October 25, 2023, at 3:30 p.m. Atlantic Time/Eastern Time. The purpose is to continue discussion on their project on the civil rights impacts of the Insular Cases in Puerto Rico.

DATES: October 25, 2023, Wednesday, at 3:30 p.m. (AT and ET):

ADDRESSES: Meeting will be held via Zoom.

Registration Link (Audio/Visual): <https://tinyurl.com/457y6474>.

Join by Phone (Audio Only): 1–833 435 1820 USA Toll Free; Meeting ID: 160 944 8040#.

FOR FURTHER INFORMATION CONTACT:

Email Victoria Moreno, Designated Federal Officer at vmoreno@usccr.gov, or by phone at 434–515–0204.

SUPPLEMENTARY INFORMATION: This meeting will take place in Spanish with English interpretation. This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email ebonor@usccr.gov at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the

regional office within 30 days following the meeting. Written comments may be emailed to Victoria Moreno at vmoreno@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at 1-312-353-8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via www.facadatabase.gov under the Commission on Civil Rights, Puerto Rico Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Coordination Unit at ebonor@usccr.gov.

Agenda

1. Welcome & Roll Call
2. Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: September 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-21087 Filed 9-26-23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a meeting via ZoomGov on Tuesday, October 17, 2023, from 12 p.m.–1 p.m. Mountain Time, for the purpose of reviewing the latest draft of their report on education adequacy on Native American students.

DATES: The meeting will take place on:
• Tuesday, October 17th from 12 p.m.–1 p.m. MT.

ADDRESSES: Zoom Link to Join (Audio/Visual): <https://www.zoomgov.com/meeting/register/vJltce2qrjgpGWpQCCbYAm3LFOwY9N7E-OM>.

FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO), at bpeery@usccr.gov or (202) 701-1376.

SUPPLEMENTARY INFORMATION:

Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Specialist, at atrevino@usccr.gov at least 10 business days prior to the meeting.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Brooke Peery at bpeery@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at (202) 701-1376.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlGAAQ>.

Please click on the "Meeting Details" and "Documents" links. Persons interested in the work of this Committee are also directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Unit office at the above email or street address.

Agenda

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Committee Discussion
- IV. Public Comment
- V. Adjournment

Dated: September 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-21086 Filed 9-26-23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Maine Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Maine Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a virtual monthly meeting on Thursday, October 12, 2023, at 12 p.m. (ET) to discuss next steps related to their report and Committee term.

DATES: Thursday, October 12, 2023; at 12 p.m. (ET)

ADDRESSES: The meetings will be held via Zoom.

Zoom Link (Audio/Visual): <https://tinyurl.com/5yr4dsby>; password: USCCR-ME.

Join by Phone (Audio Only): 1-833-435-1820 USA toll-free; Meeting ID: 161 655 9331#.

FOR FURTHER INFORMATION CONTACT:

Mallory Trachtenberg, Designated Federal Official at mtrachtenberg@usccr.gov or via phone at 202-809-9618.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email ebonor@usccr.gov at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be

emailed to Mallory Trachtenberg at mtrachtenberg@usccr.gov. Persons who desire additional information may contact the Regional Programs Coordination Unit at 1-312-353-8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via www.facadatabase.gov under the Commission on Civil Rights, Maine Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Coordination Unit at ebhor@usccr.gov.

Agenda

- I. Welcome & Roll Call
- II. Discussion: Next Steps for the Committee
- III. Public Comment
- IV. Adjournment

Dated: September 22, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023-21083 Filed 9-26-23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-864]

Pure Magnesium in Granular Form From the People's Republic of China: Continuation of Antidumping Duty Order

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on pure magnesium in granular form from the People's Republic of China (China) would likely lead to the continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of this AD order.

DATES: Applicable September 15, 2023.

FOR FURTHER INFORMATION CONTACT: Charles Doss, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-4474.

SUPPLEMENTARY INFORMATION:

Background

On November 19, 2001, Commerce published in the *Federal Register* the AD order on pure magnesium in granular form from China.¹ On February 1, 2023, the ITC instituted,² and Commerce initiated,³ the fourth sunset review of the *Order*, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). As a result of its review, Commerce determined that revocation of the *Order* would likely lead to the continuation or recurrence of dumping, and therefore, notified the ITC of the magnitude of the margins of dumping likely to prevail should the *Order* be revoked.⁴

On September 15, 2023, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the *Order* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.⁵

Scope of the Order

There is an existing AD order on pure magnesium from the People's Republic of China.⁶ The scope of this order excludes pure magnesium that is already covered by the existing order on pure magnesium in ingot form, and currently classifiable under item numbers 8104.11.00 and 8104.19.00 of the Harmonized Tariff Schedule of the United States (HTSUS).

The scope of this *Order* includes imports of pure magnesium products, regardless of chemistry, including, without limitation, raspings, granules, turnings, chips, powder, and briquettes, except as noted above.

Pure magnesium includes: (1) products that contain at least 99.95 percent primary magnesium, by weight

¹ See *Antidumping Duty Order: Pure Magnesium in Granular Form from the People's Republic of China*, 66 FR 57936 (November 19, 2001) (*Order*).

² See *Pure Granular Magnesium from China; Institution of a Five-Year Review*, 88 FR 6784 (February 1, 2023).

³ See *Initiation of Five-Year (Sunset) Reviews*, 88 FR 6700 (February 1, 2023).

⁴ See *Pure Magnesium in Granular Form from the People's Republic of China: Final Results of Expedited Fourth Sunset Review of the Antidumping Duty Order*, 88 FR 37014 (June 6, 2023), and accompanying Issues and Decision Memorandum.

⁵ See *Pure Granular Magnesium from China*, 88 FR 63616 (September 15, 2023) (*ITC Final Determination*).

⁶ See *Notice of Antidumping Duty Orders: Pure Magnesium from the People's Republic of China, the Russian Federation and Ukraine; Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium from the Russian Federation*, 60 FR 25691 (May 12, 1995).

(generally referred to as "ultra pure" magnesium); (2) products that contain less than 99.95 percent but not less than 99.8 percent primary magnesium, by weight (generally referred to as "pure" magnesium); (3) chemical combinations of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight, that do not conform to an "ASTM Specification for Magnesium Alloy" ⁷ (generally referred to as "off specification pure" magnesium); and (4) physical mixtures of pure magnesium and other material(s) in which the pure magnesium content is 50 percent or greater, but less than 99.8 percent, by weight. Excluded from this *Order* are mixtures containing 90 percent or less pure magnesium by weight and one or more of certain non-magnesium granular materials to make magnesium-based reagent mixtures. The non-magnesium granular materials of which Commerce is aware used to make such excluded reagents are: lime, calcium metal, calcium silicon, calcium carbide, calcium carbonate, carbon, slag coagulants, fluorspar, nepheline syenite, feldspar, aluminum, alumina (Al₂O₃), calcium aluminate, soda ash, hydrocarbons, graphite, coke, silicon, rare earth metals/mischmetal, cryolite, silica/fly ash, magnesium oxide, periclase, ferroalloys, dolomitic lime, and colemanite. A party importing a magnesium-based reagent which includes one or more materials not on this list is required to seek a scope clarification from Commerce before such a mixture may be imported free of antidumping duties.

The merchandise subject to this *Order* is currently classifiable under item 8104.30.00 of the HTSUS. Although the HTSUS subheading is provided for convenience and customs purposes, our written description of the scope of this *Order* is dispositive.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Order*. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

⁷ The meaning of this term is the same as that used by the American Society for Testing and Materials in its Annual Book of ASTM Standards: Volume 01.02 Aluminum and Magnesium Alloys.

The effective date of the continuation of the *Order* will be September 15, 2023.⁸ Pursuant to section 751(c)(2) of the Act and 19 CFR 351.218(c)(2), Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to fifth anniversary of the date of the last determination by the ITC.

Administrative Protective Order (APO)

This notice also serves as a final reminder to parties subject to an APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

Notification to Interested Parties

This five-year (sunset) review and this notice are in accordance with sections 751(c) and 751(d)(2) of the Act and published in accordance with section 777(i) of the Act, and 19 CFR 351.218(f)(4).

Dated: September 20, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–20940 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–893]

Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2022–2023

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

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that all exporters subject to this administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from the People's Republic of China (China) are part of the China-wide entity because they did not demonstrate their eligibility for a separate rate. The period

of review (POR) is February 1, 2022, through January 31, 2023.

DATES: Applicable September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Colin Thrasher, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3004.

SUPPLEMENTARY INFORMATION:

Background

On February 1, 2005, Commerce published in the *Federal Register* the antidumping duty order on shrimp from China.¹ On February 2, 2023, Commerce published in the *Federal Register* a notice of opportunity to request an administrative review of the *Order*.² On April 11, 2023, based on timely requests for an administrative review, Commerce initiated this administrative review with respect to 139 exporters.³ Subsequently, we released U.S. Customs and Border Protection (CBP) data to interested parties for comment.⁴ We received timely comments from the Ad Hoc Shrimp Trade Action Committee (AHSTAC).⁵

We did not receive a no-shipment statement, separate rate application (SRA), or separate rate certification (SRC) from any company subject to this review that had an active separate rate during the POR.⁶

Scope of the Order

The scope of the *Order* includes certain frozen warmwater shrimp and

prawns, whether wild caught (ocean harvested) or farm raised (produced by aquaculture), head on or head off, shell on or peeled, tail on or tail off,⁷ deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the *Order*, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the *Order*. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the *Order*.

Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.1020); (2) shrimp and prawns generally classified in the Pandalidae family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell on or peeled (HTSUS subheadings 0306.23.0020 and 0306.23.0040); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.0510); (5) dried shrimp and prawns; (6) Lee Kum Kee's shrimp sauce; (7) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.1040); and (8) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and

¹ See *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China*, 70 FR 5149 (February 1, 2005) (*Order*).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List*, 88 FR 7071 (February 2, 2023).

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 21609 (April 11, 2023).

⁴ See Memorandum, “Release of U.S. Customs and Border Protection Data,” dated May 10, 2023.

⁵ See AHSTAC's Letter, “Domestic Producers' Comments Regarding Respondent Selection,” dated May 17, 2023.

⁶ We received a timely no-shipment certification from Zhanjiang Regal Integrated Marine Resources Co., Ltd. (Zhanjiang Regal). Zhanjiang Regal is excluded from the *Order* with respect to merchandise manufactured and exported by Zhanjiang Regal. See *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Administrative Review; 2011–2012*, 78 FR 56209, 56210 (September 12, 2013). Zhanjiang Regal submitted a no-shipment certification for exports outside the above combination. However, because Zhanjiang Regal has not established its eligibility for a separate rate, outside of the excluded combination noted above, we preliminarily continue to consider it to be part of the China-wide entity.

⁷ “Tails” in this context means the tail fan, which includes the telson and the uropods.

⁸ See *ITC Final Determination*.

peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product’s total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this *Order* are currently classified under the following HTSUS subheadings:

0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, 1605.29.10.10, 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, and 0306.17.0042. These HTSUS subheadings are provided for convenience and for customs purposes only; the written description of the scope of this *Order* is dispositive.⁸

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.213.

Preliminary Results of Review

Because none of the 139 companies subject to this review submitted a no-shipment certification to maintain a separate rate, an SRA, or a SRC,⁹ Commerce preliminarily determines

they have not demonstrated their eligibility for separate rate status. As such, Commerce preliminarily determines that these 139 companies are part of the China-wide entity.

China-Wide Entity

Commerce’s policy regarding conditional review of the China-wide entity applies to this administrative review.¹⁰ Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the China-wide entity.¹¹ Because no review of the China-wide entity is being conducted, the China-wide entity’s entries subject to the review, and the rate applicable to the China-wide entity, is not subject to change as a result of this review. The China-wide entity rate is 112.81 percent.¹²

Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments, filed electronically via Enforcement and Compliance’s Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), within 30 days after the date of publication of these preliminary results of review.¹³ ACCESS is available to registered users at <https://access.trade.gov>. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.¹⁴ Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.¹⁵

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant

Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain: (1) the party’s name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to those issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.¹⁶ Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date. An electronically filed hearing request must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline.

Assessment Rates

Upon issuance of the final results of this review, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.¹⁷ We intend to instruct CBP to liquidate entries containing subject merchandise exported by the companies under review that we determine in the final results to be part of the China-wide entity at the current rate for the China-wide entity (*i.e.*, 112.81 percent).

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) for previously investigated or reviewed Chinese and non-Chinese exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding;

⁸ On April 26, 2011, Commerce amended the *Order* to include dusted shrimp, pursuant to the court decision in *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010), and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp. See *Certain Frozen Warmwater Shrimp from Brazil, India, the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 FR 23277 (April 26, 2011); see also *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam*, Inv. Nos. 731–TA–1063, 1064, 1066–1068 (Review), USITC Pub. 4221 (March 2011).

⁹ See Appendix.

¹⁰ See *Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

¹¹ *Id.*

¹² See *Order*, 83 FR at 512.

¹³ See 19 CFR 351.309(c)(1)(ii).

¹⁴ See 19 CFR 351.309; see also 19 CFR 351.303 (for general filing requirements).

¹⁵ See *Temporary Rule Modifying AD/CVD Service Requirements Due to Covid-19, Extension of Effective Period*, 85 FR 41363 (July 10, 2020).

¹⁶ See 19 CFR 351.310(d).

¹⁷ See 19 CFR 351.212(b)(1).

(2) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.*, 112.81 percent); and (3) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any briefs, within 120 days of publication of these preliminary results of review, pursuant to section 751(a)(3)(A) of the Act.

Notification to Importers

This notice also serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213(h)(1) and 19 CFR 351.221(b)(4).

Dated: September 21, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Operations.

Appendix

Companies Not Eligible for a Separate Rate

1. Allied Kinpacific Food (Dalian) Co.
2. Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd./Allied Pacific Food (Dalian) Co., Ltd.
3. Anhui Fuhuang Sungem Foodstuff Group Co., Ltd.
4. Asian Seafoods (Zhanjiang) Co., Ltd.
5. Beihai Anbang Seafood Co., Ltd.
6. Beihai Boston Frozen Food Co., Ltd.
7. Beihai Evergreen Aquatic Product Science and Technology Company Limited
8. Beihai Tianwei Aquatic Food Co. Ltd.
9. Changli Luquan Aquatic Products Co., Ltd.
10. Chengda Development Co Ltd.
11. Colorful Bright Trade Co., Ltd.
12. Dalian Beauty Seafood Company Ltd.
13. Dalian Changfeng Food Co., Ltd.
14. Dalian Guofu Aquatic Products and Food

- Co., Ltd.
15. Dalian Haiqing Food Co., Ltd.
16. Dalian Hengtai Foods Co., Ltd.
17. Dalian Home Sea International Trading Co., Ltd.
18. Dalian Philica International Trade Co., Ltd.
19. Dalian Rich Enterprise Group Co., Ltd.
20. Dalian Shanhai Seafood Co., Ltd.
21. Dalian Sunrise Foodstuffs Co., Ltd.
22. Dalian Taiyang Aquatic Products Co., Ltd.
23. Dandong Taihong Foodstuff Co., Ltd.
24. Dongwei Aquatic Products (Zhangzhou) Co., Ltd.
25. Ferrero Food
26. Fujian Chaohui Group
27. Fujian Chaowei International Trading
28. Fujian Dongshan County Shunfa Aquatic Product Co., Ltd.
29. Fujian Dongwei Food Co., Ltd.
30. Fujian Dongya Aquatic Products Co., Ltd.
31. Fujian Fuding Seagull Fishing Food Co., Ltd.
32. Fujian Haihun Aquatic Product Company
33. Fujian Hainason Trading Co., Ltd.
34. Fujian Hongao Trade Development Co.
35. Fujian R & J Group Ltd.
36. Fujian Rongjiang Import and Export Co., Ltd.
37. Fujian Zhaoan Haili Aquatic Co., Ltd.
38. Fuqing Chaohui Aquatic Food Co., Ltd.
39. Fuqing Dongwei Aquatic Products Industry Co., Ltd.
40. Fuqing Longhua Aquatic Food Co., Ltd.
41. Fuqing Minhua Trade Co., Ltd.
42. Fuqing Yihua Aquatic Food Co., Ltd.
43. Gallant Ocean Group
44. Guangdong Evergreen Aquatic Food Co., Ltd.
45. Guangdong Foodstuffs Import & Export (Group) Corporation
46. Guangdong Gourmet Aquatic Products Co., Ltd.
47. Guangdong Jinhang Foods Co., Ltd.
48. Guangdong Rainbow Aquatic Development
49. Guangdong Savvy Seafood Inc.
50. Guangdong Shunxin Marine Fishery Group Co., Ltd.
51. Guangdong Taizhou Import & Export Trade Co., Ltd.
52. Guangdong Universal Aquatic Food Co. Ltd.
53. Guangdong Wanshida Holding Corp.
54. Guangdong Wanya Foods Fty. Co., Ltd.
55. HaiLi Aquatic Product Co., Ltd.
56. Hainan Brich Aquatic Products Co., Ltd.
57. Hainan Golden Spring Foods Co., Ltd.
58. Hainan Qinfu Foods Co., Ltd.
59. Hainan Xintaisheng Industry Co., Ltd.
60. Huazhou Xinhai Aquatic Products Co. Ltd.
61. Kuehne Nagel Ltd. Xiamen Branch
62. Leizhou Bei Bu Wan Sea Products Co., Ltd.
63. Longhai Gelin Foods Co., Ltd.
64. Maoming Xinzhou Seafood Co., Ltd.
65. New Continent Foods Co., Ltd.
66. Ningbo Prolar Global Co., Ltd.
67. North Seafood Group Co.
68. Pacific Andes Food Ltd.
69. Penglai Huiyang Foodstuff Co., Ltd.
70. Penglai Yuming Foodstuff Co., Ltd.
71. Qingdao Fusheng Foodstuffs Co., Ltd.
72. Qingdao Yihexing Foods Co., Ltd.
73. Qingdao Yize Food Co., Ltd.

74. Qingdao Zhongfu International
75. Qinhuangdao Gangwan Aquatic Products Co., Ltd.
76. Rizhao Meijia Aquatic Foodstuff Co., Ltd.
77. Rizhao Meijia Keyuan Foods Co. Ltd.
78. Rizhao Rongjin Aquatic
79. Rizhao Rongxing Co. Ltd.
80. Rizhao Smart Foods Company Limited
81. Rongcheng Sanyue Foodstuff Co., Ltd.
82. Rongcheng Yin Hai Aquatic Product Co., Ltd.
83. Ruian Huasheng Aquatic Products
84. Rushan Chunjiangyuan Foodstuffs Co., Ltd.
85. Rushan Hengbo Aquatic Products Co., Ltd.
86. Savvy Seafood Inc.
87. Sea Trade International Inc.
88. Shanghai Finigate Integrated
89. Shanghai Zhoulian Foods Co., Ltd.
90. Shantou Freezing Aquatic Product Foodstuffs Co.
91. Shantou Haili Aquatic Product Co. Ltd.
92. Shantou Haimao Foodstuff Factory Co., Ltd.
93. Shantou Jiazhou Food Industrial Co., Ltd.
94. Shantou Jinping Oceanstar Business Co., Ltd.
95. Shantou Jintai Aquatic Product Industrial Co., Ltd.
96. Shantou Longsheng Aquatic Product Foodstuff Co., Ltd.
97. Shantou Ocean Best Seafood Corporation
98. Shantou Red Garden Food Processing Co., Ltd./Shantou Red Garden Foodstuff Co., Ltd.
99. Shantou Ruiyuan Industry Co., Ltd.
100. Shantou Wanya Foods Fty. Co., Ltd.
101. Shantou Yuexing Enterprise Company
102. Shengyuan Aquatic Food Co., Ltd.
103. Suizhong Tieshan Food Co., Ltd.
104. Thai Royal Frozen Food Zhanjiang Co., Ltd.
105. Time Seafood (Dalian) Company Limited
106. Tongwei Hainan Aquatic Products Co., Ltd.
107. Xiamen East Ocean Foods Co., Ltd.
108. Xiamen Granda Import and Export Co., Ltd.
109. Yangjiang Dawu Aquatic Products Co., Ltd.
110. Yangjiang Guolian Seafood Co., Ltd.
111. Yangjiang Haina Datong Trading Co.
112. Yantai Longda Foodstuffs Co., Ltd.
113. Yantai Tedfoods Co., Ltd.
114. Yantai Wei-Cheng Food Co., Ltd.
115. Yixing Magnolia Garment Co., Ltd.
116. Zhangzhou Donghao Seafoods Co., Ltd.
117. Zhangzhou Fuzhiyuan Food Co., Ltd.
118. Zhangzhou Hongwei Foods Co., Ltd.
119. Zhangzhou Tai Yi Import & Export Trading Co., Ltd.
120. Zhangzhou Xinhui Foods Co., Ltd.
121. Zhangzhou Xinwanya Aquatic Product Co., Ltd.
122. Zhangzhou Yanfeng Aquatic Product & Foodstuff Co., Ltd.
123. Zhanjiang Evergreen Aquatic Product Science and Technology Co., Ltd.
124. Zhanjiang Fuchang Aquatic Products Co., Ltd.
125. Zhanjiang Fuchang Aquatic Products Freezing Plant
126. Zhanjiang Go-Harvest Aquatic Products Co., Ltd.

127. Zhanjiang Guolian Aquatic Products Co., Ltd.
128. Zhanjiang Longwei Aquatic Products Industry Co., Ltd.
129. Zhanjiang Regal Integrated Marine Resources Co., Ltd.
130. Zhanjiang Universal Seafood Corp.
131. Zhaoan Yangli Aquatic Co., Ltd.
132. Zhejiang Evernew Seafood Co.
133. Zhejiang Tianhe Aquatic Products
134. Zhejiang Xinwang Foodstuffs Co., Ltd.
135. Zhenye Aquatic (Huilong) Ltd.
136. Zhoushan Genho Food Co., Ltd.
137. Zhoushan Green Food Co., Ltd.
138. Zhoushan Haizhou Aquatic Products
139. Zhuanghe Yongchun Marine Products

[FR Doc. 2023–21121 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD399]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public online meeting.

SUMMARY: The Groundfish and Economics Subcommittees of the Pacific Fishery Management Council's (Pacific Council) Scientific and Statistical Committee (SSC) will convene an online meeting to review the non-trawl commercial fishery sablefish trip limit model used by the Pacific Council's Groundfish Management Team (GMT). The methodology review meeting is open to the public.

DATES: The groundfish methodology review online meeting will be held Thursday, October 12, 2023, from 1 p.m. until 5 p.m. (Pacific Daylight Time) or until business for the day has been completed.

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

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

FOR FURTHER INFORMATION CONTACT:

Marlene A. Bellman, Staff Officer, Pacific Council; telephone: (503) 820–2414, email: marlene.bellman@noaa.gov.

SUPPLEMENTARY INFORMATION: The purpose of the groundfish methodology review meeting is a follow-up to the prior review recommendations from the May 9, 2023 meeting, which aimed to evaluate proposed data inputs, modeling approaches, potential improvements, and any other pertinent information related to the sablefish trip limit model used in commercial non-trawl fisheries management. This review is planned in preparation for the 2025–2026 biennial groundfish management cycle. The results of this review are not considered final until reviewed by the full SSC at a future Pacific Council meeting.

No management actions will be decided by the meeting participants. The participants' role will be the development of recommendations and reports for consideration by the SSC and the Pacific Council at a future Pacific Council meeting. The Pacific Council and Scientific and Statistical Committee will consider methodology review recommendations for use in informing management decisions at their November 2023 meeting in Garden Grove, California.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this 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 of the workshop participants to take final action to address the emergency.

Special Accommodations

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

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

Dated: September 21, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023–20948 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD318]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to a Marine Geophysical Survey in Coastal Waters Off of Texas

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the University of Texas at Austin (UT) to incidentally harass marine mammals during marine geophysical survey activities in coastal waters off of Texas.

DATES: This Authorization is effective from September 29, 2023 through September 28, 2024.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Section 101(a)(5)(A) and (D) 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 and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the

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

Summary of Request

On March 7, 2023, NMFS received a request from UT for an IHA to take marine mammals incidental to conducting a marine geophysical survey in coastal waters off of Texas. Following NMFS’ review of the application, UT submitted a revised version on April 25,

2023. The application was deemed adequate and complete on April 27, 2023. UT’s request is for take of bottlenose dolphins, Atlantic spotted dolphins, and rough-toothed dolphin by Level B harassment only. Neither UT nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate. There are no changes from the proposed IHA to the final IHA.

Description of the Specified Activity

Overview

UT plans to conduct a marine geophysical survey, specifically a low energy seismic survey, in coastal waters off of Texas during a 10 day period in the fall of 2023. The survey will take place in water depths of less than 20 meters (m). To complete this survey the vessel will tow one to two Generator-Injector (GI) airguns, each with a volume of 105 cubic inch (in³; 1,721 cubic cm (cm³)), for a total volume of 210 in³ (3,441 cm³).

The purpose of the planned survey is to validate novel dynamic positioning technology for improving the accuracy in time and space of high resolution 3-dimensional (HR3D) seismic datasets, in

particular as it pertains to field technology of offshore carbon capture systems.

Dates and Duration

The survey is planned to occur over a 10 day period during the fall of 2023 (the exact dates are uncertain). During that time, the airguns will operate continuously (*i.e.*, 24-hours per day).

Specific Geographic Region

The planned survey area is 222 square kilometers (km²) and will occur within the approximate area of 28.9–29.1° N latitude, 94.9–95.2° W longitude in the coastal waters off of Texas. This location is offshore San Luis Pass, which defines the southern tip of Galveston Island, Texas. The closest point of approach of the planned survey area to the coast is approximately 3 km. The planned survey area is depicted in Figure 1, and the survey lines could occur anywhere within the survey area. The water depth of the planned survey area ranges from 10 to 20 m. The survey vessel (the R/V Brooks McCall (McCall) or similar vessel operated by TDI-Brooks International) will likely depart and return to Freeport or Galveston, Texas.

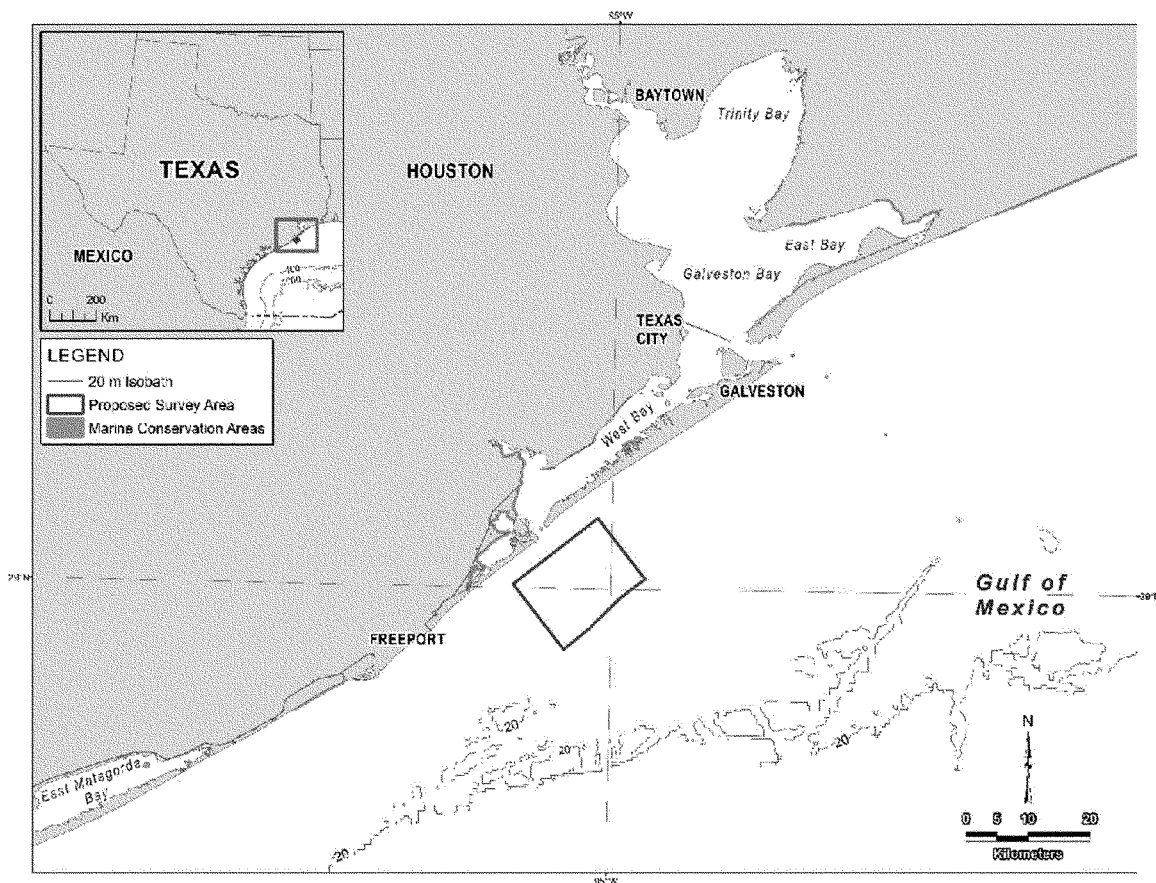


Figure 1-- Location of the Planned Northwest Gulf of Mexico Survey.

Note: Survey tracklines could occur anywhere within the planned survey area.

A detailed description of the planned geophysical survey was provided in the **Federal Register** notice of the proposed IHA (88 FR 53453, August 8, 2023). Since that time, no changes have been made to the planned survey activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specified activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to UT was published in the **Federal Register** on August 8, 2023 (88 FR 53453). That notice described, in detail, UT's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments. This proposed notice was available for a 30-day public comment period. NMFS received no public comments.

Description of Marine Mammals in the Area of Specified Activities

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

Table 1 lists all species or stocks for which take is expected and authorized for this activity and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by

the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is 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 or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Atlantic and Gulf of Mexico

SARs. All values presented in Table 1 are the most recent available at the time

of publication and are available online at: <https://www.fisheries.noaa.gov/>

[national/marine-mammal-protection/marine-mammal-stock-assessments](https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments).

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES ¹

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ²	Stock abundance (CV, N _{min} , most recent abundance survey) ³	PBR	Annual M/SI ⁴	Gulf of Mexico population abundance (Roberts et al. 2016)
Odontoceti (toothed whales, dolphins, and porpoises)							
<i>Family Delphinidae:</i>							
Atlantic spotted dolphin.	<i>Stenella frontalis</i>	Gulf of Mexico	-/-; N	21,506 (0.26; 17,339; 2018).	166	36	47,488
Rough-toothed dolphin.	<i>Steno bredanensis</i>	Gulf of Mexico	-/-; N	unk (n/a; unk; 2018)	undetermined	39	4,853
Bottlenose dolphin	<i>Tursiops truncatus</i>	Gulf of Mexico Western Coastal.	-/-; N	20,759 (0.13; 18,585; 2018).	167	36	138,602
		Northern Gulf of Mexico Continental Shelf.	-/-; N	63,280 (0.11; 57,917; 2018).	556	65	138,602

¹ Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2022)).

² 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.

³ NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

⁴ 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, vessel strike). Annual M/SI (mortality/serious injury) often cannot be determined precisely and is in some cases presented as a minimum value or range.

As indicated above, all 3 species (with 4 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the planned survey areas are included in Table 2 of the IHA application. While the additional 11 species listed in Table 2 of UT's application have been infrequently sighted in the survey area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Species or stocks that only occur in deep waters (>200 m) within the Gulf of Mexico are unlikely to be observed during this survey where the maximum water depth is 20 m, and thus, the following species or stocks will not be considered further: offshore stock of bottlenose dolphins, pantropical spotted dolphin, spinner dolphin, striped dolphin, Clymene dolphin, Fraser's dolphin, Risso's dolphin, melon-headed whale, pygmy killer whale, false killer whale, killer whale, and short-finned pilot whale.

A detailed description of the species likely to be affected by the geophysical survey, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (88 FR 53453, August 8, 2023); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (<https://www.fisheries.noaa.gov/find-species>) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal

species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzkow and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

Hearing group	Generalized hearing range*
Low-frequency (LF) cetaceans (baleen whales)	7 hertz (Hz) to 35 kilohertz (kHz).
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.

TABLE 2—MARINE MAMMAL HEARING GROUPS—Continued
[NMFS, 2018]

Hearing group	Generalized hearing range*
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, Cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

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

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

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

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from UT's survey activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The notice of proposed IHA (88 FR 53453, August 8, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from UT on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (88 FR 53453, August 8, 2023).

Estimated Take of Marine Mammals

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

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing,

nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes will be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to sound from low energy seismic airguns. Based on the nature of the activity, Level A harassment is neither anticipated nor authorized. As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the authorized take numbers are estimated.

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

Acoustic Thresholds

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

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other

factors related to the source or exposure context (*e.g.*, frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.*, bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.*, Southall *et al.*, 2007, 2021; Ellison *et al.*, 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (re 1 micropascal (μPa)) for continuous (*e.g.*, vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.*, seismic airguns) or intermittent (*e.g.*, scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by temporary threshold shift (TTS) as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

UT's planned survey includes the use of impulsive seismic sources (*e.g.*, GI-airgun) and therefore, the 160 dB re 1 μPa (rms) criterion is applicable for analysis of Level B harassment.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). UT's planned survey includes the use of impulsive sources.

These thresholds are provided in the Table 3 and 4 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>.

Ensonified Area

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

The planned survey will entail the use of up to two 105 in³ airguns with a maximum total discharge of 210 in³ at a tow depth of 3–4 m. Lamont-Doherty Earth Observatory (L-DEO) model results were used to determine the 160 dB_{rms} radius for the two-airgun array in water depths >100 m. Received sound levels were predicted by L-DEO's model (Diebold *et al.*, 2010) as a function of distance from the airguns for the two 105 in³ airguns with a maximum total discharge of 210 in³. This modeling approach uses ray tracing for the direct wave traveling from the array to the receiver and its associated source ghost (reflection at the air-water interface in the vicinity of the array), in a constant-velocity half-space (infinite

homogenous ocean layer, unbounded by a seafloor).

The planned surveys will acquire data with up to two 105-in³ GI guns (separated by up to 2.4 m) at a tow depth of ~3–4 m. The shallow-water radii are obtained by scaling the empirically derived measurements from the Gulf of Mexico calibration survey to account for the differences in volume and tow depth between the calibration survey (6,600 in³ at 6 m tow depth) and the planned survey (210 in³ at 4 m tow depth). A simple scaling factor is calculated from the ratios of the isopleths calculated by the deep-water L-DEO model, which are essentially a measure of the energy radiated by the source array.

L-DEO's methodology is described in greater detail in UT's IHA application. The estimated distances to the Level B harassment isopleth for the planned airgun configuration are shown in Table 3.

TABLE 3—PREDICTED RADIAL DISTANCES FROM THE R/V BROOKS MCCALL SEISMIC SOURCE TO ISOPLETHS CORRESPONDING TO LEVEL B HARASSMENT THRESHOLD

Airgun configuration	Water depth (m)	Predicted distances (m) to 160 dB received sound level
Two 105-in GI guns	<100	1,750

¹ Distance is based on empirically derived measurements in the Gulf of Mexico with scaling applied to account for differences in tow depth.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional user spreadsheet tool to accompany the Technical Guidance (2018) that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. Table 4 presents the modeled PTS isopleths for mid-frequency cetaceans, the only hearing group for which takes are expected, based on L-DEO modeling incorporated in the companion User Spreadsheet (NMFS 2018).

TABLE 4—MODELED RADIAL DISTANCES TO ISOPLETHS CORRESPONDING TO LEVEL A HARASSMENT THRESHOLDS

Hearing group	MF
PTS Peak	1.5
PTS SEL _{cum}	0

Predicted distances to Level A harassment isopleths, which vary based on marine mammal hearing groups, were calculated based on modeling performed by L-DEO using the Nucleus software program and the NMFS User Spreadsheet, described below. The acoustic thresholds for impulsive sounds (*e.g.*, airguns) contained in the Technical Guidance (2018) were presented as dual metric acoustic thresholds using both cumulative sound energy (SEL_{cum}) and peak sound pressure metrics (NMFS 2016a). As dual metrics, NMFS considers onset of PTS (Level A harassment) to have occurred when either one of the two metrics is exceeded (*i.e.*, metric resulting in the largest isopleth). The SEL_{cum} metric

considers both level and duration of exposure, as well as auditory weighting functions by marine mammal hearing group. In recognition of the fact that the requirement to calculate Level A harassment ensonified areas could be more technically challenging to predict due to the duration component and the use of weighting functions in the new SEL_{cum} thresholds, NMFS developed an optional User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to facilitate the estimation of take numbers.

The SEL_{cum} for the two-GI airgun array is derived from calculating the modified farfield signature. The farfield signature is often used as a theoretical representation of the source level. To compute the farfield signature, the source level is estimated at a large distance (right) below the array (*e.g.*, 9 km), and this level is back projected mathematically to a notional distance of 1 m from the array's geometrical center. However, it has been recognized that the source level from the theoretical farfield

signature is never physically achieved at the source when the source is an array of multiple airguns separated in space (Tolstoy *et al.*, 2009). Near the source (at short ranges, distances <1 km), the pulses of sound pressure from each individual airgun in the source array do not stack constructively as they do for the theoretical farfield signature. The pulses from the different airguns spread out in time such that the source levels observed or modeled are the result of the summation of pulses from a few airguns, not the full array (Tolstoy *et al.*, 2009). At larger distances, away from the source array center, sound pressure of all the airguns in the array stack coherently, but not within one time sample, resulting in smaller source levels (a few dB) than the source level derived from the farfield signature. Because the farfield signature does not take into account the interactions of the two airguns that occur near the source center and is calculated as a point source (single airgun), the modified farfield signature is a more appropriate measure of the sound source level for large arrays. For this smaller array, the modified farfield changes will be correspondingly smaller as well, but this method is used for consistency across all array sizes.

Auditory injury for all species is unlikely to occur given the small

modeled zones of injury (estimated zone less than 2 m for mid-frequency cetaceans). Additionally, animals are expected to have aversive/compensatory behavior in response to the activity (Nachtigall *et al.*, 2018) further limiting the likelihood of auditory injury for all species. UT did not request authorization of take by Level A harassment, and no take by Level A harassment is authorized by NMFS.

Marine Mammal Occurrence

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

For the planned survey area in the northwest Gulf of Mexico, UT determined that the best source of density data for marine mammal species that might be encountered in the project area was habitat-based density modeling conducted by Garrison *et al.* (2022). The Garrison *et al.* (2022) data provides abundance estimates for marine mammal species in the Gulf of Mexico within 40 km² hexagons (~3.9 km sides and ~7 km across from each side) on a monthly basis. To calculate expected densities specific to the survey area, UT created a 7 km perimeter around the survey area and used that perimeter to select the density hexagons for each

species in each month. The 7 km distance was chosen for the perimeter to ensure that at least one full density hexagon outside the survey area in all directions was selected, providing a more robust sample for the calculations. They then calculated the mean of the predicted densities from the selected cells for each species and month. The highest mean monthly density was chosen for each species from the months of September to December (*i.e.*, the months within which the survey is expected to occur). NMFS concurred with this approach to calculate species density.

Rough-toothed dolphins were not modeled by Garrison *et al.* (2022) due to a lack of sightings, so habitat-based marine mammal density estimates from Roberts *et al.* (2016) were used. The Roberts *et al.* (2016) models consisted of 10 km x 10 km grid cells containing average annual densities for U.S. waters in the Gulf of Mexico. The same 7 km perimeter described above was used to select grid cells from the Roberts *et al.* (2016) dataset, and the mean of the selected grid cells for rough-toothed dolphins was calculated to estimate the annual average density of the species in the survey area. Estimated densities used and Level B harassment ensonified areas to inform take estimates are presented in Table 5.

TABLE 5—MARINE MAMMAL DENSITIES AND TOTAL ENSONIFIED AREA OF ACTIVITIES IN THE PLANNED SURVEY AREA

Species	Estimated density (#/km ²)	Level B ensonified area (km ²)
Atlantic spotted dolphin	^b 0.00082	7,866
Bottlenose dolphin ^a	^b 0.34024	7,866
Rough-toothed dolphin	^c 0.00362	7,866

^a Bottlenose dolphin density estimate does not differentiate between coastal and shelf stocks.
^b Density calculated from Garrison *et al.* (2022).
^c Density calculated from Roberts *et al.* (2016).

Take Estimation

Here, we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized. In order to estimate the number of marine mammals predicted to be exposed to sound levels that would result in Level B harassment, radial distances from the airgun array to the predicted isopleth

corresponding to the Level B harassment threshold was calculated, as described above. Those radial distances were then used to calculate the area(s) around the airgun array predicted to be ensonified to sound levels that exceed the harassment thresholds. The area expected to be ensonified on 1 day was determined by multiplying the number of line km possible in 1 day by two times the 160-dB radius plus adding endcaps to the start and beginning of the

line. The daily ensonified area was then multiplied by the number of survey days (10 days). The highest mean monthly density for each species was then multiplied by the total ensonified area to calculate the estimated takes of each species.

No takes by Level A harassment are expected or authorized. Estimated takes for the planned survey are shown in Table 6.

TABLE 6—ESTIMATED TAKE FOR AUTHORIZATION

Species	Stock	Estimated take	Authorized take	Stock abundance ¹	Percent of stock
		Level B	Level B		
Atlantic spotted dolphin	Gulf of Mexico	6	² 26	21,506	0.12
Bottlenose dolphin ³	Gulf of Mexico Western Coastal	2,676	2,676	20,759	12.89
	Northern Gulf of Mexico Continental Shelf			63,280	4.23
Rough-toothed dolphin ..	Gulf of Mexico	28	28	³ 4,853	0.58

¹ Stock abundance for Atlantic spotted dolphins and bottlenose dolphins was taken from Garrison *et al.* (2022). Stock abundance for rough-toothed dolphins was taken from Roberts *et al.* (2016), as Garrison *et al.* (2022) did not create a model for this species.

² Estimated take increased to mean group size from Maze-Foley and Mullin (2006).

³ Estimated take for bottlenose dolphins is not apportioned to stock, as density information does not differentiate between coastal and shelf dolphins. However, based on the planned survey depths, we expect that most of the takes would be from the coastal stock, but some takes could be from the shelf stock. Percent of stock was calculated as if all takes estimated for authorization accrued to the single stock with the lowest population abundance.

Mitigation

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

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

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

Mitigation measures that will be adopted during the planned survey include, but are not limited to: (1) vessel speed or course alteration, provided that doing so would not compromise operation safety requirements; (2) monitoring a pre-start clearance zone; and (3) ramp-up procedures.

Vessel-Visual Based Mitigation Monitoring

Visual monitoring requires the use of trained observers (herein referred to as visual protected species observers (PSOs)) to scan the ocean surface visually for the presence of marine mammals. PSOs shall establish and monitor a pre-start clearance zone and, to the extent practicable, a Level B harassment zone (Table 3). These zones shall be based upon the radial distance from the edges of the acoustic source (rather than being based on the center of the array or around the vessel itself). During pre-start clearance (*i.e.*, before ramp-up begins), the pre-start clearance zone is the area in which observations of marine mammals within the zone would prevent airgun operations from beginning (*i.e.*, ramp-up). The pre-start clearance zone encompasses the area at and below the sea surface out to a radius of 200 meters from the edges of the airgun array.

During survey operations (*e.g.*, any day on which use of the acoustic source is planned to occur, and whenever the acoustic source is in the water, whether activated or not), a minimum of two PSOs must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset). Visual monitoring must begin no less than 30 minutes prior to ramp-up and must continue until 1 hour after use of the acoustic source ceases or until 30 minutes past sunset. Visual PSOs must coordinate to ensure 360 degree visual coverage around the vessel from the most

appropriate observation posts, and must conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner.

PSOs shall establish and monitor a pre-start clearance zone and to the extent practicable, a Level B harassment zone. These zones shall be based upon the radial distance from the edges of the acoustic source (rather than being based on the center of the array or around the vessel itself).

Any observations of marine mammals by crew members shall be relayed to the PSO team. During good conditions (*e.g.*, daylight hours, Beaufort sea state (BSS) three or less), visual PSOs shall conduct observations when the acoustic source is not operating for comparison of sightings rates and behavior with and without use of the acoustic source and between acquisition periods, to the maximum extent practicable.

Visual PSOs may be on watch for a maximum of 4 consecutive hours followed by a break of at least 1 hour between watches and may conduct a maximum of 12 hours of observation per 24-hour period.

Pre-Start Clearance and Ramp-Up

Ramp-up is the gradual and systematic increase of emitted sound levels from an acoustic source. Ramp-up will begin with one GI airgun 105 in³ first being activated, followed by the second after 5 minutes. The intent of pre-clearance observation (30 minutes) is to ensure no marine mammals are observed within the pre-start clearance zone prior to the beginning of ramp-up. The intent of ramp-up is to warn marine mammals in the vicinity of survey activities and to allow sufficient time for those animals to leave the immediate vicinity. A ramp-up procedure, involving a stepwise increase in the number of airguns are activated and the full volume is achieved, is required at all times as part of the activation of the

acoustic source. All operators must adhere to the following pre-clearance and ramp-up requirements:

(1) The operator must notify a designated PSO of the planned start of ramp-up as agreed upon with the lead PSO; the notification time should not be less than 60 minutes prior to the planned ramp-up in order to allow PSOs time to monitor the pre-start clearance zone for 30 minutes prior to the initiation of ramp-up (pre-start clearance);

- Ramp-ups shall be scheduled so as to minimize the time spent with the source activated prior to reaching the designated run-in;

- One of the PSOs conducting pre-start clearance observations must be notified again immediately prior to initiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed;

- Ramp-up may not be initiated if any marine mammal is within the pre-start clearance zone. If a marine mammal is observed within the pre-start clearance zone during the 30 minutes pre-clearance period, ramp-up may not begin until the animal(s) has been observed exiting the zone or until an additional time period has elapsed with no further sightings (15 minutes for small delphinids and 30 minutes for all other species);

- Ramp-up must begin by activating the first airgun for 5 minutes and then adding the second airgun; and

- PSOs must monitor the pre-start clearance zone during ramp-up, and ramp-up must cease and the source must be shut down upon detection of a marine mammal within the pre-start clearance zone. Once ramp-up has begun, observations of marine mammals for which take authorization is granted within the pre-start clearance zone does not require shutdown.

(2) If the acoustic source is shut down for brief periods (*i.e.*, less than 30 minutes) for reasons other than implementation of prescribed mitigation (*e.g.*, mechanical difficulty), it may be activated again without ramp-up if PSOs have maintained constant observation and no detections of marine mammals have occurred within the pre-start clearance zone. For any longer shutdown, pre-start clearance observation and ramp-up are required. Ramp-up may occur at times of poor visibility (*e.g.*, BSS 4 or greater), including nighttime, if appropriate visual monitoring has occurred with no detections of marine mammals in the 30 minutes prior to beginning ramp-up. Acoustic source activation may only occur at night where operational

planning cannot reasonably avoid such circumstances.

- Testing of the acoustic source involving all elements requires ramp-up. Testing limited to individual source elements or strings does not require ramp-up but does require a 30 minute pre-start clearance period.

Shutdown Procedures

The shutdown requirement will be waived for small dolphins. As defined here, the small dolphin group is intended to encompass those members of the Family Delphinidae most likely to voluntarily approach the source vessel for purposes of interacting with the vessel and/or airgun array (*e.g.*, bow riding). This exception to the shutdown requirement applies solely to specific genera of small dolphins—Steno, Stenella, and Tursiops. As Tursiops and Steno are the only species expected to potentially be encountered, there is no shutdown requirement included in the IHA for species for which take is authorized.

Vessel Strike Avoidance Measures

These measures apply to all vessels associated with the planned survey activity; however, we note that these requirements do not apply in any case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply. These measures include the following:

(1) Vessel operators and crews must maintain a vigilant watch for all marine mammals and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any marine mammal. A single marine mammal at the surface may indicate the presence of submerged animals in the vicinity of the vessel; therefore, precautionary measures should be exercised when an animal is observed. A visual observer aboard the vessel must monitor a vessel strike avoidance zone around the vessel (specific distances detailed below), to ensure the potential for strike is minimized. Visual observers monitoring the vessel strike avoidance zone can be either third-party observers or crew members, but crew members responsible for these duties must be provided sufficient training to (1) distinguish marine mammals from other phenomena and (2) broadly to identify a marine mammal as a baleen whale, sperm whale, or other marine mammals;

(2) Vessel speeds must be reduced to 10 knots (kn) (18.5 km/h) or less when mother and calf pairs, pods, or large

assemblages of cetaceans are observed near a vessel;

(3) All vessels must maintain a minimum separation distance of 100 m from sperm whales;

(4) All vessels must maintain a minimum separation distance of 500 m baleen whales. If a baleen whale is sighted within the relevant separation distance, the vessel must steer a course away at 10 kn or less until the 500 m separation distance has been established. If a whale is observed but cannot be confirmed as a species other than a baleen whale, the vessel operator must assume that it is a baleen whale and take appropriate action.

(5) All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.*, for animals that approach the vessel); and

(6) When marine mammals are sighted while a vessel is underway, the vessel should take action as necessary to avoid violating the relevant separation distance (*e.g.*, attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). This does not apply to any vessel towing gear or any vessel that is navigationally constrained.

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

Monitoring and Reporting

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

Monitoring and reporting requirements prescribed by NMFS should contribute to improved

understanding of one or more of the following:

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

Vessel-Based Visual Monitoring

As described above, PSO observations will take place during daytime airgun operations. Two visual PSOs will be on duty at all time during daytime hours. Monitoring shall be conducted in accordance with the following requirements:

(1) UT must work with the selected third-party observer provider to ensure PSOs have all equipment (including backup equipment) needed to adequately perform necessary tasks, including accurate determination of distance and bearing to observed marine mammals, and to ensure that PSOs are capable of calibrating equipment as necessary for accurate distance estimates and species identification. See Condition 5(d) in the IHA for list of equipment.

PSOs must have the following requirements and qualifications:

- (1) PSOs shall be independent, dedicated and trained and must be employed by a third-party observer provider;
- (2) PSOs shall have no tasks other than to conduct visual observational effort, collect data, and communicate with and instruct relevant vessel crew

with regard to the presence of protected species and mitigation requirements (including brief alerts regarding maritime hazards);

(3) PSOs shall have successfully completed an approved PSO training course appropriate for their designated task (visual);

(4) NMFS must review and approve PSO resumes accompanied by a relevant training course information packet that includes the name and qualifications (*i.e.*, experience, training completed, or educational background) of the instructor(s), the course outline or syllabus, and course reference material as well as a document stating successful completion of the course;

(5) PSOs must successfully complete relevant training, including completion of all required coursework and passing (80 percent or greater) a written and/or oral examination developed for the training program;

(6) PSOs must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least 1 undergraduate course in math or statistics; and

(7) The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver shall be submitted to NMFS and must include written justification. Requests shall be granted or denied (with justification) by NMFS within one week of receipt of submitted information. Alternate experience that may be considered includes, but is not limited to:

- Secondary education and/or experience comparable to PSO duties;
- Previous work experience conducting academic, commercial, or government-sponsored protected species surveys; or
- Previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

At least one visual PSO must be unconditionally approved (*i.e.*, have a minimum of 90 days at-sea experience working in that role at the particular Tier level (1–3) with no more than 18 months elapsed since the conclusion of the at-sea experience). One PSO with such experience shall be designated as the lead for the entire PSO team. The lead PSO shall serve as primary point of contact for the vessel operator. To the maximum extent practicable, the duty schedule shall be planned such that unconditionally-approved PSOs are on duty with conditionally-approved PSOs.

PSOs must use standardized electronic data collection forms. At a minimum, the following information must be recorded:

- Vessel name, vessel size and type, maximum speed capability of vessel;
 - Dates (MM/DD/YYYY format) of departures and returns to port with port name;
 - PSO names and affiliations, PSO identification (ID; initials or other identifier);
 - Date (MM/DD/YYYY) and participants of PSO briefings;
 - Visual monitoring equipment used (description);
 - PSO location on vessel and height (in meters) of observation location above water surface;
 - Watch status (description);
 - Dates (MM/DD/YYYY) and times (Greenwich mean time (GMT) or coordinated universal time (UTC)) of survey on/off effort and times (GMC/UTC) corresponding with PSO on/off effort;
 - Vessel location (decimal degrees) when survey effort began and ended and vessel location at beginning and end of visual PSO duty shifts;
 - Vessel location (decimal degrees) at 30-second intervals if obtainable from data collection software, otherwise at practical regular interval;
 - Vessel heading (compass heading) and speed (in knots) at beginning and end of visual PSO duty shifts and upon any change;
 - Water depth (in meters) (if obtainable from data collection software);
 - Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including BSS and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon;
 - Factors that may have contributed to impaired observations during each PSO shift change or as needed as environmental conditions changed (description) (*e.g.*, vessel traffic, equipment malfunctions); and
 - Vessel/Survey activity information (and changes thereof) (description), such as acoustic source power output while in operation, number and volume of acoustic source operating in the array, tow depth of the acoustic source, and any other notes of significance (*i.e.*, pre-start clearance, ramp-up, shutdown, testing, shooting, ramp-up completion, end of operations, streamers, *etc.*).
- The following information should be recorded upon visual observation of any marine mammal:
- Sighting ID (numeric);

- Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);
- Location of PSO/observer (description);
- Vessel activity at the time of the sighting (e.g., deploying, recovering, testing, shooting, data acquisition, other);
- PSO who sighted the animal/PSO ID;
- Time and date of sighting (GMT/UTC, MM/DD/YYYY);
- Initial detection method (description);
- Sighting cue (description);
- Vessel location at time of sighting (decimal degrees);
- Water depth (in meters);
- Direction of vessel's travel (compass direction);
- Speed (knots) of the vessel from which the observation was made;
- Direction of animal's travel relative to the vessel (description, compass heading);
- Bearing to sighting (degrees);
- Identification of the animal (e.g., genus/species, lowest possible taxonomic level, or unidentified) and the composition of the group if there is a mix of species;
- Species reliability (an indicator of confidence in identification) (1 = unsure/possible, 2 = probable, 3 = definite/sure, 9 = unknown/not recorded);
- Estimated distance to the animal (meters) and method of estimating distance;
- Estimated number of animals (high, low, and best) (numeric);
- Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);
- Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);
- Detailed behavior observations (e.g., number of blows/breaths, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);
- Animal's closest point of approach (in meters) and/or closest distance from any element of the acoustic source;
- Description of any actions implemented in response to the sighting (e.g., delays, shutdown, ramp-up) and time and location of the action.
- Photos (Yes or No);
- Photo Frame Numbers (List of numbers); and
- Conditions at time of sighting (Visibility; BSS).

Reporting

UT must submit a draft comprehensive report to NMFS on all activities and monitoring results within 90 days of the completion of the survey or expiration of the IHA, whichever comes sooner. The report will describe the activities that were conducted and sightings of marine mammals. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90 day report will summarize the dates and locations of survey operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities).

The draft report shall also include geo-referenced time-stamped vessel tracklines for all time periods during which airguns were operating. Tracklines should include points recording any change in airgun status (e.g., when the airguns began operating, when they were turned off, or when they changed from full array to single gun or vice versa). Geographic information system (GIS) files shall be provided in Environmental Systems Research Institute (ESRI) shapefile format and include the UTC date and time, latitude in decimal degrees, and longitude in decimal degrees. All coordinates shall be referenced to the WGS84 geographic coordinate system. In addition to the report, all raw observational data shall be made available to NMFS. A final report must be submitted within 30 days following resolution of any comments on the draft report.

Reporting Injured or Dead Marine Mammals

Sighting of injured or dead marine mammals—In the event that personnel involved in survey activities covered by the authorization discover an injured or dead marine mammal, UT shall report the incident to the OPR, NMFS, and the NMFS Southeast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Vessel strike—In the event of a vessel strike of a marine mammal by any vessel involved in the activities covered by the authorization, UT shall report the incident to OPR, NMFS and to the NMFS Southeast Regional Stranding Coordinator as soon as feasible. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Vessel's speed during and leading up to the incident;
- Vessel's course/heading and what operations were being conducted (if applicable);
- Status of all sound sources in use;
- Description of avoidance measures/requirements that were in place at the time of the strike and what additional measure were taken, if any, to avoid strike;
- Environmental conditions (e.g., wind speed and direction, BSS, cloud cover, visibility) immediately preceding the strike;
- Species identification (if known) or description of the animal(s) involved;
- Estimated size and length of the animal that was struck;
- Description of the behavior of the animal immediately preceding and following the strike;
- If available, description of the presence and behavior of any other marine mammals present immediately preceding the strike;
- Estimated fate of the animal (e.g., dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and
- To the extent practicable, photographs or video footage of the animal(s).

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (e.g., intensity, duration), the context of any

impacts or responses (e.g., critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (e.g., as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in Table 1, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity.

NMFS does not anticipate that serious injury or mortality would occur as a result from low-energy survey, and no serious injury or mortality is proposed to be authorized. As discussed in the Potential Effects of Specified Activities on Marine Mammals and Their Habitat section, non-auditory physical effects and vessel strike are not expected to occur. NMFS expects that all potential take would be in the form of Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity was occurring), responses that are considered to be of low severity and with no lasting biological consequences (e.g., Southall *et al.*, 2007, 2021).

In addition to being temporary, the maximum expected Level B harassment zone around the survey vessel is 1,750 m. Therefore, the ensonified area surrounding the vessel is relatively small compared to the overall distribution of animals in the area and their use of the habitat. Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the survey area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the short duration (10 days) of the disturbance and the availability of similar habitat and resources in the

surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

There are no rookeries, mating, or calving grounds known to be biologically important to marine mammals within the planned survey area and there are no feeding areas known to be biologically important to marine mammals within the survey area. There is no designated critical habitat for any ESA-listed marine mammals within the project area.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- (1) No serious injury or mortality is anticipated or authorized;
- (2) No Level A harassment is anticipated or authorized, even in the absence of mitigation measures;
- (3) Take is anticipated to be by Level B harassment only consisting of temporary behavioral changes of small percentages of the affected species due to avoidance of the area around the survey vessel. The relatively short duration of the planned survey (10 days) will further limit the potential impacts of any temporary behavioral changes that would occur;
- (4) The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- (5) Foraging success is not likely to be significantly impacted as effects on prey species for marine mammals would be temporary and spatially limited; and
- (6) The mitigation measures, including visual monitoring, ramp-ups, and shutdowns are expected to minimize potential impacts to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under section 101(a)(5)(A)

and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

NMFS is authorizing incidental take by Level B harassment of three marine mammal species with four managed stocks. The total amount of takes authorized relative to the best available population abundance is less than 5 percent for 3 managed stocks and less than 13 percent for 1 managed stock (Gulf of Mexico Western Coastal stock of bottlenose dolphin assuming all takes by Level b harassment are of this stock; see Take Estimation subsection) (Table 6). The take numbers authorized are considered conservative estimates for purposes of the small numbers determination as they assume all takes represent different individual animals, which is unlikely to be the case.

Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of

designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

National Environmental Policy Act

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

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to UT for the potential harassment of small numbers of three marine mammal species incidental to the marine geophysical survey in coastal waters off of Texas that includes the previously explained mitigation, monitoring and reporting requirements.

Dated: September 22, 2023.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023-21089 Filed 9-26-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD404]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one day in-person meeting of its Shrimp Advisory Panel (AP).

DATES: The meeting will convene Thursday, October 19, 2023, from 8:30 a.m. to 5 p.m., EDT. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will take place at the Gulf Council office. Registration information will be available on the Council's website by visiting www.gulfcouncil.org and clicking on the Shrimp AP meeting on the calendar.

Council address: Gulf of Mexico Fishery Management Council, 4107 W. Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348-1630.

FOR FURTHER INFORMATION CONTACT: Dr. Matt Freeman, Economist, Gulf of Mexico Fishery Management Council; matt.freeman@gulfcouncil.org; telephone: (813) 348-1630.

SUPPLEMENTARY INFORMATION: The following items are on the agenda, though agenda items may be addressed out of order (changes will be noted on the Council's website when possible.) Thursday, October 19, 2023; 8:30 a.m.-5 p.m. EST (7:30 a.m.-4 p.m. CST).

Meeting will begin with Adoption of Agenda, Approval of Summaries from the March 15-16, 2023, meeting and the May 18, 2023, meeting, and Scope of Work. The AP will review and discuss Council Actions in Response to Motions from the April and May 2023 Shrimp AP Meetings, receive a presentation on National Marine Fisheries Service (NMFS) cellular vessel monitoring system Project, discuss a collaborative path forward to Understand Inshore Shrimping Effort to Inform Sea Turtle Restoration Efforts in the Gulf of Mexico.

The AP will receive updates from Bureau of Ocean Energy Management (BOEM) on Gulf Wind Energy, on re-initiation of Shrimp Biological Opinion due to Sawfish and Giant Manta Rays, and on Endangered Species Act Listing and Critical Habitat Rule.

The AP will review and discuss SEDAR 87 Assessment update for Brown, White and Pink Shrimp and receive information update on Deepwater Horizon Natural Resource and Damage Assessment projects.

Lastly, the AP will receive any public testimony and discuss other business items.

Meeting Adjourns—

The in-person meeting will be broadcast via webinar. You may register by visiting www.gulfcouncil.org and clicking on the Shrimp Advisory Panel meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on www.gulfcouncil.org as they become available.

Although other non-emergency issues not on the agenda may come before the Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions 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 Act, provided the public has been notified of the Council's intent to take action to address the emergency at least 5 working days prior to the meeting.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid or accommodations should be directed to Kathy Pereira, kathy.pereira@gulfcouncil.org, at least 5 days prior to the meeting date.

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

Dated: September 22, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-21060 Filed 9-26-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD405]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a meeting of its Law Enforcement Technical Committee (LETC), in conjunction with the Gulf States Marine Fisheries Commission's Law Enforcement Committee (LEC).

DATES: The meeting will convene on Wednesday, October 18, 2023; beginning at 8:30 a.m. until 12 p.m., CDT. The Committees will be in a closed session from 7:30 a.m. until 8:15 a.m. CDT.

ADDRESSES: The meeting will be held at the Hilton New Orleans Riverside Hotel, located at Two Poydras Street, New Orleans, LA 70130; (504) 561-0500. Please visit the Gulf Council website (www.gulfcouncil.org) for agenda and meeting materials information.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348-1630.

FOR FURTHER INFORMATION CONTACT: Dr. John Froeschke, Deputy Director, Gulf of Mexico Fishery Management Council; john.froeschke@gulfcouncil.org, telephone: (813) 348-1630, and Mr. Steve VanderKooy, Inter-jurisdictional Fisheries (IJF) Coordinator, Gulf States Marine Fisheries Commission; svanderkooy@gsmfc.org, telephone: (228) 875-5912.

SUPPLEMENTARY INFORMATION: The following items of discussion are on the agenda, though agenda items may be addressed out of order and any changes will be noted on the Council's website when possible.

Joint Gulf Council's Law Enforcement Technical Committee (LETC) and Gulf States Marine Fisheries Commission's Law Enforcement Committee (LEC) Meeting Agenda, Wednesday, October 18, 2023; Beginning at 8:30 a.m.—12 p.m., CDT

The joint meeting will begin in a **CLOSED SESSION** from 7:30 a.m.—8:15 a.m. with introductions, case work discussions and any other business.

General session will begin at approximately 8:30 a.m. with introductions and adoption of agenda, and approval of minutes from the Joint LEC/LETC virtual meeting from March 2023 and election of Joint Committee Chair and Vice Chair.

The Gulf Council LETC will hold a discussion on Red Snapper Individual Fishing Quota (IFQ) advanced landing notifications from 2022 including a review of the Proportion of Inspected to Non-Inspected Red Snapper IFQ landings and Sale of Recreationally Caught Fish; and will review the Nomination Process for the 2023 Officer/Team of the Year Award.

The GSMFC LEC will review the IJF Program Activity for Gray (Mangrove) Snapper Profile Status and Commission Pubs.

The committee will present the State Report Highlights from Florida, Alabama, Mississippi, Louisiana, Texas, U.S. Coast Guard (USCG), NOAA Office of Law Enforcement (OLE), and U.S. Fish and Wildlife Service (USFWS); and will discuss any Other Business items.
— Meeting Adjourns

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on www.gulfcouncil.org.

The Law Enforcement Technical Committee consists of principal law enforcement officers in each of the Gulf States, as well as the NOAA OLE, USFWS, the USCG, and the NOAA Office of General Counsel for Law Enforcement.

Although other non-emergency issues not on the agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in the agenda 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 action to address the emergency.

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

Dated: September 22, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-21057 Filed 9-26-23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XC044]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Coast Guard Construction in Astoria, Oregon

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the United States Coast Guard (USCG) for authorization to take marine mammals incidental to the East Tongue Point (ETP) construction project in Astoria, Oregon. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting

comments on a possible one-time, 1-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than October 27, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to ITP.harlacher@noaa.gov. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. In case of problems accessing these documents, please call the contact listed below.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-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: Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified

geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

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

National Environmental Policy Act

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

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On April 22, 2022, NMFS received a request from the USCG for an IHA to take marine mammals incidental to pile driving activity associated with the ETP construction in Astoria, Oregon. Following NMFS’ review of the

application, we received a revised version of the application on June 27, 2022. After finalizing construction details, the USCG submitted another revised version on May 26, 2023, followed by a final revised version on July 24, 2023, which was deemed adequate and complete on August 1, 2023. USCG’s request is for take of harbor seal, California sea lion, Steller sea lion and harbor porpoise by Level B harassment and, for harbor seal and harbor porpoise, Level A harassment. Neither USCG nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

The USCG requested an IHA to homeport multiple new Fast Response Cutters (FRC) to support USCG District 13 at ETP in Astoria, OR (Figure 1). This three-phased project entails both onshore and in-water construction activities to remove old piles, construct and improve facilities necessary for the long-term support of the FRC’s and USCG mission. Phase 1 includes pile removal and demolition, dredging and shoreline rock improvements, phase 2 includes all pile driving and in water construction, and phase 3 includes all overwater and upland construction. The USCG completed a Homeport feasibility study in 2015 to determine the best site for FRC and determined ETP was the most suitable site due to favorable currents and low exposure to wave action.

This overall project is needed to improve or construct waterside and landslide facilities that will meet homeporting requirements of the FRCs. This includes the availability of logistics and support amenities for personnel, the ability of the new FRC docks/floats to accommodate the FRCs with all necessary operations on the boat while it is stationary at the dock, and the ability of the facility to provide for a long-term USCG presence for the economic life of its assets. Facilities at ETP are aged, outdated, and will require improvements to meet homeporting requirements.

Of the stages of this project, the only part that may result in Level A and Level B harassment, and further analyzed in this notice is the in-water construction activities associated with impact pile driving (Phase 2). The USCG proposes installation of 30-inch (in) and 36-in steel pipe piles for their new facilities with an estimated 52 total days of impact pile driving. Pile driving will

only occur within the Oregon Department of Fish and Wildlife (ODFW) approved in-water working window, however the proposed IHA will have a 1-year period of effectiveness. Phase 1 which includes dredging, pile removal and shoreline improvements and phase 3 involving only landside or over-water improvements, do not result in take based on the noise analysis and implementation of mitigation measures by the USCG and therefore will not be discussed further.

Dates and Duration

The ETP project is planned in a 3-phase approach with only phase 2 covered under this IHA. The IHA would be valid from November 1, 2023 to October 31, 2024; however, pile driving would only occur in the ODFW in-water work window from November 1, 2023 to February 29, 2024.

Specific Geographic Region

The project location is on the east side of the Tongue Point peninsula protruding into the Columbia River at approximately river mile 18. It lies in the northern portion of an industrial concrete pier area, formerly associated with a World War II-era U.S. Navy installation, just north of Highway 30 approximately 3 miles east of Astoria (Figure 1). The proposed project area is located within the Tongue Point Department of Labor Jobs Corps Center, which falls inside the urban growth boundary for Astoria. Various industrial and commercial uses, mostly for the marine industry, occur on the southern portion of the ETP site. To the north-northeast of the developed industrial area, the forested Tongue Point peninsula remains a designated natural area.

The project area is bound by the main stem of the Columbia River to the north and west and by Cathlamet Bay to the south and east. Mott Island is located approximately 0.5 miles east of the project area and Mill Creek flows into the Columbia River immediately south of the capped landfill. Further south and east up the John Day channel, Lois Island lies across from the John Day River mouth and a protected deep-water anchorage area is found. Moss and Lois Islands are part of the Lewis and Clark National Wildlife Refuge, which encompasses all islands approximately 27 miles upstream from the mouth of the Columbia River (USFWS 2020).

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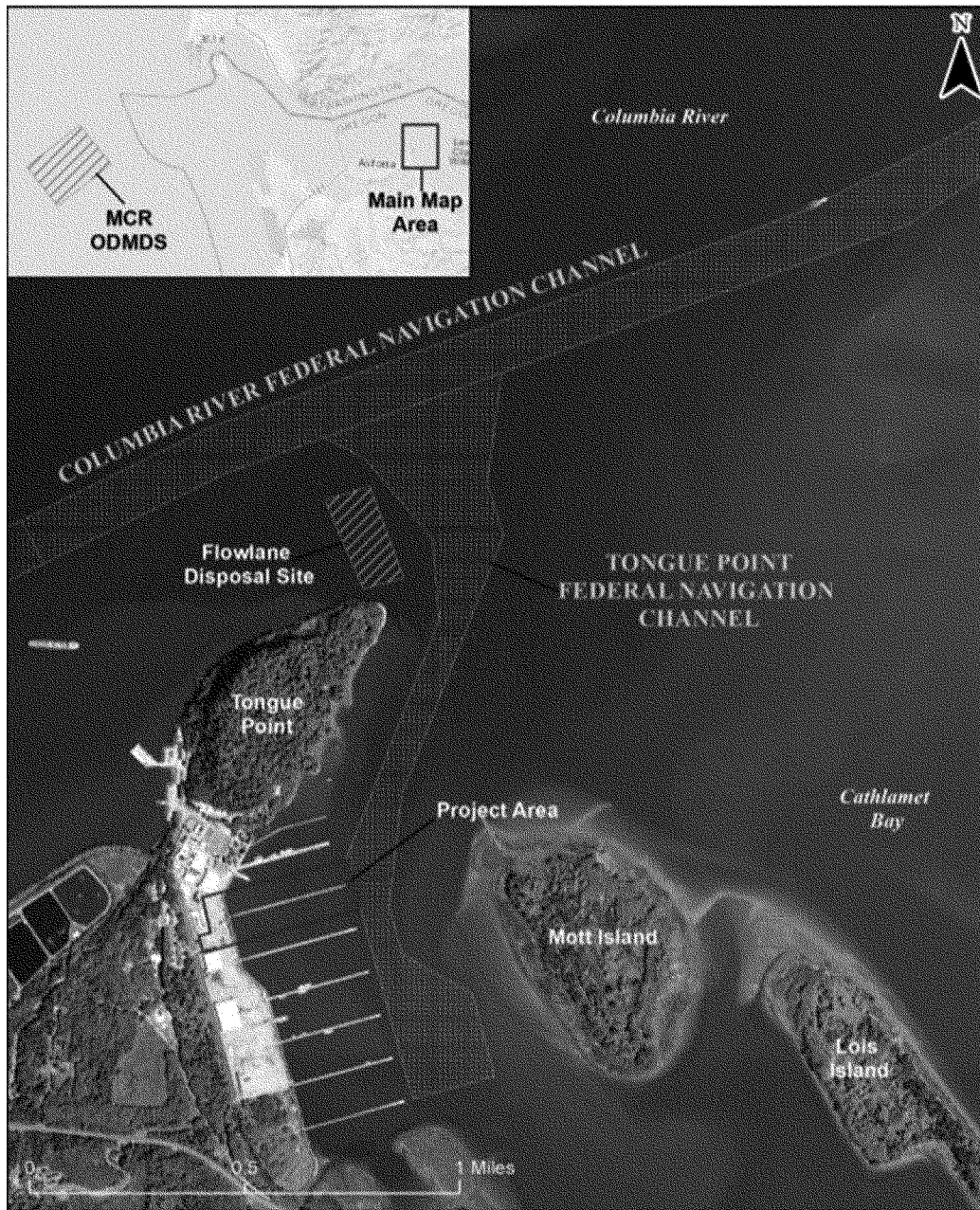


Figure 1 -- Project Location and Vicinity

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Detailed Description of the Specified Activity

Equipment and most materials needed to perform pier demolition and disposal, dredging, pile driving, pier, and floating dock construction will be mobilized via barges. It is anticipated that multiple barges may be present in the project or project staging areas at any time. The selected design-build contractor will mobilize equipment and materials based on the project phasing and task schedule to be determined once the project has been contracted. The overall

project includes landslide improvements, waterside improvements, in-water construction, over-water construction, and upland construction. However, as previously stated this IHA only covers in-water construction associated with pile installation activities that could result in take of marine mammals.

Piles will be installed during the in-water work window from November 1, 2023, through February 29, 2024, using impact hammers, per Table 1-1 and Table 1-2 in USCG's application. USCG estimates up to three piles will be

driven each 8 hour workday, and the actual driving time for each pile could be as high as approximately 30 minutes. An estimated 52 total days of pile driving (not all consecutive) will occur during the in-water work window from November through February.

Impact pile driving associated with the project is the only activity that could result in incidental take of marine mammals. Underwater noise generated during pile driving is dependent upon the impact energy produced by the pile driving hammer, the type and size of pile, water depth, and the substrate into

which the pile is being driven. Modeled pile driving scenarios accounted for the energy needed to drive the piles and

utilized the two largest diameter pile sizes for the model as determined from engineering plans. A water depth of

three meters was used, which is representative of the project area depths (Table 1).

TABLE 1—PROPOSED PILE DRIVING

Pile size and type	Method	Maximum piles per day	Activity duration	Estimated days of work
36-inch steel pipe	impact install ..	3	40–45 blows per minute for 9 minutes	52
30-inch steel pipe	impact install ..	3	40–45 blows per minute for 9 minutes .....	.....

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

Description of Marine Mammals in the Area of Specified Activities

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

these species (*e.g.*, physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/find-species>).

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

included here as gross indicators of the status of the species or stocks and other threats.

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

TABLE 2—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Phocoenidae (porpoises): Harbor Porpoise	<i>Phocoena phocoena</i>	Northern Coast. Oregon/Washington	-, -, N	21,487 (0.44, 15,123, 2011).	151	≥3.0
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions): California Sea Lion	<i>Zalophus californianus</i>	US	-, -, N	257,606 (N/A, 233,515, 2014).	14,011	>321
Steller Sea Lion	<i>Eumetopias jubatus</i>	Eastern	-, -, N	43,201 (N/A, 43,201, 2017).	2,592	112
Family Phocidae (earless seals) Harbor Seal	<i>Phoca vitulina</i>	Oregon/Washington Coast	-, -, N	UNK	UND	10.6

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/>. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

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.

As indicated above, all four species in Table 2 temporally and spatially co-

occur with the activity to the degree that take is reasonably likely to occur. While

killer whales (*Orcinus orca*), humpback whales (*Megaptera novaeangliae*), and

gray whales (*Eschrichtius robustus*) have been sighted off the Oregon coast, the USCG's project is located 23 km into the mouth of the Columbia River. Therefor the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here and in the USCG's application.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately

assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for

mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

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

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

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

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

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

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

species or stock through effects on annual rates of recruitment or survival.

Acoustic effects on marine mammals during the specified activity can occur from impact pile driving. The effects of underwater noise from USCG's proposed activities have the potential to result in Level A or Level B harassment of marine mammals in the action area.

Description of Sound Source

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 removal, and impact and vibratory pile driving. 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 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay

(ANSI, 1986; NIOSH, 1998; ANSI, 2005; NMFS, 2018a). 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 rapid rise/decay time that impulsive sounds do (ANSI, 1995; NIOSH, 1998; NMFS, 2018a). 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).

USCG propose to use impact pile driving to install new steel pipe piles associated with the ETP project. 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). 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).

The likely or possible impacts of USCG'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 equipment and personnel; however, any impacts to marine mammals are expected to be primarily acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile driving.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving is the primary means by which marine mammals may be harassed from the USCG'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 as an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions, such as communication and predator and prey detection. The effects of pile driving 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 TS is customarily expressed in dB. 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; Kryter *et al.*, 1966; 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 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 *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 a 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.

Many studies have examined noise-induced hearing loss in marine mammals (see Finneran (2015) and Southall *et al.* (2019) for summaries). For cetaceans, published data on the onset of TTS are limited to the captive bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless

porpoise (*Neophocoena asiaeorientalis*), and for pinnipeds in water, measurements of TTS are limited to harbor seals, elephant seals (*Mirounga angustirostris*), and California sea lions. These studies examine hearing thresholds measured in marine mammals before and after exposure to intense sounds. The difference between the pre-exposure and post-exposure thresholds can be used to determine the amount of threshold shift at various post-exposure times. The amount and onset of TTS depends on the exposure frequency. Sounds at low frequencies, well below the region of best sensitivity, are less hazardous than those at higher frequencies, near the region of best sensitivity (Finneran and Schlundt, 2013). At low frequencies, onset-TTS exposure levels are higher compared to those in the region of best sensitivity (*i.e.*, a low frequency noise would need to be louder to cause TTS onset when TTS exposure level is higher), as shown for harbor porpoises and harbor seals (Kastelein *et al.*, 2019a, 2019b, 2020a, 2020b). In addition, TTS can accumulate across multiple exposures, but the resulting TTS will be less than the TTS from a single, continuous exposure with the same SEL (Finneran *et al.*, 2010; Kastelein *et al.*, 2014; Kastelein *et al.*, 2015a; Mooney *et al.*, 2009). This means that TTS predictions based on the total, cumulative SEL will overestimate the amount of TTS from intermittent exposures, such as sonars and impulsive sources. Nachtigall *et al.* (2018) and Finneran (2018) describe the measurements of hearing sensitivity of multiple odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale (*Pseudorca crassidens*)) when a relatively loud sound was preceded by a warning sound. These captive animals were shown to reduce hearing sensitivity when warned of an impending intense sound. Based on these experimental observations of captive animals, the authors suggest that wild animals may dampen their hearing during prolonged exposures or if conditioned to anticipate intense sounds. Another study showed that echolocating animals (including odontocetes) might have anatomical specializations that might allow for conditioned hearing reduction and filtering of low-frequency ambient noise, including increased stiffness and control of middle ear structures and placement of inner ear structures (Ketten *et al.*, 2021). Data available on noise-induced hearing loss for mysticetes are currently lacking (NMFS, 2018).

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); and, 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 nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.*, Croll *et al.*, 2001; Nowacek *et al.*, 2004; Madsen *et al.*, 2006; Yazvenko *et al.*, 2007). 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., Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.*, 2002b) and, more rarely, studied in wild populations (e.g., Romano *et al.*, 2002a). For example, Rolland *et al.*, (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as “distress.” In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of 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.

Airborne Acoustic Effects—Although pinnipeds are known to haul out regularly near Astoria, we believe that incidents of take resulting solely from airborne sound are unlikely due to the sheltered proximity between the proposed project area and these haul-out sites which are at least 3 miles (4.8 kilometers) away and not in the acoustic zones that could be directly affect by noise disturbance. There is a possibility that an animal could surface in-water, but with head out, within the area in which airborne sound exceeds relevant thresholds and thereby be exposed to levels of airborne sound that we associate with harassment, but any such occurrence would likely be accounted for in our estimation of incidental take from underwater sound. Therefore, authorization of incidental take resulting from airborne sound for pinnipeds is not warranted, and airborne sound is not discussed further here. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Marine Mammal Habitat Effects

The USCG’s construction activities could have localized, temporary impacts on marine mammal habitat and their prey by increasing in-water sound pressure levels and slightly decreasing water quality. However, the proposed location is not heavily used by marine mammals and is in close proximity to a heavily trafficked industrial area. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater and airborne 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 ensound the project area where both fish and mammals occur and could affect foraging success.

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

In-Water Construction Effects on Potential Foraging Habitat

The proposed activities would result in a minor loss of habitat and potentially change underwater features for fish, but these changes are insignificant and limited to the area of redevelopment. The total seafloor area likely impacted by the project is relatively small compared to the available habitat in the Columbia River Gorge and on the Pacific Coast and does not include any Biologically Important Areas (BIA) or other habitat of known importance. The area is highly influenced by anthropogenic activities. Additionally, the total seafloor area affected by pile installation and removal is a small area compared to the vast foraging area available to marine mammals in the area. At best, the impact area provides marginal foraging habitat for marine mammals and fishes. Furthermore, pile driving at the project site would not obstruct movements or migration of marine mammals.

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

Effects on Potential Prey

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (e.g., crustaceans, cephalopods, fish, zooplankton, *etc.*). Marine mammal prey varies by species, season, and location.

However, impacts to prey will be limited to the construction window of November 1, 2023 through February 29, 2024 to reduce impacts to fish species in the area. Here, we describe studies regarding the effects of noise on known marine mammal prey.

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

Fish react to sounds that 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, although several are based on studies in support of large, multiyear bridge construction projects (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., Pena *et al.*, 2013; Wardle *et al.*, 2001; Jorgenson and Gyselman, 2009; Popper *et al.*, 2015).

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.

Construction activities, in the form of increased turbidity, have the potential to adversely affect forage fish in the project area. Forage fish form a significant prey base for many marine mammal species that occur in the project area. Increased turbidity is expected to occur in the immediate vicinity (on the order of 10 ft (3 meters (m)) or less) of construction activities. However, suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle. Given the limited area affected and high tidal dilution rates, any effects on forage fish are expected to be minor or negligible. Finally, exposure to turbid waters from construction activities is not expected to be different from the current exposure; fish and marine mammals in the Columbia River are routinely exposed to substantial levels of suspended sediment from natural and anthropogenic sources.

In summary, given the short-term and limited duration of sound associated with pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would be temporary and would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Additionally, all in-water work will occur during the winter, when marine resident fish species are only present in limited numbers. 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 of Marine Mammals

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

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would primarily be by Level B harassment, as use of the acoustic sources (*i.e.*, impact pile driving) 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. The proposed mitigation and monitoring measures are expected to minimize the severity of the 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 proposed take numbers are estimated.

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

Acoustic Thresholds

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

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

available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous (e.g., vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources.

USCG’s proposed activity includes the use impulsive (impact pile driving) sources, and therefore the RMS SPL threshold of 160 dB re 1 μ Pa is applicable.

Level A harassment—NMFS’ Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). USCG’s proposed activity includes the use of impulsive (impact pile driving) sources.

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

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset 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; $L_{EOW,24h}$: 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 μ Pa, and cumulative sound exposure level (L_E) has a reference value of 1 μ Pa²s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (i.e., varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

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

Underwater sound propagation modeling was completed by USCG using dBSea, a software developed by Marshall Day Acoustics for the modeling of underwater sound propagation in a variety of environments. The model was built by importing bathymetry data and placing noise sources in the environment. Each source can consist of equipment chosen from either the standard or the user-defined databases. Noise mitigation

methods may also be included. The user has control over the seabed and water properties including sound speed profile, temperature, salinity, and current. Noise levels were calculated to the extent of the bathymetry area. To examine results in more detail, levels may be plotted in cross sections, or a detailed spectrum may be extracted at any point in the calculation area. Levels were calculated in third octave bands from 12.5 (hertz) Hz to 20 kHz. Please refer to Acoustic Assessment included in USCG’s application for additional details on the modeling principles and assumptions.

The representative acoustic modeling scenarios were derived from descriptions of the expected

construction activities through consultations between the USCG project design and engineering teams. The scenarios modeled were ones where potential underwater noise impacts of marine species were anticipated and included impact pile driving associated with pier installation. All modeling scenarios occur at a representative location. This location was selected so that the effects of sound propagation at the range of water column depths occurring within the project area could be evaluated.

The USCG opted to perform their own acoustic modeling for the Level A and Level B harassment isopleths as they had site specific information to input into the model, which may assist in

providing more accurate results than, for example, use of NMFS' User Spreadsheet tool, which is a relatively simple tool that cannot incorporate site-specific environmental information. The modeling used by USCG takes into account bathymetry, geo-acoustic properties of sub-bottom sediments, and

sound speed profile. NMFS has reviewed USCG's modeling and determined that it is acceptable for use here.

A summary of construction and operational scenarios included in the underwater acoustic modeling analysis is provided in the Acoustic Assessment

and summarized in Table 5 below. The pile diameters selected for the impact pile driving modeling scenarios were based on maximum project design considerations approximated by USCG. The Level A and Level B harassment isopleths for the proposed activities are shown in Table 6.

TABLE 5—SOURCE LEVELS FOR IMPACT PILE INSTALLATION

Pile size	Peak SPLs (dB)	RMS SPLs (dB)	SELss (dB)	Source
36-in pile	208	190	180	Caltrans 2020.
30-in pile	210	190	177	Caltrans 2020.

TABLE 6—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS FOR IMPACT PILE DRIVING

Activity	Level A harassment zones (m)			Level B harassment zone (m)
	HF cetaceans	Phocid pinnipeds	Otariid pinnipeds	
36-in pile	287	197	0	602
30-in pile	213	130	0	602

Marine Mammal Occurrence and Take Calculation and Estimation

In this section, we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations and describe how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization. The USCG proposed using marine mammal species densities from the Pacific Navy Marine Species Density Database to estimate take for marine mammals. This database incorporates analyzed literature and research for marine mammal density estimates per season for regions throughout the U.S. and the USCG based their take estimates on regionally

available population density estimates and site-specific knowledge. Although this database provides densities for all species present in the action area, the densities are based on offshore abundance and not directly relevant to occurrence within in the Columbia River. Following careful review of the analysis presented by the USCG in its application, including marine mammal occurrence data, NMFS has determined that different information inputs than those selected by the USCG represent the best available scientific information for marine mammal abundance in the action area. These selections are discussed in greater detail below.

Steller Sea Lion, California Sea Lion and Harbor Seal

For Steller sea lions, California sea lions, and harbor seals, the numbers of

individuals were referenced from Washington Department of Fish and Wildlife's (WDFW) surveys from 2000–2014 at the South Jetty for the months of in water work (November through February) and averaged to get an estimated daily count (Table 7). While animals were surveyed at the prominent haul out site along the South Jetty, since the ETP site is close to the mouth of the river and the South Jetty, we assumed each of these estimates represents a good proxy for the total number of individuals that could be present in the project vicinity. We derived potential take estimates from the average abundance recorded over the specified period.

TABLE 7—PINNIPED COUNTS FROM THE SOUTH JETTY FROM 2000–2014
[WDFW 2014]

	Steller sea lion (monthly)	Steller sea lion (daily)	California Sea lion (monthly)	California sea lion (daily)	Harbor seal (monthly)	Harbor seal (daily)
November	1,663	55	1,214	40	0	0
December	1,112	36	725	23	57	2
January	249	8	10	0.3	0	0
February	259	9	28	1	1	0.04
Average (all months)	821	27	494	16	15	0.5

To calculate the total estimated takes, we multiplied the estimated days of

activity by the associated average daily pinniped counts (monthly count/days of

the month and averaged across all months) for each species (Table 8).

TABLE 8—ESTIMATED TAKE OF STELLER SEA LIONS, CALIFORNIA SEA LIONS, AND HARBOR SEALS

Pile type and method	Days of activity	Steller sea lion average count	Steller sea lion calculated take	California sea lion average count	California sea lion calculated take	Harbor seal average count	Harbor seal calculate take
36-in Steel Pile Impact Installation	52	27	1,404	16	832	0.5	26
30-in Steel Pile Impact Installation							

There is some potential for take by Level A harassment of harbor seals due to the largest zone being approximately 200 m and because of the cryptic nature and assumed lower detectability of harbor seals at this distance. Based on the relative proportion of the area expected to be ensnared above the Level A harassment threshold for phocid pinnipeds from impact pile driving (approximately 0.36 square kilometers (km²)) to the area ensnared above the Level B harassment threshold (1.1 km² for impact pile driving), we estimated that of the total number of harbor seals that may be located within the greater Level B harassment zone, approximately 33 percent would approach the pile driving activities closer and enter the smaller Level A harassment zone (197 m). Thus, we assume that 33 percent of the total estimated takes of harbor seals (26 individuals; see Table 9) would be by Level A harassment. Therefore, we are proposing to authorize 9 takes of harbor seals by Level A harassment and 17 takes by Level B harassment (Table 10).

The Level A harassment zone for otariid pinnipeds is 0 m. The USCG would be required to enforce a minimum shutdown zone of 10 m for these species. At that close range, the USCG would be able to detect California sea lions and Steller sea lions and

implement the required shutdown measures before any sea lions could enter the Level A harassment zone. Therefore, no takes of California sea lions or Steller sea lions by Level A harassment are requested or proposed to be authorized.

Harbor Porpoise

Harbor porpoises are regularly observed in the coastal waters near the mouth of the Columbia River and are known to occur year-round, although this project occurs farther upstream in the Columbia River. Their nearshore abundance peaks with anchovy presence, which is generally June through October. However, there was one recorded sighting of a harbor porpoise in the project area east of the jetties in the September–November timeframe (OBIS–SEAMAP 2019). During monitoring for pile driving at the Columbia River Jetty System which is at the mouth of the Columbia River approximately 23 km from the USCG's proposed action area, over the course of a 5 day monitoring period, observers detected 5 harbor porpoises (Grette Associates 2016). Additionally we reviewed monitoring reports from four recent projects in the nearby area (Army Corps of Engineers King Pile Markers and Sand Island Pile Dike Test Piles, and Phase 1 and 2 of the City of Astoria Bridge Replacement which can be found

at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities#active-authorizations>). Only one project with activities occurring over 15 days had eight sightings of harbor porpoise at Sand Island Dike.

Given that, there is some potential for harbor porpoise to be present near the project area, and based on the previously mentioned monitoring reports sighting data, we calculated that harbor porpoise could enter the Level B harassment zone every other day of pile driving (or 0.5/day). To calculate the total estimated takes by Level B harassment, we multiplied the estimated days of activity by the associated daily harbor porpoise rate (Table 10).

There is also some potential for take by Level A harassment of harbor porpoise due to the largest zone being approximately 300 m and because of the cryptic nature and assumed lower detectability of harbor porpoise at this distance. The USCG anticipates that 12 harbor porpoises during impact driving could be taken by Level A harassment. Take by Level A harassment for harbor porpoise was calculated in the same way it was for harbor seals. In total, we are proposing to authorize take of 26 harbor porpoises (Table 10).

TABLE 10—PROPOSED TAKE OF MARINE MAMMALS BY LEVEL A AND LEVEL B HARASSMENT BY SPECIES, STOCK AND PERCENT OF TAKE BY STOCK

Species	Stock	Proposed take by Level A harassment	Proposed take by Level B harassment	Total proposed take	Stock abundance	Percent of stock
Harbor Porpoise	Northern Oregon/Washington Coast	12	14	26	21,487	0.1
California sea lion	U.S	0	832	832	257,606	0.3
Steller sea lion	Eastern	0	1,404	1,404	43,201	3.2
Harbor seal	Oregon/Washington Coast	9	17	26	24,732	0.1

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular

attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and

feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

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

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

Time Restrictions

The USCG has proposed in its description of the project that pile driving would occur only during daylight hours (no sooner than 30 minutes after sunrise through no later than 30 minutes before sunset), when visual monitoring of marine mammals can be conducted. In addition, ODFW requires all in-water construction be limited to the months of November through February to minimize impacts to ESA listed fish species.

Mitigation Measures

USCG must follow mitigation measures as specified below:

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

- Employ Protected Species Observers (PSOs) and establish monitoring locations as described in the application and the IHA. USCG must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all pile driving, at least one PSO must be used.

The PSO will be stationed as close to the activity as possible;

- The placement of the PSOs during all pile driving activity will ensure that the entire shutdown zone, see Table 11, is visible during pile driving activities. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone will 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;

- Monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.*, pre-clearance monitoring) through 30 minutes post-completion of pile driving activity;

- Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 11 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals;

- USCG must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30 second waiting period, then two subsequent reduced-energy strike sets. A soft start must 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; and

- If a marine mammal is observed entering or within the shutdown zones indicated in Table 11, pile driving must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone (Table 11) or 15 minutes have passed without re-detection of the animal.

Shutdown Zones

USCG will establish shutdown zones for all pile driving activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones would be based upon the Level A harassment zone for each pile size/type where applicable, as shown in Table 11.

For in-water heavy machinery activities other than pile driving, if a marine mammal comes within 10 m, work will stop and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions. A 10 m shutdown zone would also serve to protect marine mammals from physical interactions with project vessels during pile driving and other construction activities, such as barge positioning or drilling. If an activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone indicated in Table 11 or 15 minutes have passed without re-detection of the animal. Construction activities must be halted upon observation of 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.

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

USCG will also establish shutdown zones for all marine mammals for which take has not been authorized or for which incidental take has been authorized but the authorized number of takes has been met. These zones are equivalent to the Level B harassment zones for each activity. If a marine mammal species not covered under this IHA enters the shutdown zone, all in-water activities will cease until the animal leaves the zone or has not been observed for at least 15 minutes, and NMFS will be notified about species and precautions taken. Pile driving will proceed if the non-IHA species is observed to leave the Level B harassment zone or if 15 minutes have passed since the last observation.

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

TABLE 11—SHUTDOWN ZONES AND MONITORING ZONES

Activity	Minimum shutdown zone (m)			Harassment zone (m)
	HF cetaceans	Phocid	Otariid	
36-in Impact Installation	300	50	10	610
30-in Impact Installation	220	50	10	610

Protected Species Observers

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

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

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

Proposed Monitoring and Reporting

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

Monitoring and reporting requirements prescribed by NMFS should contribute to improved

understanding of one or more of the following:

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

Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the conditions in this section and the IHA. Marine mammal monitoring during pile driving activities will be conducted by PSOs meeting the following requirements:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO will 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; and

- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator will be designated. The lead observer will be required to have prior experience working as a marine mammal observer during construction.

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.

- USCG must employ three PSOs during all pile driving activities depending on the size of the monitoring and shutdown zones. A minimum of one PSO must be assigned to monitor waters surrounding the active pile driving location.

- USCG must establish the following monitoring locations with the best views of monitoring zones as described below, in the IHA, and USCG's application.

- PSOs would be deployed in strategic locations around the harassment zone at all times during in-water pile driving. PSOs will be positioned at locations that provide full views of the impact hammering monitoring zones and the shutdown zones. PSOs will be stationed on the staging barges, on shore at the project site, and at the entrance to the commercial dock area at ETP. All PSOs will have access to high-quality

binoculars, range finders to monitor distances, and a compass to record bearing to animals as well as radios or cell phones for maintaining contact with work crews.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs will record all incidents of marine mammal occurrence, regardless of distance from activity, and will document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

USCG shall conduct briefings between construction supervisors and crews, PSOs, USCG staff prior to the start of all pile driving activities and when new personnel join the work. These briefings will explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance from any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. 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 the number and type of piles driven or removed and by what method (*i.e.*, impact) and the total equipment duration for vibratory removal for each pile or total number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information:
 - Name of PSO who sighted the animal(s) and PSO location and activity at the time of sighting;

- Time of sighting;
 - Identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentifiable), PSO confidence in identification, and the composition of the group if there is a mix of species;
 - Distance and bearing of each marine mammal observed relative to the pile being driven for each sightings (if pile driving was occurring at time of sighting);
 - Estimated number of animals (min/max/best estimate);
 - Estimated number of animals by cohort (adults, juveniles, neonates, group composition, sex class, *etc.*);
 - Animal's closest point of approach and estimated time spent within the harassment zone;
 - Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
 - Number of marine mammals detected within the harassment zones and shutdown zones; by species;
 - Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensured, and resulting changes in behavior of the animal(s), if any; and
- If no comments are received from NMFS within 30 days, the draft final 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.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the USCG must immediately cease the specified activities and report the incident to the Office of Protected Resources (OPR) (PR.ITP.MonitoringReports@noaa.gov), NMFS and to the West Coast Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, USCG 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 IHA. The USCG must not resume their activities until notified by NMFS. The

report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, our analysis applies to all species listed in Table 2 for which take could occur, given that NMFS expects the anticipated effects of the proposed pile driving/removal on different marine mammal stocks to be similar in nature. Where there are meaningful differences between species

or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, NMFS has identified species-specific factors to inform the analysis.

Pile driving activities associated with the USCG construction project have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A and Level B harassment, from underwater sounds generated from pile driving. Potential takes could occur if individuals are present in the ensonified zone when these activities are underway.

No serious injury or mortality would be expected, even in the absence of required mitigation measures, given the nature of the activities. Further, limited take by Level A harassment is proposed for two species, but the potential for harassment would be minimized through the construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

Take by Level A harassment is proposed for harbor seals and harbor porpoise to account for the possibility that an animal could enter a Level A harassment zone prior to detection, and remain within that zone for a duration long enough to incur PTS before being observed and the USCG shutting down pile driving activity. Any take by Level A harassment is expected to arise from, at most, a small degree of PTS, *i.e.*, minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by impact pile driving (*i.e.*, the low-frequency region below 2 kHz), not severe hearing impairment or impairment within the ranges of greatest hearing sensitivity. Animals would need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS.

Further, the amount of authorized take by Level A harassment is very low for both marine mammal species. If hearing impairment occurs, it is most likely that the affected animal would lose only a few decibels in its hearing sensitivity. Due to the small degree anticipated, any PTS potential incurred would not be expected to affect the reproductive success or survival of any individuals, much less result in adverse impacts on the species or stock.

Additionally, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. However, since

the hearing sensitivity of individuals that incur TTS is expected to recover completely within minutes to hours, it is unlikely that the brief hearing impairment would affect the individual's long-term ability to forage and communicate with conspecifics, and would therefore not likely impact reproduction or survival of any individual marine mammal, let alone adversely affect rates of recruitment or survival of the species or stock.

The Level A harassment zones identified in Table 5 are based upon an animal's exposure to pile driving of up to three steel piles per day. Given the short duration to impact drive each pile and break between pile installations (to reset equipment and move piles into place), an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement in the area. If an animal was exposed to accumulated sound energy, the resulting PTS would likely be small (*e.g.*, PTS onset) at lower frequencies where pile driving energy is concentrated, and unlikely to result in impacts to individual fitness, reproduction, or survival.

The nature of the pile driving project precludes the likelihood of serious injury or mortality. For all species and stocks, take would occur within a limited, confined area (adjacent to the project site) of the stock's range. Level A and Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further, the amount of take proposed to be authorized is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving in the Columbia River are expected to be mild, short term, and temporary. Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not observable, such as changes in vocalization patterns. Given that pile driving would occur for only a portion of the project's duration, any harassment occurring would be temporary. Additionally, many of the species present in region would only be present temporarily based on seasonal patterns or during transit between other habitats. These temporarily present species would be exposed to even smaller periods of noise-generating activity, further decreasing the impacts.

For all species, there are no known BIA near the project area that would be impacted by USCG's planned activities. While California sea lions and harbor seals are the species most likely to occur within the immediate project area the nearest haul out for both species is approximately 3 miles (4.8 km) away. There are three known haul out sites for both species near the project area including Tongue Point Sands, Taylor Sands, and Green Island/Sanborn Slough, the closest being Tongue Point Sands 3 miles (4.8 km) from the project area. Additionally, there is a Steller sea lion haul out in the Columbia River; it is approximately 15 miles (24.1 km) away from the project site at the south jetty off the western shoreline of Fort Stevens State Park. None of these haul outs are in the immediate project vicinity.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on each stock's continued survival. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or proposed to be authorized;
- Authorized Level A harassment would be very small amounts and of low degree;
- For all species, the mouth of the Columbia River is a very small and peripheral part of their range;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks. Level B harassment would be primarily in the form of behavioral disturbance, resulting in avoidance of the project areas around where impact or vibratory pile driving is occurring, with some low-level TTS that may limit the detection of acoustic cues for relatively brief amounts of time in relatively confined footprints of the activities;
- Effects on species that serve as prey for marine mammals from the activities are expected to be short-term and, therefore, any associated impacts on marine mammal feeding are not

expected to result in significant or long-term consequences for individuals, or to accrue to adverse impacts on their populations;

- The ensouffled areas are very small relative to the overall habitat ranges of all species and stocks;
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- USCG would implement mitigation measures including soft starts and shutdown zones to minimize the numbers of marine mammals exposed to injurious levels of sound, and to ensure that take by Level A harassment is, at most, a small degree of PTS.

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 activities will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities. For all species, the proposed take is below one third of the population for all marine mammal stocks (Table 10).

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the USCG for conducting impact pile driving associated with the ETP project in Astoria, Oregon, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed construction project. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, 1 year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activity section of this notice

is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).

- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: September 18, 2023.

Catherine Marzin,

*Acting Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD193]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico (GOM), notification is hereby given that a Letter of Authorization (LOA) has been issued to LLOG Exploration Company (LLOG) for the take of marine mammals incidental to geophysical survey activity in the GOM.

DATES: The LOA is effective from September 21, 2023, through December 31, 2025.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427-8401.

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 to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are 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.

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).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively "industry operators"), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an 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 these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

LLOG plans to conduct one of the following vertical seismic profile (VSP) survey types: Zero Offset, Offset, Walkaway VSP, and/or Checkshots within Keathley Canyon Block 686. The survey area has water depths of 1,888 to 1,966 meters (m). LLOG plans to use either a 12-element, 2,400 cubic inch (in³) airgun array, or a 6-element, 1,500 in³ airgun array. The survey is planned to occur for up to 5 days during the period from issuance of the LOA to

December 31, 2025. Please see LLOG's application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by LLOG in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5322, January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone¹); (3) number of days; and (4) season.² The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No VSP surveys were included in the modeled survey types, and use of existing proxies (*i.e.*, 2D, 3D NAZ, 3D WAZ, Coil) is generally conservative for use in evaluation of VSP survey effort. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, June 22, 2018). Coil was selected as the best available proxy survey type because the spatial coverage of the planned survey is most similar to that associated with the coil survey pattern.

For the planned survey, the seismic source array will be deployed in one of the following forms: Zero Offset VSP—deployed from a drilling rig at or near the borehole, with the seismic receivers (*i.e.*, geophones) deployed in the borehole on wireline at specified depth intervals; Offset VSP—in a fixed position deployed from a supply vessel on an offset position; Walkaway VSP—attached to a line, or a series of lines, towed by a supply vessel; or Checkshots—similar to Zero Offset VSP, typically hung from a platform and a sensor placed at a few depths in the well, where only the first energy arrival is recorded. The coil survey pattern in the model was assumed to cover approximately 144 kilometers squared (km²) per day (compared with approximately 795 km², 199 km², and 845 km² per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.*, area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area covered per day to be most influential on daily modeled exposures exceeding

¹ For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

² For purposes of acoustic exposure modeling, seasons include Winter (December–March) and Summer (April–November).

Level B harassment criteria. Because LLOG's planned survey is expected to cover no additional area as a stationary source, the coil proxy is most representative of the effort planned by LLOG in terms of predicted Level B harassment.

In addition, all available acoustic exposure modeling results assume use of a 72 element, 8,000 in³ array. Thus, estimated take numbers for this LOA are considered conservative due to the differences in both the airgun array (maximum 12 elements and 2,400 in³), and in daily survey area planned by LLOG (as mentioned above), as compared to those modeled for the rule.

The survey is planned to occur in Zone 5. The survey could take place in any season. Therefore, the take estimates for each species are based on the season that has the greater value for the species (*i.e.*, winter or summer).

Additionally, for some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. This can result in unrealistic projections regarding the likelihood of encountering particularly rare species and/or species not expected to occur outside particular habitats. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, our rule acknowledged that other information could be considered (see, *e.g.*, 86 FR 5322, (January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public). For this survey, NMFS has other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for Rice's whales and killer whales produces results inconsistent with what is known regarding their occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for those species as described below.

NMFS' final rule described a "core habitat area" for Rice's whales (formerly

known as GOM Bryde's whales)³ located in the northeastern GOM in waters between 100–400 m depth along the continental shelf break (Rosel *et al.*, 2016). However, whaling records suggest that Rice's whales historically had a broader distribution within similar habitat parameters throughout the GOM (Reeves *et al.*, 2011; Rosel and Wilcox, 2014). In addition, habitat-based density modeling identified similar habitat (*i.e.*, approximately 100–400 m water depths along the continental shelf break) as being potential Rice's whale habitat (Roberts *et al.*, 2016), although the core habitat area contained approximately 92 percent of the predicted abundance of Rice's whales. See discussion provided at, *e.g.*, 83 FR 29228, 83 FR 29280 (June 22, 2018); 86 FR 5418 (January 19, 2021).

Although Rice's whales may occur outside of the core habitat area, we expect that any such occurrence would be limited to the narrow band of suitable habitat described above (*i.e.*, 100–400 m) and that, based on the few available records, these occurrences would be rare. LLOG's planned activities will occur in water depths of approximately 1,888 to 1,966 m in the central GOM. Thus, NMFS does not expect there to be the reasonable potential for take of Rice's whale in association with this survey and, accordingly, does not authorize take of Rice's whale through the LOA.

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.*, 2015; Maze-Foley and Mullin, 2006). As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.*, 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the

limited data available to inform the model, it "should be viewed cautiously" (Roberts *et al.*, 2015).

NOAA surveys in the GOM from 1992–2009 reported only 16 sightings of killer whales, with an additional 3 encounters during more recent survey effort from 2017–2018 (Waring *et al.*, 2013; <https://www.boem.gov/gommapps>). Two other species were also observed on fewer than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale⁴). However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002–2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively informed our rulemaking process, as discussed at 86 FR 5322, 86 FR 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounter during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.* (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.* (2012) reported data from a study of 4 killer whales, noting that the whales performed 20 times as many dives 1–30 m in depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

³ The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.*, 2021).

⁴ However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water. This survey would take place in deep waters that would overlap with depths in which killer whales typically occur. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. In addition, as noted above in relation to the general take estimation methodology, the assumed proxy source (72-element, 8,000-in³ array) results in a significant overestimate of the actual potential for take to occur. NMFS' determination in reflection of the information discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales will generally result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5322, 86 FR 5403, January 19, 2021). In this case, use of the acoustic exposure modeling produces an estimate of two killer whale exposures. Given the foregoing, it is unlikely that any killer whales would be encountered during this at most 5-day survey, and accordingly no take of killer whales is authorized through this LOA.

In addition, in this case, use of the exposure modeling produces results that are smaller than average GOM group sizes for one species (Maze-Foley and Mullin, 2006). NMFS' typical practice in

such a situation is to increase exposure estimates to the assumed average group size for a species in order to ensure that, if the species is encountered, exposures will not exceed the authorized take number. However, other relevant considerations here lead to a determination that increasing the estimated exposures to the average group size would likely lead to an overestimate of actual potential take. In this circumstance, the very short survey duration (maximum of 5 days) and relatively small Level B harassment isopleths produced through use of the (at most) 12-element, 2,400-in³ airgun array (compared with the modeled 72-element, 8,000 in³ array) mean that it is unlikely that certain species would be encountered at all, much less that the encounter would result in exposure of a greater number of individuals than is estimated through use of the exposure modeling results. As a result, in this case NMFS has not increased the estimated exposure values to assumed average group sizes in authorizing take.

Based on the results of our analysis, NMFS has determined that the level of taking expected for this survey and authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations for the affected species or stocks of marine mammals. See Table 1 in this notice and Table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed "small numbers." In short, when an

acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5322, 86 FR 5438, January 19, 2021).

The take numbers for authorization, which are determined as described above, are used by NMFS in making the necessary small numbers determinations through comparison with the best available abundance estimates (see discussion at 86 FR 5322, 86 FR 5391, January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and model-predicted abundance information (<https://seamap.env.duke.edu/models/Duke/GOM/>). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.*, 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in Table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take ¹	Abundance ²	Percent abundance
Rice's whale	0	51	n/a
Sperm whale	132	2,207	6.0
<i>Kogia</i> spp.	³ 50	4,373	1.1
Beaked whales	580	3,768	15.4
Rough-toothed dolphin	100	4,853	2.1
Bottlenose dolphin	473	176,108	0.3
Clymene dolphin	281	11,895	2.4
Atlantic spotted dolphin	189	74,785	0.3
Pantropical spotted dolphin	1,274	102,361	1.2
Spinner dolphin	341	25,114	1.4
Striped dolphin	110	5,229	2.1
Fraser's dolphin	⁴ 32	1,665	1.9
Risso's dolphin	83	3,764	2.2
Melon-headed whale	185	7,003	2.6
Pygmy killer whale	43	2,126	2.0
False killer whale	69	3,204	2.2
Killer whale	0	267	n/a
Short-finned pilot whale	53	1,981	2.7

¹ Scalar ratios were not applied in this case due to brief survey duration.

² Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.*, 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and killer whale, the larger estimated SAR abundance estimate is used.

³ Includes 3 takes by Level A harassment and 47 takes by Level B harassment.

⁴ Modeled exposure estimate less than assumed average group size (Maze-Foley and Mullin, 2006)

Based on the analysis contained herein of LLOG's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.*, less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to LLOG authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: September 21, 2023.

Catherine Marzin,

*Acting Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2023-20947 Filed 9-26-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD397]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Executive Committee via webinar to discuss the Council budget and workplan.

DATES: The meeting will be held from 1 p.m. until 3 p.m. on Tuesday, October 24, 2023.

ADDRESSES: The meeting will be held via webinar. Webinar registration is required. Details are included in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer,

SAFMC; phone: (843) 302-8440 or toll free: (866) SAFMC-10; fax: (843) 769-4520; email: kim.iverson@safmc.net.

SUPPLEMENTARY INFORMATION: Meeting information, including the webinar registration link, online public comment form, agenda, and briefing book materials will be posted on the Council's website at: <https://safmc.net/council-meetings/>. Comments become part of the Administrative Record of the meeting and will automatically be posted to the website and available for Council consideration.

At this meeting, the Council's Executive Committee will review the 2023 Council budget status, planned activities for 2023, and the draft 2024 operating budget including priorities for potential additional funds available through the Inflation Reduction Act. The meeting will include a closed session to discuss personnel topics.

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

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

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

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

Dated: September 22, 2023.

Rey Israel Marquez,

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

[FR Doc. 2023-21059 Filed 9-26-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD401]

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 82 South Atlantic Gray Triggerfish Assessment Webinar 7.

SUMMARY: The SEDAR 82 assessment of the South Atlantic stock of gray triggerfish will consist of a data workshop, a series of assessment webinars, and a review workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 82 South Atlantic Gray Triggerfish Assessment Webinar 7 is scheduled for October 18, 2023, from 11 a.m. to 3 p.m., Eastern. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice.

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Registration for the webinar is available by contacting the SEDAR coordinator via email at Meisha.Key@safmc.net.

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; phone (843) 571-4366; email: Meisha.Key@safmc.net. www.sedarweb.org.

FOR FURTHER INFORMATION CONTACT: Meisha Key, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone (843) 571-4366; email: Meisha.Key@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 82 South Atlantic Gray Triggerfish Assessment Webinar 7 are as follows: Discuss any leftover data issues that were not cleared up during the data process, answer any questions that the analysts have, and discuss model development and model setup.

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 South Atlantic Fishery Management Council 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: September 22, 2023.

Key Israel Marquez,

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

[FR Doc. 2023–21058 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; DOCX Submission Requirements

The United States Patent and Trademark Office (USPTO) 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. The USPTO invites comments on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** (88 FR 37039) on June 6, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comment.

Agency: United States Patent and Trademark Office, Department of Commerce.

Title: DOCX Submission Requirements.

OMB Control Number: 0651–New.

Needs and Uses: On August 3, 2020, the USPTO published a final rule in the **Federal Register** that included a new fee set forth in 37 CFR 1.16(u). See Setting and Adjusting Patent Fees in Fiscal Year 2020, 85 FR 46932. Although that final rule indicated the new fee at § 1.16(u) would go into effect on January 1, 2022, the effective date of the new fee was delayed to give applicants more time to adjust to filing patent applications in the DOCX format.

As specified in § 1.16(u), the fee is due for any application filed under 35 U.S.C. 111 for an original patent—except design, plant, or provisional applications—where the specification, claims, and/or abstract do not conform to the USPTO requirements for submission in the DOCX format. Therefore, the fee is due for nonprovisional utility applications filed

under 35 U.S.C. 111, including continuing applications, that are not filed in the DOCX format.

The USPTO conducted two pilot programs for filing applications in the DOCX format. The eMod Text Pilot Program was conducted between August 2016 and September 2017. The USPTO then expanded the ability to file patent applications in the DOCX format in EFS–Web to all users in September 2017. In 2018, the USPTO launched the Patent Center and conducted the Patent Center Text Pilot Program from June 2018 through April 2020. All applicants have been able to file applications in the DOCX format in the Patent Center since April 2020. Information about the Patent Center is available at www.uspto.gov/PatentCenter. The USPTO continues to hold many discussions and training sessions with stakeholders to ensure a fair and reasonable transition to the DOCX format. In addition, to further ensure a fair and reasonable transition to the DOCX format, the USPTO has, since April 2022, provided patent applicants with the option to submit a back-up applicant-generated PDF version of the application along with the DOCX file(s) when filing an application in Patent Center. See Extension of the Option for Submission of a PDF With a Patent Application Filed in DOCX Format, 88 FR 37036 (Jun. 6, 2023).

The items in this new information collection relate solely to the impacts of the § 1.16(u) non-DOCX filing surcharge fee on the filing of nonprovisional utility applications under 35 U.S.C. 111, including continuing applications. In particular, this new information collection accounts for the § 1.16(u) non-DOCX filing surcharge fee itself, as well as an additional 30 minutes of time to accommodate (i) the extra review that some respondents may undertake as they start to become more familiar with the DOCX format and (ii) submission of the back-up applicant-generated PDF that some respondents will opt to submit.

The estimated volumes for the items in this new information collection are based on the estimates for the corresponding nonprovisional utility applications filed under 35 U.S.C. 111, including continuing applications, that are covered under an existing OMB clearance (0651–0032; Initial Patent Applications). Respondents for the items in the new information collection will either take an extra 30 minutes to file their applications in DOCX format or they will pay the non-DOCX surcharge, they will not do both.

Form Numbers: None.

Type of Review: New.

Affected Public: Private sector; individuals and households.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency: On occasion.

Estimated Number of Annual

Respondents: 411,817 respondents (including 164,066 respondents from filing fees).

Estimated Number of Annual

Responses: 411,817 responses (including 164,066 responses from filing fees).

Estimated Time per Response: The USPTO estimates that the responses in this information collection will take the public approximately 30 minutes (0.50 hours) to complete. This includes the time to create and submit the completed filing to the USPTO. The USPTO provides the 30-minute estimate out of an abundance of caution for the initial period after the effective date of the non-DOCX filing surcharge fee. The USPTO expects to decrease the 30-minute estimate by the first renewal of this collection as the public more fully comprehends the nature of, and how to comply with, the DOCX format.

Estimated Total Annual Respondent Burden Hours: 123,877 hours.

Estimated Total Annual Respondent Non-Hourly Cost Burden: \$49,588,160.

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

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website, www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search feature and entering the title of the information collection of the OMB Control Number, 0651–New.

Further information can be obtained by:

- *Email:* InformationCollection@uspto.gov. Include "0651–New information request" in the subject line of the message.

- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Justin Isaac,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2023–21099 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–C–2023–0034]

Joint ITA–NIST–USPTO Collaboration Initiative Regarding Standards

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments; extension of comment period.

SUMMARY: The United States Patent and Trademark Office (USPTO) is extending the deadline for written comments announced in the **Federal Register** Notice titled "Joint ITA–NIST–USPTO Collaboration Initiative Regarding Standards; Notice of Public Listening Session and Request for Comments." Through this notice, the USPTO is extending the period for public comments until November 6, 2023.

DATES: Written comments must be received on or before November 6, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Hannon, at 571–272–7385 or Mr. Anthony Quinn, at 202–893–6488. Inquiries can also be sent to SEP_Policy@uspto.gov.

SUPPLEMENTARY INFORMATION: On September 11, 2023, the USPTO published a **Federal Register** Notice titled "Joint ITA–NIST–USPTO Collaboration Initiative Regarding Standards; Notice of Public Listening Session and Request for Comments" (88 FR 62349), announcing that the USPTO, the International Trade Administration (ITA), and the National Institute for Standards and Technology (NIST) are seeking stakeholder input on the current state of U.S. firm participation in standard setting, and the ability of U.S. industry to readily adopt standards to grow and compete, especially as they relate to the standardization of critical and emerging technologies. The Agencies are now extending the comment submission period until November 6, 2023, to ensure that stakeholders have a sufficient opportunity to submit written comments.

All other information provided in the September 11, 2023, notice remains unchanged. Previously submitted comments do not need to be resubmitted.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2023–20919 Filed 9–26–23; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Army

Advisory Committee on Arlington National Cemetery Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following virtual Federal advisory committee meeting of the Remember and Explore Subcommittee to the Advisory Committee on Arlington National Cemetery. This meeting is open to the public. For more information, please visit: <https://www.arlingtoncemetery.mil/About/Advisory-Committee-on-Arlington-National-Cemetery/ACANC-Meetings>.

DATES: The Remember and Explore Subcommittee will meet on Thursday, October 12, 2023, from 4 p.m. to 7 p.m., eastern daylight time.

FOR FURTHER INFORMATION CONTACT: Ms. Renea Yates; Designated Federal Official or Mr. Matthew Davis; Alternate Designated Federal Official (DFO) for the ACANC, in writing at Arlington National Cemetery (ANC), Arlington VA 22211, or by email at matthew.r.davis.civ@army.mil, or by phone at 1–877–907–8585.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10, 5 U.S.C. (commonly known as the Federal Advisory Committee Act or FACA), the Sunshine in the Government Act of 1976 (U.S.C. 552b) and 41 Code of the Federal Regulations (CFR) 102–3.150.

Purpose of the Meeting: The primary purpose of the Remember & Explore Subcommittee is to recommend methods to maintain the Tomb of the Unknown Soldier Monument, including the cracks in the large marble sarcophagus, the adjacent marble slabs, and the potential replacement marble stone for the sarcophagus already gifted to the Army; accomplish an independent assessment of requests to place commemorative monuments within ANC; and identify means to capture and convey ANC's history, and improve the quality of visitors' experiences now and for generations to come.

Agenda: The Remember and Explore Subcommittee will receive an update to the Chaplain Memorials; and receive an update on Road Naming at Arlington National Cemetery.

Public's Accessibility to the Meeting: Pursuant to FACA and 41 CFR 102–

3.140 through 102–3.165, this meeting is open to the public.

Procedures for Attendance and Public

Comment: Contact Mr. Matthew Davis via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section to register to attend this virtual meeting. Public attendance will be via virtual attendance only. To attend this event, submit your full name, organization, email address, and phone number, and which meeting you would like to attend. Upon receipt of this information, a link will be sent to the email address provided which will allow virtual attendance to the event. Requests to attend the meeting must be received by 5 p.m. eastern daylight time, on Monday, 9 October 2023. (ANC will be unable to provide technical assistance to any user experiencing technical difficulties.)

For additional information about public access procedures, contact Mr. Matthew Davis, the Alternate DFO, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and 5 U.S.C. 1009(a)(3), the public or interested organizations may submit written comments or statements to the Subcommittees and/or the ACANC in response to the stated agenda of the open meeting or in regard to the ACANC's Committee's mission in general. Written comments or statements should be submitted to Mr. Matthew Davis, the Alternate DFO, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or

statement must include the author's name, title or affiliation, address, and daytime phone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the ACANC's DFO at least seven business days prior to the meeting to be considered by the ACANC. The ACANC's DFO will review all timely submitted written comments or statements with the ACANC's Chairperson, and ensure the comments are provided to all members of the ACANC before the meeting. Written comments or statements received after this date may not be provided to the ACANC until its next meeting. Pursuant to 41 CFR 102–3.140d, the ACANC is not obligated to allow any member of the public to speak or otherwise address the ACANC during the meeting. Members of the public may be permitted to make verbal comments during these meetings, and if allowed only at the time and in the manner described below. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three (3) business days in advance to the ACANC's Alternate DFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The ACANC's DFO will log each request, in the order received, and in consultation with the appropriate Chair determine whether the subject matter of each comment is relevant to the missions and/or the topics to be addressed in these public meeting. Members of the public who have

requested to make a comment and whose comments have been deemed relevant under the process described above, will be invited to speak in the order in which their requests were received by the ACANC's DFO. The appropriate Chair may allot a specific amount of time for comments.

James W. Satterwhite Jr.,

Army Federal Register Liaison Officer.

[FR Doc. 2023–21070 Filed 9–26–23; 8:45 am]

BILLING CODE 3711–02–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21–66]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at neil.g.hedlund.civ@mail.mil or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21–66 with attached Policy Justification.

Dated: September 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

February 7, 2022

The Honorable Nancy Pelosi
 Speaker of the House
 U.S. House of Representatives
 H-209, The Capitol
 Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-66, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Taipei Economic and Cultural Representative Office in the United States (TECRO) for defense articles and services estimated to cost \$100 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

James A. Hursch
 Director

Enclosures:

1. Transmittal
2. Policy Justification

Transmittal No. 21-66

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Taipei Economic and Cultural Representative Office in the United States (TECRO)

(ii) *Total Estimated Value:*

Major Defense Equipment*	\$ 0 million
Other	\$100.0 million
Total	\$100.0 million

* Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):
 None

Non-MDE:

Equipment and services to support participation in the Patriot

International Engineering Services Program (IESP) and Field Surveillance Program (FSP) for five years, including engineering services support, designed to sustain, maintain, and improve the Patriot Air Defense System within the performance envelope described in the system specification through the investigation and resolution of identified problems; missile field surveillance support for legacy (Guidance Enhanced Missile (GEM)) and Patriot Advanced Capability-3 (PAC-3) missiles, designed to ensure the reliability and performance of the Patriot missile through storage and aging programs, surveillance firing programs, and configuration management; legacy and PAC-3 missile stockpile reliability testing, to provide quantitative reliability assessments of the deployed missile round; U.S. Government and contractor technical and logistics support, and other related elements of program support. Participation in the shared IESP and FSP for the life of the Patriot system is a requirement of the U.S. Government.

(iv) *Military Department: Army (TW-B-ZDQ)*

(v) *Prior Related Cases, if any: TW-B-YYV, TW-B-ZBI*

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None*

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: None*

(viii) *Date Report Delivered to Congress: February 7, 2022*

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office in the United States—International Engineering Services Program (IESP) and Field Surveillance Program (FSP) Support

Taipei Economic and Cultural Representative Office in the United

States (TECRO) has requested to buy equipment and services to support participation in the Patriot International Engineering Services Program (IESP) and Field Surveillance Program (FSP) for five years, including engineering services support, designed to sustain, maintain, and improve the Patriot Air Defense System within the performance envelope described in the system specification through the investigation and resolution of identified problems; missile field surveillance support for legacy (Guidance Enhanced Missile (GEM)) and Patriot Advanced Capability-3 (PAC-3) missiles, designed to ensure the reliability and performance of the Patriot missile through storage and aging programs, surveillance firing programs, and configuration management; legacy and PAC-3 missile stockpile reliability testing, to provide quantitative reliability assessments of the deployed missile round; U.S. Government and contractor technical and logistics support, and other related elements of program support. Participation in the shared IESP and FSP for the life of the Patriot system is a requirement of the U.S. Government. The total estimated program cost is \$100.0 million.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96-8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, economic and progress in the region.

The proposed sale will help to sustain the recipient's missile density and ensure readiness for air operations. The recipient will use this capability as a deterrent to regional threats and to strengthen homeland defense. The recipient will have no difficulty absorbing this equipment and services into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Raytheon Technologies in Andover, MA; and Lockheed Martin in Camden, AK. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the permanent assignment of any additional U.S. Government or contractor representatives to recipient. Support teams will travel to recipient on a temporary basis.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2023-21054 Filed 9-26-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 21-46]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at neil.g.hedlund.civ@mail.mil or (703) 697-9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 21-46 with attached Policy Justification and Sensitivity of Technology.

Dated: September 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

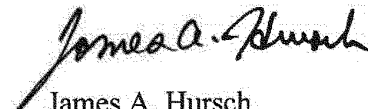
FEB 08 2022

The Honorable Nancy Pelosi
 Speaker of the House
 U.S. House of Representatives
 H-209, The Capitol
 Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 21-46 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Jordan for defense articles and services estimated to cost \$70 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,


 James A. Hursch
 Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

Transmittal No. 21-46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Government of Jordan

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	\$50 million
Other	\$20 million
Total	\$70 million

* Funding Source: Foreign Military Financing (FMF)

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One hundred fourteen (114) Guided Multiple Launch Rocket System (GMLRS) Unitary High Explosive (HE) Tri-Mode Fuze (GMLRS-U)

(M31) Rockets
One hundred fourteen (114) Reduced Range Practice Rockets (RRPR)
Non-MDE:

Also included is support equipment; publications and technical data; personnel training and equipment; systems integration support; U.S. Government and contractor engineering technical and logistics support services; and other related elements of logistics and program support.

(iv) *Military Department: Army* (JO-B-YAY)

(v) *Prior Related Cases, if any:* JO-B-WYB

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* February 8, 2022

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Jordan—Guided Multiple Launch Rocket Systems (GMLRS) Alternate Warhead (AW) Unitary Rocket Pods

The Government of Jordan has requested to buy one hundred fourteen (114) Guided Multiple Launch Rocket System (GMLRS) Unitary High Explosive (HE) Tri-Mode Fuze (GMLRS-U) (M31) Rockets; and one hundred fourteen (114) Reduced Range Practice Rockets (RRPR). Also included is support equipment; publications and technical data; personnel training and equipment; systems integration support; U.S. Government and contractor engineering technical and logistics support services; and other related elements of logistics and program support. The estimated total cost is \$70 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a Major Non-NATO Ally that is an important force for political

stability and economic progress in the Middle East.

The proposed sale will improve Jordan's capability to meet current and future threats on its borders and provide greater security for its economic infrastructure. This sale will provide Jordan with a long-range precision artillery support capability that will significantly improve U.S.-Jordan interoperability and provide for the defense of vital installations. Jordan will have no difficulty absorbing these additional systems into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin Missile and Fire Control, Dallas, TX. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this sale will not require the assignment of any additional U.S. Government or contractor representatives to Jordan.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 21-46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The Guided Multiple Launch Rocket System (GMLRS) is a solid propellant artillery rocket for the High Mobility Artillery Rocket System (HIMARS). GMLRS uses GPS-aided inertial guidance to accurately and quickly deliver a single high-explosive blast fragmentation warhead to targets. The GMLRS has an operational range of 15–70km.

2. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

3. If a technologically advanced adversary were to obtain knowledge of

the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Government of Jordan can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Jordan.

[FR Doc. 2023-20975 Filed 9-26-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 22-20]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at neil.g.hedlund.civ@mail.mil or (703) 697-9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 22-20 with attached Policy Justification and Sensitivity of Technology.

Dated: September 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

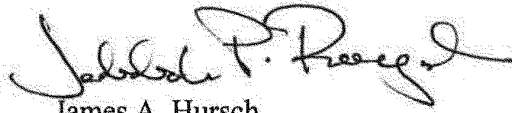
February 17, 2022

The Honorable Nancy Pelosi
 Speaker of the House
 U.S. House of Representatives
 H-209, The Capitol
 Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 22-20, concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Poland for defense articles and services estimated to cost \$6 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

for 
 James A. Hursch
 Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 22-20

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Poland.

(ii) *Total Estimated Value:*

Major Defense Equipment * .. \$4.4 billion
 Other \$1.6 billion.

TOTAL \$6.0 billion

Funding Source: National Funds.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):
 Two hundred fifty (250) M1A2SEPv3 Abrams Main Battle Tanks
 Two hundred fifty (250) AN/VLQ-12 CREW Duke Counter-IED Systems
 Twenty-six (26) M88A2 HERCULES Combat Recovery Vehicles
 Seventeen (17) M1110 Joint Assault

Bridges

Two hundred seventy-six (276) M2 .50 Caliber Machine Guns
 Five hundred (500) M240C 7.62mm Machine Guns
 Fifteen (15) AGT1500 Gas Turbine Engines
 Nine thousand one hundred sixty-eight (9,168) 120mm M865 Target Practice, Cone Stabilized, Discarding Sabot—Tracer (TPCSDS-T) Cartridges

Four thousand five hundred ninety-two (4,592) 120mm M1002 Target Practice Multipurpose Tracer (TPMP-T) Projectiles

Thirteen thousand nine hundred twenty (13,920) 120mm M830A1 High Explosive Anti-Tank (HEAT) TP-T Cartridges

Six thousand nine hundred sixty (6,960) 120mm XM1147 High Explosive Multipurpose Tracers

Non-MDE:

Also included are forward repair systems; trailer mounted generators; Common Remote Operated Weapons Station Low Profile (CROWS-LP); communications equipment; GPS receivers; ammunition; spare and repair parts; Special Tools and Test Equipment (STTE); technical manuals and publications; maintenance trainers; gunnery training systems; tank driver's trainers; new equipment training; U.S. Government and contractor technical, engineering, and logistics personnel services; and other related elements of logistics and program support.

(iv) *Military Department: Army (PL-B-UDT).*

(v) *Prior Related Cases, if any:* None.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* February 17, 2022.

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Poland—M1A2 SEPv3 Main Battle Tank

The Government of Poland has requested to buy two hundred fifty (250) M1A2SEPv3 Abrams Main Battle tanks; two hundred fifty (250) AN/VLQ-12 CREW Duke counter-IED systems; twenty-six (26) M88A2 HERCULES Combat Recovery vehicles; seventeen (17) M1110 joint assault bridges; two hundred seventy-six (276) M2 .50 caliber machine guns; five hundred (500) M240C 7.62mm machine guns; fifteen (15) AGT1500 gas turbine engines; nine thousand one hundred sixty-eight (9,168) 120mm M865 Target Practice, Cone Stabilized, Discarding Sabot—Tracer (TPCSDS-T) cartridges; four thousand five hundred ninety-two (4,592) 120mm M1002 Target Practice Multipurpose Tracer (TPMP-T) projectiles; thirteen thousand nine hundred twenty (13,920) 120mm M830A1 High Explosive Anti-Tank (HEAT) TP-T cartridges; and six

thousand nine hundred sixty (6,960) 120mm XM1147 High Explosive multipurpose tracers. Also included are forward repair systems; trailer mounted generators; Common Remote Operated Weapons Station Low Profile (CROWS-LP); communications equipment; GPS receivers; ammunition; spare and repair parts; Special Tools and Test Equipment (STTE); technical manuals and publications; maintenance trainers; gunnery training systems; tank driver's trainers; new equipment training; U.S. Government and contractor technical, engineering, and logistics personnel services; and other related elements of logistics and program support. The total estimated program cost is \$6.0 billion.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a NATO Ally that is a force for political stability and economic progress in Europe.

The proposed sale will improve Poland's capability to meet current and future threats by providing a credible force that is capable of deterring adversaries and participating in NATO operations. Poland will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractors will be General Dynamics Land Systems, Sterling Heights, MI; BAE Systems, York, PA; Leonardo DRS, Arlington, VA; Honeywell Aerospace, Phoenix, AZ; Raytheon Company, McKinney, TX; and Lockheed Martin, Orlando, FL. There are no known offset agreements proposed in connection with this proposed sale.

Implementation of this proposed sale will require approximately (22) U.S. Government and (52) U.S. contractor representatives to travel to Poland for a duration of up to five years to support equipment fielding and training.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 22-20

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. M1A2 SEPv3 Abrams Tank: The M1A2 Abrams is a third-generation American main battle tank, produced by General Dynamics Land Systems and named for General Creighton Abrams. The M1A2 SEPv3 (System Enhancement

Package version 3) features include a multi-fuel turbine engine, composite armor, an advanced computer fire control system, separate ammunition storage in a blow-out compartment, and 120mm main gun. Extensive improvements have been integrated into the latest M1A2 SEPv3 configuration. These improvements include improved digital systems, increased electrical power margin to support demands of future technologies, line replaceable modules (LRM) to reduce operational support costs, ammunition data link to support new tank main gun rounds, and an auxiliary power unit (APU). M1A2 SEPv3 Abrams tank components considered to contain sensitive technology in the proposed sale are as follows:

a. Thermal Imaging System (TIS) and Commander's Independent Thermal Viewer (CITV)

(1) The TIS and CITV constitutes a target acquisition system which, when operated with other tank systems gives the tank crew a substantial advantage over the potential threat.

(2) The TIS provides the Abrams M1A2 crew with the ability to effectively aim and fire the tank main armament system under a broad range of adverse battlefield conditions. The TIS can be operated and viewed by the tank gunner or tank commander, and is the main sighting system for the tanks' main gun (cannon). The CITV provides the same target acquisition system as the TIS, but provides the tank commander a separate system that can be controlled and operated independent of the TIS.

b. Armor: Major components of the armor are fabricated and assembled into serialized removable subassemblies, and installed in sealed modules.

c. 120mm Main Gun (Cannon) & M256 Gun Barrel: The Abrams 120mm main gun system is composed of a 120 millimeter (mm) smoothbore gun (cannon) also referred to as the M256 gun barrel, manufactured at Watervliet Arsenal; armor-piercing, fin stabilized, discarded sabot (APFSDS) and other warheads; and combustible cartridge case ammunition.

d. AGT-1500 Gas Turbine Propulsion System: The use of AGT-1500 gas turbine propulsion system in the M1A2 is a unique application of armored vehicle power pack technology. The hardware is composed of the AGT-1500 engine and transmission and is not classified. Manufacturing processes associated with the production of turbine blades, recuperator, bearings and shafts, and hydrostatic pump and motor are proprietary and therefore commercially competition sensitive.

e. Common Remotely Operated Weapon Station—Low Profile (CROWS-LP): The CROWS-LP (M153A2E1) is a commander's weapon station. It allows for operation of weapons—M2HB, M2A1, M240B and M240 machine guns. The CROWS-LP is an updated version of the M153A2 CROWS. The CROWS-LP M153A2E1 has improved performance over the M153A2.

f. Ammunition Data Link (ADL): The Ammunition Data Link (ADL) is a system consisting of hardware, electronics, software and an upgraded fire control system. The ADL is required to effectively fire the latest generation of "smart" 120mm main gun ammunition. The ADL offers the capability to supply data to the main gun ammunition to increase the capability and effectiveness of the smart round. The Advanced Multipurpose (AMP) smart round requires the ADL to function, and is a future enhancement for use with the M1A2 Abrams.

g. Driver Vision Enhancer—Abrams (DVE-A) AN/VAS-5 and Rear View Sensor System (RVSS):

(1) The AN/VAS-5 Driver Vision Enhancer—Abrams (DVE-A) and Rear View Sensor System (RVSS) are thermal imaging systems developed for use while driving combat vehicles and tactical wheeled vehicles. The DVE-A provides night vision capability for the Abrams tank driver. RVSS provides a rear view camera for the Abrams tank.

(2) DVE-A and RVSS allow for tactical vehicle movement in support of operational missions in all environmental conditions (day/night and all weather) and provides enhanced driving capability during limited visibility conditions (darkness, smoke, dust, fog, etc.).

h. Global Positioning System (GPS) AN/PSN-13 Defense Advanced GPS Receiver (DAGR): Global Positioning System (GPS) capability is currently provided to Abrams tanks using the DAGR. The DAGR is a handheld GPS receiver which utilizes Selective Availability Anti-Spoofing Module (SAASM) security. It is used for the Abrams tank, the M88A2 HERCULES Recovery Vehicle and the Joint Assault Bridge.

i. Handheld Communication Radio AN/PRC-158: The AN/PRC-158 is a multiband handheld radio. It is a portable, compact, tactical software-defined combat-net radio manufactured by L3/Harris Corporation. It is also referred to as the AN/PRC-158 Multi-Channel Manpack Radio System. The AN/PRC-158 has been fielded since 2005 by the U.S. Army, the USMC, and various select countries. It is used for the Abrams tank, the M88A2

HERCULES Recovery Vehicle and the Joint Assault Bridge.

j. Battle Management System (BMS): The BMS for the Poland SEPv3 tank will consist of a Data Distribution Unit—Expandable (DDUx), a transceiver, and commercial software called Sitaware. It equips soldiers with secure data encryption and advanced logistics. It includes an intuitive interface with features like touch-to-zoom maps and drag-and-drop icons. It is used for the Abrams tank, the M88A2 HERCULES Recovery Vehicle and the Joint Assault Bridge.

k. Counter Remote Controlled Improvised Explosive Device (RCIED) Electronic Warfare (CREW) Duke AN/VLQ-12: The AN/VLQ-12 CREW Duke system is a vehicle-mounted, lightweight system that neutralizes RCIED threats and gives troops a tactical advantage across the full spectrum of operations. It is the U.S. Army's state-of-the-art security enhancement to the U.S. Army Abrams tank. The AN/VLQ-12 CREW Duke system uses an advanced software-defined architecture that supports rapid reconfiguration to adapt to the constantly evolving threat environment.

2. M88A2 HERCULES Recovery Vehicle: The primary role of the M88A2 Heavy Equipment Recovery Combat Utility Lifting Extraction System (HERCULES) Combat Recovery Vehicle is recovery of the Abrams M1 Main Battle Tank. The 70-ton M88A2 Recovery Combat Vehicle is standard equipment to de-process, recover, and sustain the Abrams M1 Tank. The vehicle's role is to extricate combat vehicles that have become bogged down or entangled; and to repair or replace damaged parts in fighting vehicles while under fire. The M88A2 main winch is capable of 70-ton single line recovery; and a 140-ton 2:1 recovery when used with a 140-ton pulley. The A-frame boom of the M88A2 can lift 35 tons when used in conjunction with the spade down. The spade can be used for light earth moving and to anchor the vehicle when using the main winch. The M88A2 employs an Auxiliary Power Unit (APU) to provide auxiliary electrical and hydraulic power when the main engine is not in operation; the APU can also be used to slave start other vehicles. The M88A2 recovery vehicle components considered to contain sensitive technology in the proposed case are as follows:

a. AVDS-1790-8CR Engine Propulsion System: The AVDS-1790-8CR is a unique modification to the standard piston engine family in the M60 series and the base M88A1.

b. Driver's Vision Enhancer (DVE-CV M88): Driver's Vision Enhancer (DVE-CV M88) is a thermal imaging system developed for use while driving Combat Vehicles (CVs) and Tactical Wheeled Vehicles (TWVs). It allows for tactical vehicle movement in support of operational missions in all environmental conditions (day/night and all weather) and provides enhanced driving capability during limited visibility conditions (darkness, smoke, dust, fog, etc.). The DVE provides night vision targeting capabilities for armored vehicles and long-range night vision reconnaissance capability to the warfighter. The DVE-CV for M88 vehicle is a platform-mounted night vision device (not man-portable), requires external power supply and is integrated into the vehicle.

3. M1110 Joint Assault Bridge: The M1110 Joint Assault Bridge (JAB) is a fully tracked armor engineer vehicle specifically designed to replace the M48/M60 AVLB, M104 Wolverine HAB and provide assault bridging capabilities to armored forces. The JAB System consists of an M1A1 Abrams chassis (with A2 heavy suspension) and a hydraulic bridge launch mechanism that will launch and retrieve the Heavy Assault Scissor Bridge MLC-115 Normal and MLC-124 Caution. The JAB contains:

a. Armor: Major components of the armor are fabricated and assembled into serialized removable subassemblies, and installed in sealed modules. —

b. AGT-1500 Gas Turbine Propulsion System: The use of AGT-1500 gas turbine propulsion system in the JAB is a unique application of armored vehicle power pack technology. The hardware is composed of the AGT-1500 engine and transmission.

c. Driver Vision Enhancer—JAB (DVE) and Rear View Sensor System (RVSS): The Driver Vision Enhancer (DVE) used on the JAB is the DVE-10 and Rear View Sensor System (RVSS) both are thermal imaging systems developed for use while driving combat vehicles and tactical wheeled vehicles. The DVE provides night vision capability for the JAB driver. The RVSS provides a rear view camera for the JAB. DVE and RVSS allow for tactical vehicle movement in support of operational missions in all environmental conditions (day/night and all weather) and provides enhanced driving capability during limited visibility conditions (darkness, smoke, dust, fog, etc.).

4. M830A1 120mm High Explosive Anti-Tank (HEAT) TP-T Cartridges is a chemical energy, multi-purpose projectile with an anti-personnel capability. The round consists of a fin

stabilized steel body which is loaded with Composition A3 Type II explosive. The fins are canted and impart spin to the projectile. A copper shaped charge liner and wave shaper are contained within the warhead.

5. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

7. A determination has been made that Poland will provide substantially the same degree of protection for the sensitive technology being released as

the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

8. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Poland.

[FR Doc. 2023–21073 Filed 9–26–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 22–13]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense (DoD).

ACTION: Arms sales notice.

SUMMARY: The DoD is publishing the unclassified text of an arms sales notification.

FOR FURTHER INFORMATION CONTACT: Neil Hedlund at *neil.g.hedlund.civ@mail.mil* or (703) 697–9214.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 22–13 with attached Policy Justification and Sensitivity of Technology.

Dated: September 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

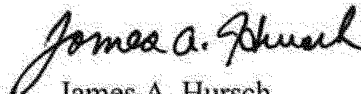
February 10, 2022

The Honorable Nancy Pelosi
 Speaker of the House
 U.S. House of Representatives
 H-209, The Capitol
 Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 22-13, concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Indonesia for defense articles and services estimated to cost \$13.9 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,


 James A. Hursch
 Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 22-13

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Indonesia

(ii) *Total Estimated Value:*

Major Defense Equipment * ..	\$9.5 billion
Other	\$ 4.4 billion
Total	\$13.9 billion

Funding Source: National Funds

(iii) *Description and Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Up to thirty-six (36) F-15ID Aircraft
 Eighty-seven (87) F110-GE-129 or
 F100-PW-229 Engines (72)

installed, 15 spares)
 Forty-five (45) AN/APG-82(v)1
 Advanced Electronically Scanned
 Array (AESA) Radars (36 installed,
 9 spares)
 Forty-five (45) AN/ALQ-250 Eagle
 Passive Active Warning
 Survivability Systems (EPAWSS)
 (36 installed, 9 spares)
 Forty-eight (48) Advanced Display
 Core Processor (ADCP) II Digital
 Computers (36 installed, 12 spares)
 Eighty (80) Joint Helmet Mounted
 Cueing Systems (JHMCS) (72
 installed, 8 spares)
 Ninety-two (92) Embedded Global
 Positioning Systems (GPS)/Inertial
 Navigation System (EGI) Security
 Devices
 Forty (40) AN/AAQ-13 LANTIRN
 Navigation Pods (36 installed, 4
 spares)
 Forty (40) AN/AAQ-33 Sniper
 Advanced Targeting Pods (ATP) (36
 installed, 4 spares)
 One hundred fifty-six (156) LAU-128
 Launchers (144 installed, 12 spares)
 Forty (40) M61A "Vulcan" Gun
 Systems (36 installed, 4 spares)
Non-MDE:
 Also included are Air Combat
 Maneuvering Instrumentation
 (ACMI) (P5 CTS) training pods and
 support equipment; MS-110 Recce
 Pods; AN/ASG-34 Infrared Search
 and Track International; AN/ALE-
 47 counter-measures dispenser;
 AN/PYQ Simple Key Loaders;
 additional precision navigation,
 secure communications and
 cryptographic equipment;
 Electronic Combat International
 Security Assistance Program
 (ECISAP) support; Joint Mission
 Planning Systems (JMPS); Night
 Vision Goggles (NVG) and support
 equipment and spares; conformal
 fuel tanks; chaff and flares; aircraft
 and personnel support and test
 equipment; pylons, launcher
 adaptors, weapons interfaces, fuel
 tanks, and attached hardware; travel
 pods, precision measurement
 equipment laboratory, calibration,
 and simulators; spare and repair
 parts, repair and return services;
 maps, publications, and technical
 documentation; studies and
 surveys; classified/unclassified
 software and software support;
 personnel training and training
 equipment; facilities and facility
 management, design and/or
 construction services; U.S.
 Government and contractor
 engineering, technical and logistics
 support services; and other related
 elements of logistical and program
 support.

(iv) *Military Department: Air Force*
 (ID-D-SAC)
 (v) *Prior Related Cases, if any: None*
 (vi) *Sales Commission, Fee, etc., Paid,*
Offered, or Agreed to be Paid: None
known at this time
 (vii) *Sensitivity of Technology*
Contained in the Defense Article or
Defense Services Proposed to be Sold:
See Attached Annex
 (viii) *Date Report Delivered to*
Congress: February 10, 2022
 * As defined in Section 47(6) of the
 Arms Export Control Act.

POLICY JUSTIFICATION

Indonesia—F-15ID Aircraft

The Government of Indonesia has
 requested to buy up to thirty-six (36) F-
 15ID aircraft; eighty-seven (87) F110-
 GE-129 or F100-PW-229 engines (72
 installed, 15 spares); forty-five (45) AN/
 APG-82(v)1 Advanced Electronically
 Scanned Array (AESA) Radars (36
 installed, 9 spares); forty-five (45) AN/
 ALQ-250 Eagle Passive Active Warning
 Survivability Systems (EPAWSS) (36
 installed, 9 spares); forty-eight (48)
 Advanced Display Core Processor
 (ADCP) II digital computers (36
 installed, 12 spares); eighty (80) Joint
 Helmet Mounted Cueing Systems
 (JHMCS) (72 installed, 8 spares); ninety-
 two (92) Embedded Global Positioning
 Systems (GPS)/Inertial Navigation
 System (EGI) security devices; forty (40)
 AN/AAQ-13 LANTIRN navigation pods
 (36 installed, 4 spares); forty (40) AN/
 AAQ-33 Sniper Advanced Targeting
 Pods (ATP) (36 installed, 4 spares); one
 hundred fifty-six (156) LAU-128
 launchers (144 installed, 12 spares); and
 forty (40) M61A "Vulcan" gun systems
 (36 installed, 4 spares). Also included
 are Air Combat Maneuvering
 Instrumentation (ACMI) (P5 CTS)
 training pods and support equipment;
 MS-110 Recce Pods; AN/ASG-34
 Infrared Search and Track International;
 AN/ALE-47 counter-measures
 dispenser; AN/PYQ Simple Key
 Loaders; additional precision
 navigation, secure communications and
 cryptographic equipment; Electronic
 Combat International Security
 Assistance Program (ECISAP) support;
 Joint Mission Planning Systems (JMPS);
 Night Vision Goggles (NVG) and support
 equipment and spares; conformal fuel
 tanks; chaff and flares; aircraft and
 personnel support and test equipment;
 pylons, launcher adaptors, weapons
 interfaces, fuel tanks, and attached
 hardware; travel pods, precision
 measurement equipment laboratory,
 calibration, and simulators; spare and
 repair parts, repair and return services;
 maps, publications, and technical

documentation; studies and surveys;
 classified/unclassified software and
 software support; personnel training
 and training equipment; facilities and
 facility management, design and/or
 construction services; U.S. Government
 and contractor engineering, technical
 and logistics support services; and other
 related elements of logistical and
 program support. The estimated total
 cost is \$13.9 billion.

This proposed sale will support the
 foreign policy goals and national
 security objectives of the United States
 by improving the security of an
 important regional partner that is a force
 for political stability, and economic
 progress in the Asia-Pacific region. It is
 vital to U.S. national interest to assist
 Indonesia in developing and
 maintaining a strong and effective self-
 defense capability.

The proposed sale will improve
 Indonesia's capability to meet current
 and future threats by enabling it to
 provide increased deterrence and air
 defense coverage across a very complex
 air and maritime domain. Indonesia will
 have no difficulty absorbing these
 aircraft and equipment into its armed
 forces.

The proposed sale of this equipment
 and support will not alter the basic
 military balance in the region.

The principal contractor will be The
 Boeing Company, St. Louis, MO. The
 purchaser typically requests offsets. Any
 offset agreement will be defined in
 negotiations between the purchaser and
 the contractor.

Implementation of this proposed sale
 will require the assignment of fewer
 than 20 U.S. Government and contractor
 representatives to Indonesia to provide
 technical support for maintenance
 operations and to conduct flight and
 maintenance training.

There will be no adverse impact on
 U.S. defense readiness as a result of this
 proposed sale.

Transmittal No. 22-13

Notice of Proposed Issuance of Letter of
 Offer Pursuant to Section 36(b)(1) of the
 Arms Export Control Act

Annex

Item No. vii

(vii) Sensitivity of Technology:

1. The F-15ID aircraft is a two seat,
 twin engine, all weather dual-role
 advanced long-range interdiction and
 tactical aircraft based on the F-15E
 airframe. It features advanced avionics,
 electronic warfare and self-protection
 systems, along with superior weapons
 payload. The F-15ID can be employed
 in air superiority, interdiction, close air
 support and escort roles.

2. Sensitive elements of the proposed F-15ID include hardware, accessories, components, and associated software. Additional sensitive areas include operating manuals and maintenance technical orders containing performance information, operating and test procedures, and other information related to support operation and repair. The hardware, software, and data identified are classified to protect vulnerabilities, design, and performance parameters and other critical information.

3. Pratt and Whitney F100-PW-229EEP or General Electric F110-GE-129 engines are afterburning turbofan jet engines that power the F-15 and deliver 29,500 (P&W) and 29,100 (GE) lb (131 kN) thrust respectively.

4. AN/APG-82(V) 1 is an Active Electronically Scanned Array (AESA) radar upgrade for the F-15. It includes higher processor power, higher transmission power, more sensitive receiver electronics, and Synthetic Aperture Radar (SAR), which creates higher-resolution ground maps from a greater distance than existing mechanically scanned array radars (*e.g.*, APG-68). The upgrade features an increase in detection range of air targets, increases in processing speed and memory, as well as significant improvements in all modes.

5. The AN/ALQ-250 Eagle Passive Active Warning Survivability System (EPAWSS) includes fully integrated radar warning, geo-location, situational awareness, and advanced electronic countermeasures that can be employed passively or actively. It is an internally mounted suite.

6. The Advanced Display Core Processor (ADCP) II is the central aircraft computer of the F-15. It serves as the hub for all aircraft subsystems and avionics data transfer.

7. The Embedded GPS-INS (EGI) with Selective Availability Anti-Spoofing Module (SAASM) is a self-contained navigation system that provides the following: acceleration, velocity, position, attitude, platform azimuth, magnetic and true heading, altitude, body angular rates, time tags, and coordinated universal time (UTC) synchronized time. SAASM enables the GPS receiver access to the encrypted P(Y) signal providing protection against active spoofing attacks.

8. The AN/AAQ-33 SNIPER Advanced Targeting Pod (ATP) targeting system is a multi-sensor, electro-optical targeting pod incorporating infrared, low-light television camera, laser range finder/target designator, and laser spot tracker. It is used to provide navigation

and targeting for military aircraft in adverse weather and using precision-guided weapons such as laser-guided bombs. It also provides positive target identification, autonomous tracking, coordinate generation, and precise weapons guidance from extended standoff ranges.

9. The AN/AAQ-13 LANTIRN is a navigation pod and provides high-speed penetration and precision attack assistance in all flying conditions. The pod uses a terrain-following radar and a fixed infrared sensor to display an image of the terrain in front of the aircraft on a heads-up display.

10. The MS-110 Recce Pod is a Non-Program of Record electro-optic and infrared airborne reconnaissance system with long range, day/night, multi-spectral sensor technology. The multi-spectral sensor lets the end user see color and better distinguish subtle features that traditional gray-scale imagery cannot. The pod can transmit imagery via a datalink to ground-stations for near-real time analysis and exploitation.

11. The AN/ASG-34 Infrared Search and Track International system is a long-wave, high resolution, passive infrared sensor system that searches and detects heat sources within its field of regard.

12. The AN/APQ-10C Simple Key Loader is a handheld fill device for securely receiving, storing, and transferring data between cryptographic and communications equipment.

13. The Joint Helmet Mounted Cueing Systems (JHMCS) is a modified HGU-55/P helmet that incorporates a visor-projected Heads Up Display to cue weapons and aircraft sensors to air and ground targets. This system projects visual targeting and aircraft performance information on the back of the helmet's visor, enabling the pilot to monitor this information without interrupting his field of view through the cockpit canopy.

14. The AN/AVS-9 Night Vision Goggles (NVG) provide imagery sufficient for an aviator to complete night time missions in extreme low light conditions.

15. The AN/ALE-47 Counter-Measures Dispensing System (CMD5) is an integrated, threat-adaptive, software programmable dispensing system capable of dispensing chaff, flares, and active radio frequency expendables. The system is internally mounted and may be operated as a stand-alone system or may be integrated with other on-board electronic warfare and avionics systems. The AN/ALE-47 uses data received over

the aircraft interfaces to assess the threat situation and to determine a response.

16. The Joint Mission Planning System (JMPS) or equivalent is a multi-platform PC based mission planning system to support military aviation operations.

17. The M61 20mm Vulcan Cannon is a six-barreled automatic cannon chambered in 20x120mm with a cyclic rate of fire from 2,500–6,000 shots per minute. This weapon is a hydraulically powered air cooled Gatling gun used to damage/destroy aerial targets, suppress/incapacitate personnel targets and damage or destroy moving and stationary light material targets.

18. The LAU-128 Guided Missile Launcher is capable of launching the AIM-120 Advanced Medium Range Air-to-Air Missile (AMRAAM) or the AIM-9X family of missiles. The LAU-128 launcher provides mechanical and electrical interface between missile and aircraft.

19. The P5 Combat Training System (CTS)/Tactical Combat Training System (TCTS) provides next generation, interoperable air combat training capabilities for U.S. and allied forces. The system allows the U.S. Navy, Marines and Air Force to train on a common platform with coalition partners. It sets the standard for joint, multiservice and coalition training.

20. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

21. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

22. A determination has been made that Indonesia can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

23. All defense articles and services listed in this transmittal have been authorized for release and export to Indonesia.

[FR Doc. 2023-21066 Filed 9-26-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Office of the Secretary**

[Transmittal No. 22-06]

Arms Sales Notification**AGENCY:** Defense Security Cooperation Agency, Department of Defense (DoD).**ACTION:** Arms sales notice.**SUMMARY:** The DoD is publishing the unclassified text of an section arms sales notification.**FOR FURTHER INFORMATION CONTACT:** Neil Hedlund at neil.g.hedlund.civ@mail.mil or (703) 697-9214.**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164

dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 22-06 with attached Policy Justification and Sensitivity of Technology.

Dated: September 21, 2023.

Aaron T. Siegel,*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, SUITE 101
ARLINGTON, VA 22202-5408

FEB 03 2022

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-209, The Capitol
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 22-06, concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Jordan for defense articles and services estimated to cost \$4.21 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

A handwritten signature in dark ink, reading "James A. Hursch".

James A. Hursch
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

Transmittal No. 22–06

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Jordan.

(ii) *Total Estimated Value*:

Major Defense Equipment * ..	\$2.39 billion
Other	\$1.82 billion

TOTAL	\$4.21 billion

Funding Source: Foreign Military Financing (FMF)

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

Major Defense Equipment (MDE):

Twelve (12) F–16 C Block 70 Aircraft

Four (4) F–16 D Block 70 Aircraft

Twenty-one (21) F100–GE–129D

Engines or F100–PW229EEP

Engines (16 installed, 5 spares)

Twenty-one (21) Improved

Programmable Display Generators

(iPDG) (16 installed, 5 spares)

Twenty-one (21) AN/APG–83 Active

Electronically Scanned Array

(AESA) Scalable Agile Beam Radars

(SABR) (16 installed, 5 spares)

Twenty-one (21) Modular Mission

Computers (MMC) 7000AH (16

installed, 5 spares)

Twenty-seven (27) LN–260 (or

equivalent) Embedded Global

Positioning System (GPS) Inertial

Navigation Systems (INS) (EGI)

with Selective Availability Anti-

Spoofing Module (SAASM) and

Precise Positioning Service (PPS)

(16 installed, 11 spares)

Six (6) AN/AAQ–33 Sniper Advanced

Targeting Pods (ATP)

Thirty-one (31) Link 16 Low-Volume

Terminals (for aircraft and ground

stations) (26 installed, 5 spares)

Seventy-two (72) LAU–129 Launchers

(64 installed, 8 spares)

Twenty-one (21) M61A1 Vulcan

Cannons (16 installed, 5 spares)

Four Hundred Two (402) FMU–139 or

FMU–152 Joint Programmable

Fuzes

One Hundred (100) KMU–556 Joint

Direct Attack Munition (JDAM) Tail

Kits for 2,000LB GBU–31

One Hundred Two (102) KMU–572

JDAM Tail Kits for 500LB Laser

JDAM GBU–54

One Hundred (100) MAU–209

Computer Control Group (CCG) for

Paveway II (PWII) GBU–10

One Hundred Two (102) MXU–651

Air Foil Group (AFG) for 2,000LB

PWII GBU–10

One Hundred (100) MAU–210

Enhanced Computer Control Group

(ECCG) for 500LB Enhanced

Paveway II (EP II) EGBU–49

One Hundred Three (103) MXU–650

Air Foil Group (AFG) for 500LB EP

II EGBU–49

Two Hundred (200) MK–84 or BLU–

117 (or equivalent) Bomb Bodies

Two Hundred Four (204) MK–82 or

BLU–111 (or equivalent) Bomb

Bodies

Six (6) MK–82 Inert Bombs

Two (2) MAU–169 Computer Control

Group (CCG) Trainers

Non-MDE:

Also included are AN/ARC–238

radios; AN/APX–126 or equivalent

Advanced Identification Friend or

Foes (AIFF) with Combined

Interrogator Transponder (CIT);

Joint Helmet Mounted Cueing

System II (JHMCS II) or Scorpion

Hybrid Optical-based Inertial

Tracker (HOBIT) helmet mounted

displays; AN/ALQ–254 Viper

Shield or equivalent Integrated

Electronic Warfare (EW) systems;

AN/ALE–47 Countermeasure

Dispenser Systems (CMDS); KY–

58M Cryptographic Devices; KIV–

78 Cryptographic Devices; Simple

Key Loaders (SKLs); Joint Mission

Planning System (JMPS) or

equivalent; PGU–28 High Explosive

Incendiary (HEI) ammunition;

PGU–27 training ammunition (non-

HEI); ARD–446 impulse cartridges;

ARD–863 impulse cartridges; BBU–

36 impulse cartridges; BBU–35

impulse cartridges; MK–124 smoke

flares; MJU–7/B flare cartridges

L463 or MJU–53 or equivalent;

Common Munitions Built-in-Test

(BIT) Reprogramming Equipment

(CMBRE); ADU–891 adapters for

CMBRE; DSU–38 laser sensors for

Laser JDAM GBU–54; Cartridge

Actuated Device/Propellant

Actuated Devices (CAD/PAD);

BRU–57 bomb racks; MAU–12

bomb racks and TER–9A triple

ejection racks; other chaff and flare,

ammunition, and pylons; launcher

adaptors and weapons interfaces;

fuel tanks and attached hardware;

travel pods; aircraft and weapons

integration, test, and support

equipment; electronic warfare

database and mission data file

development; precision

measurement and calibration

laboratory equipment; secure

communications; cryptographic

equipment; precision navigation

equipment; aircraft and personnel

support and test equipment; spare

and repair parts; repair and return

services; maps, publications, and

technical documentation; studies

and surveys; classified/unclassified

software and software support;

personnel training and training

equipment; facilities and facility management, design and/or construction services; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department*: Air Force

(JO–D–SAC), Navy (JO–P–LCB).

(v) *Prior Related Cases, if any*: None.

(vi) *Sales Commission, Fee, etc., Paid*,

Offered, or Agreed to be Paid: None.

(vii) *Sensitivity of Technology*

Contained in the Defense Article or

Defense Services Proposed to be Sold:

See Attached Annex.

(viii) *Date Report Delivered to*

Congress: February 3, 2022.

* As defined in Section 47(6) of the

Arms Export Control Act.

POLICY JUSTIFICATION

Jordan—F–16 C/D Block 70 Aircraft

The Government of Jordan has requested to buy twelve (12) F–16 C Block 70 aircraft; four (4) F–16 D Block 70 aircraft; twenty-one (21) F100–GE–129D engines or F100–PW229EEP engines (16 installed, 5 spares); twenty-one (21) Improved Programmable Display Generators (iPDG) (16 installed, 5 spares); twenty-one (21) AN/APG–83 Active Electronically Scanned Array (AESA) Scalable Agile Beam Radars (SABR) (16 installed, 5 spares); twenty-one (21) Modular Mission Computers (MMC) 7000AH (16 installed, 5 spares); twenty-seven (27) LN–260 (or equivalent) Embedded Global Positioning System (GPS) Inertial Navigation Systems (INS) (EGI) with Selective Availability Anti-Spoofing Module (SAASM) and Precise Positioning Service (PPS) (16 installed, 11 spares); six (6) AN/AAQ–33 Sniper Advanced Targeting Pods (ATP); thirty-one (31) Link 16 Low-Volume Terminals (for aircraft and ground stations) (26 installed, 5 spares); seventy-two (72) LAU–129 launchers (64 installed, 8 spares); twenty-one (21) M61A1 Vulcan cannons (16 installed, 5 spares); four hundred two (402) FMU–139 or FMU–152 Joint Programmable fuzes; one hundred (100) KMU–556 Joint Direct Attack Munition (JDAM) tail kits for 2,000LB GBU–31; one hundred two (102) KMU–572 JDAM tail kits for 500LB Laser JDAM GBU–54; one hundred (100) MAU–209 Computer Control Group (CCG) for Paveway II (PWII) GBU–10; one hundred two (102) MXU–651 Air Foil Group (AFG) for 2,000LB PWII GBU–10; one hundred (100) MAU–210 Enhanced Computer Control Group (ECCG) for 500LB Enhanced Paveway II (EP II) EGBU–49;

one hundred three (103) MXU-650 Air Foil Group (AFG) for 500LB EP II EGBU-49; two hundred (200) MK-84 or BLU-117 (or equivalent) bomb bodies; two hundred four (204) MK-82 or BLU-111 (or equivalent) bomb bodies; six (6) MK-82 inert bombs; and two (2) MAU-169 Computer Control Group (CCG) trainers. Also included are AN/ARC-238 radios; AN/APX-126 or equivalent Advanced Identification Friend or Foes (AIFF) with Combined Interrogator Transponder (CIT); Joint Helmet Mounted Cueing System II (JHMCS II) or Scorpion Hybrid Optical-based Inertial Tracker (HOBIT) helmet mounted displays; AN/ALQ-254 Viper Shield or equivalent Integrated Electronic Warfare (EW) systems; AN/ALE-47 Countermeasure Dispenser Systems (CMDs); KY-58M Cryptographic Devices; KIV-78 Cryptographic Devices; Simple Key Loaders (SKLs); Joint Mission Planning System (JMPS) or equivalent; PGU-28 High Explosive Incendiary (HEI) ammunition; PGU-27 training ammunition (non-HEI); ARD-446 impulse cartridges; ARD-863 impulse cartridges; BBU-36 impulse cartridges; BBU-35 impulse cartridges; MK-124 smoke flares; MJU-7/B flare cartridges L463 or MJU-53 or equivalent; Common Munitions Built-in-Test (BIT) Reprogramming Equipment (CMBRE); ADU-891 adapters for CMBRE; DSU-38 laser sensors for Laser JDAM GBU-54; Cartridge Actuated Device/Propellant Actuated Devices (CAD/PAD); BRU-57 bomb racks; MAU-12 bomb racks and TER-9A triple ejection racks; other chaff and flare, ammunition, and pylons; launcher adaptors and weapons interfaces; fuel tanks and attached hardware; travel pods; aircraft and weapons integration, test, and support equipment; electronic warfare database and mission data file development; precision measurement and calibration laboratory equipment; secure communications; cryptographic equipment; precision navigation equipment; aircraft and personnel support and test equipment; spare and repair parts; repair and return services; maps, publications, and technical documentation; studies and surveys; classified/unclassified software and software support; personnel training and training equipment; facilities and facility management, design and/or construction services; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support. The estimated total cost is \$4.21 billion.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the security of a Major Non-NATO Ally that is an important force for political stability and economic progress in the Middle East.

The proposed sale will improve Jordan's capability to meet current and future threats by ensuring continued interoperability with U.S. and coalition forces. These aircraft will modernize the Jordanian fighter aircraft fleet and support operational requirements associated with regional U.S.-coalition goals, such as countering violent extremist organizations, countering malign state and non-state actors, and border defense. Jordan will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Lockheed Martin, Greenville, South Carolina. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will require the assignment of fewer than twenty (20) U.S. contractor representatives to Jordan for a duration of thirty-six (36) months to support secure storage requirements of critically controlled assets and provide on-site contractor logistics support.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 22-06

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The F-16 Block 70 weapon system is a fourth generation single-engine supersonic all-weather multirole fighter aircraft and features advanced avionics and systems. It contains the General Electric F110-129D engine, AN/APG-83 radar, digital flight control system, embedded internal global navigation system, Joint Helmet Mounted Cueing Systems (JHMCS) II or Scorpion Hybrid Optical-based Inertial Tracker (HOBIT) with Night Vision Device (NVD) capability, internal and external Electronic Warfare (EW) equipment, Advanced IFF, Link-16 datalink, operational flight trainer, and software computer programs.

2. The General Electric F110-129 engine is an afterburning turbofan jet engine that powers the F-16.

3. The Improved Programmable Display Generator (iPDG) and color multifunction displays utilize ruggedized commercial liquid crystal display technology that is designed to withstand the harsh environment found in modern fighter cockpits. The display generator is the fifth generation graphics processor for the F-16. Through the use of state-of-the-art microprocessors and graphics engines, it provided orders of magnitude increases in throughput, memory, and graphics capabilities.

4. The Scalable Agile Beam Radar (SABR) APG-83 is an Active Electronically Scanned Array (AESA) radar upgrade for the F-16. It includes higher processor power, higher transmission power, more sensitive receiver electronics, and Synthetic Aperture Radar (SAR), which creates higher-resolution ground maps from a greater distance than existing mechanically scanned array radars (e.g., APG-68). The upgrade features an increase in detection range of air targets, increases in processing speed and memory, as well as significant improvements in all modes.

5. The Modular Mission Computer (MMC) 7000AH is the central aircraft computer of the F-16. It serves as the hub for all aircraft subsystems and avionics data transfer.

6. The Embedded GPS-INS (EGI) with Selective Availability Anti-Spoofing Module (SAASM) is a self-contained navigation system that provides the following: acceleration, velocity, position, attitude, platform azimuth, magnetic and true heading, altitude, body angular rates, time tags, and coordinated universal time (UTC) synchronized time. SAASM enables the GPS receiver access to the encrypted P(Y) signal providing protection against active spoofing attacks.

7. The AN/ALQ-254 Viper Shield or equivalent Integrated Electronic Warfare (EW) Suite provides passive radar warning, wide spectrum Radio Frequency (RF) jamming, and control and management of the entire EW system. This system is anticipated to be internal to the aircraft although mounted pod variants are used in certain circumstances.

8. The AN/AAQ-33 Sniper Advanced Targeting Pods (ATP) is a single, lightweight targeting pod for military aircraft that provides positive target identification, autonomous tracking, Global Positioning System (GPS) coordinate generation, and precise weapons guidance from extended standoff ranges. It incorporates a high

definition mid-wave forward-looking infrared (FLIR), dual-mode laser, visible-light high definition television (HDTV), laser spot tracker, video data link (VDL), and a digital data recorder.

9. The Link-16 is an advanced command, control, communications, and intelligence (C3I) system incorporating high capacity, jam-resistant, digital communication links for exchange of near real-time tactical information, including both data and voice, among air, ground, and sea elements. It provides the warfighter key theater functions such as surveillance, identification, air control, weapons engagement coordination, and direction for all services and allied forces. With modernized cryptography, Link-16 will ensure interoperability into the future.

10. AN/ARC-238 radio with HAVE QUICK II is a voice communications radio system that is equipped with HAVE QUICK II, which employs cryptographic technology. Other waveforms may be included as needed.

11. The AN/APX-126 or equivalent Advanced Identification Friend or Foe (AIFF) Combined Interrogator Transponder (CIT) is a system capable of transmitting and interrogating Mode 5, Mode 4 and Mode 5 anti-jam performance specifications/data, software source code, algorithms, and tempest plans or reports will not be offered, released discussed, or demonstrated.

12. The Joint Helmet Mounted Cueing System II (JHMCS II) or Scorpion Hybrid Optical-based Inertial Tracker (HObIT) is a device used in aircraft to project information to the pilot's eyes and aids in tasks such as cueing weapons and aircraft sensors to air and ground targets. This system projects visual targeting and aircraft performance information on the back of the helmet's visor, enabling the pilot to monitor this information without interrupting his/her field of view through the cockpit canopy. This provides improvement for close combat targeting and engagement.

13. The AN/ALE-47 Countermeasure Dispenser Set (CMDS) provides an integrated threat-adaptive, computer controlled capability for dispensing chaff, flares, and active radio frequency expendables. The system is internally mounted and may be operated as a stand-alone system or may be integrated with other on-board Electronic Warfare (EW) and avionics systems. The AN/ALE-47 uses threat data received over the aircraft interfaces to assess the threat situation and determine a response. Expendable routines tailored to the immediate aircraft and threat environment may be dispensed using one of four operational modes.

14. The KY-58M is a lightweight terminal for secure voice and data communications. The KY-58M provides wideband/narrowband half duplex communication.

15. The KIV-78 is a crypto applique for IFF. It can be loaded with Mode 5 classified elements.

16. The Simple Key Loader (SKL) is a ruggedized, portable, hand-held device, for securely receiving, storing, and transferring data between compatible cryptographic and communications equipment.

17. Joint Mission Planning System (JMPS) is a multi-platform PC-based mission planning system.

18. The LAU-129 Guided Missile Launcher is capable of launching a single AIM-9 (Sidewinder) family of missiles or AIM-120 Advanced Medium Range Air-to-Air Missile (AMRAAM). The LAU-129 launcher provides mechanical and electrical interface between missile and aircraft.

19. The M61A1 Vulcan Cannon is a six-barreled automatic cannon chambered in 20x120mm with a cyclic rate of fire from 2,500–6,000 shots per minute. This weapon is a hydraulically powered air cooled Gatling gun used to damage/destroy aerial targets, suppress/incapacitate personnel targets and damage or destroy moving and stationary light material targets.

20. The Joint Programmable Fuze FMU-152 or FMU-139 fuzes are multi-delay sensors compatible with weapon guidance kits, tail kits, high-explosive bombs, and reduced collateral damage weapons which provide all arming and detonation event functions combined in a single fuze system.

21. The Joint Direct Attack Munitions (JDAM) is a guidance set that converts existing unguided bomb into an accurate, adverse weather "smart" munition. The Guidance Set consists of a Tail Kit, which contains the Inertial Navigation System (INS) and a Global Positioning System (GPS), a set of Aerosurfaces and an umbilical cover, which allows the JDAM to improve the accuracy of unguided, General Purpose bombs. The JDAM weapon can be delivered from modest standoff ranges at high or low altitudes against a variety of land and surface targets during the day or night. JDAM is capable of receiving target coordinates via preplanned mission data from the delivery aircraft, by onboard aircraft sensors (*i.e.*, FLIR, Radar, etc.) during captive carry, or from a third-party source via manual or automated aircrew cockpit entry. The Guidance Set, when combined with a warhead and appropriate fuze, forms a JDAM Guided Bomb Unit (GBU).

The KMU-556 is the tail kit for a GBU-31, 2,000 pound JDAM.

22. Laser JDAM (Joint Direct Attack Munitions) (GBU-54) converts existing unguided free-fall bombs into precision guided smart munitions by adding a new tail section containing Inertial Navigation System (INS) guidance/Global Positioning System (GPS) guidance and adds a semi-active laser seeker. This allows the weapon to strike targets moving at up to 70 mph. The LJDAM weapon consists of a DSU-38 sensor, a JDAM guidance set installed on bomb body and a fuze. The DSU-38 consists of a laser spot tracker (same size and shape as a DSU-33 proximity fuze), a cable connecting the DSU-38 to the basic JDAM guidance set, a cable cover, cable cover tie down straps, modified tail kit door and wiring harness, and associated modified JDAM software that incorporates navigation and guidance flight software to support both LJDAM and standard JDAM missions.

The KMU-572 is the tail kit for a GBU-54, 500 pound Laser JDAM.

23. The Paveway II (PWII) is a maneuverable, free-fall Laser Guided Bomb (LGB) that guides to a spot of laser energy reflected off the target. The LGB is delivered like a normal general purpose (GP) warhead and the semi-active guidance corrects for many of the normal errors inherent in any delivery system. Laser designation for the LGB can be provided by a variety of laser target markers or designators. An LGB consists of a MAU-209 or MAU-169 Computer Control Group (CCG), that is not warhead specific, and a warhead specific Air Foil Group (AFG) that attaches to the nose and tail of the GP bomb body.

The GBU-10 is a 2,000lb GP bomb body fitted with the MXU-651 AFG to guide to its laser designated target. The inert GBU-12 uses a BDU-50 inert bomb body and MAU-169 CCG trainer for training purposes.

24. The Enhanced Paveway II (EP II) Laser Guided Bomb (LGB) is a maneuverable, all-weather, free-fall weapon that guides to a spot of laser energy reflected off the target. The "enhanced" component is the addition of GPS-aided Inertial Navigation Systems (GAINS) guidance to the laser seeker. Laser designation for the LGB can be provided by a variety of laser target markers or designators. The EP II consists of an MAU-210 Enhanced Computer Control Group (ECCG) that is not warhead specific and a warhead-specific Air Foil Group (AFG) that attaches to the nose and tail of a GP bomb body.

The EGBU-49 is a 500LB GP bomb body fitted with the MXU-650 AFG to guide to its laser-designated target.

25. The Mk-84 General Purpose (GP) bomb body is a 2,000 pound, free-fall, unguided, low-drag weapon.

26. The Mk-82 GP bomb body is a 500 pound, free-fall, unguided, low-drag weapon.

27. Mk-82 inert GP bomb body is a 500 pound, free-fall, unguided, low-drag weapon without the explosive fill.

28. The highest level of classification of defense articles, components, and services included in this potential sale is SECRET.

29. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

30. A determination has been made that Jordan can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

31. All defense articles and services listed in this transmittal have been authorized for release and export to the Government of Jordan.

[FR Doc. 2023-21063 Filed 9-26-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD-2023-OS-0089]

Proposed Collection; Comment Request

AGENCY: Office of the Secretary of Defense, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995*, the Office of the Secretary of Defense announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and

clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 27, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09-09, Alexandria, VA 22350-3100, Angela Duncan, 571-372-7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Control Number: Generic Clearance for Improving Customer Experience (OMB Circular A-11, Section 280 Implementation); OMB Control Number 0704-0595.

Needs and Uses

A. Purpose

Whether seeking a loan, Social Security benefits, veteran's benefits, or other services provided by the Federal Government, individuals and businesses expect Government customer services to be efficient and intuitive, just like services from leading private-sector organizations. Yet the 2016 American Consumer Satisfaction Index and the 2017 Forrester Federal Customer Experience Index show that, on average, Government services lag nine

percentage points behind the private sector.

A modern, streamlined and responsive customer experience means: raising government-wide customer experience to the average of the private sector service industry; developing indicators for high-impact Federal programs to monitor progress towards excellent customer experience and mature digital services; and providing the structure (including increasing transparency) and resources to ensure customer experience is a focal point for agency leadership. To support this, OMB Circular A-11 section 280 established government-wide standards for mature customer experience organizations in government and measurement. To enable Federal programs to deliver the experience taxpayers deserve, they must undertake three general categories of activities: conduct ongoing customer research, gather and share customer feedback, and test services and digital products.

These data collection efforts may be either qualitative or quantitative in nature or may consist of mixed methods. Additionally, data may be collected via a variety of means, including but not limited to electronic or social media, direct or indirect observation (*i.e.*, in person, video and audio collections), interviews, questionnaires, surveys, and focus groups. DoD will limit its inquiries to data collections that solicit strictly voluntary opinions or responses. Steps will be taken to ensure anonymity of respondents in each activity covered by this request.

The results of the data collected will be used to improve the delivery of Federal services and programs. It will include the creation of personas, customer journey maps, and reports and summaries of customer feedback data and user insights. It will also provide government-wide data on customer experience that can be displayed on performance.gov to help build transparency and accountability of Federal programs to the customers they serve.

Method of Collection: DoD will collect this information by electronic means when possible, as well as by mail, fax, telephone, technical discussions, and in-person interviews. DoD may also utilize observational techniques to collect this information.

B. Annual Reporting Burden

Affected Public: Collections will be targeted to the solicitation of opinions from respondents who have experience with the program or may have

experience with the program in the near future.

Affected Public: Individuals or households.

Annual Burden Hours: 50,000.

Number of Respondents: 300,000.

Responses per Respondent: 1.

Annual Responses: 300,000.

Average Burden per Response: 10 minutes.

Frequency: On occasion.

Dated: September 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–20979 Filed 9–26–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: Docket Search Results ED–2023–SCC–0170]

Agency Information Collection Activities; Comment Request; School Pulse Panel 2024–25 Preliminary Field Activities

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 27, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number Docket Search Results ED–2023–SCC–0170. 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 www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the

Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 4C210, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, (202) 245–6347.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel 2024–25 Preliminary Field Activities.

OMB Control Number: 1850–0969.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 6,339.

Total Estimated Number of Annual Burden Hours: 2,551.

Abstract: The School Pulse Panel (SPP) is a data collection originally designed to collect repeated voluntary responses from a nationally representative sample of public schools to better understand how schools, students, and educators are responding to the ongoing stressors of the coronavirus pandemic. The School Pulse Panel is conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the

United States Department of Education. Due to the immediate need to collect information from schools during the pandemic to satisfy the requirement of Executive Order 14000, an emergency clearance was issued to develop and field the first several monthly collections of the SPP in 2021 and a full review of the SPP data collection was performed under the traditional clearance review process in 2022 (OMB# 1850–0969). SPP's innovative design and timely dissemination of findings have been used and cited frequently among Department of Education senior leadership, the White House Domestic Policy Counsel, the USDA's Food and Nutrition Service, the Centers for Disease Control and Prevention, Congressional deliberations, and the media. The ongoing interest by stakeholders has resulted in dedicated funding to continue the SPP as an ongoing, quick-turnaround data collection vehicle.

For the 2024–25 school year, the survey may ask school staff about a wide range of topics, including but not limited to instructional mode offered; enrollment counts of subgroups of students for various subject interests; strategies to address learning recovery; safe and healthy school mitigation strategies; mental health services; use of technology; information on staffing, nutrition services, absenteeism, usage of federal funds, facilities, and overall principal experiences. It is planned that content will be rotated in and out monthly. This package includes preliminary activities, including a generic special district application and communication materials for district and school recruitment, that will be conducted to help with recruitment efforts for the 2024–25 sample.

Roughly 8,000 public elementary, middle, high, and combined-grade schools will be randomly selected to participate in a panel. The goal will be national representation from 1,000 responding schools in order to report out national estimates. School staff will be asked to provide requested data monthly during the 2024–25 school year. This approach provides the ability to collect detailed information on various topics while also assessing changes over time for items that are repeated from month to month. Given the high demand for data collection during this time, the content of the survey will change monthly.

This request is to conduct the SPP 2024–25 preliminary activities, including contacting and obtaining research approvals from public school districts with an established research approval process (“special contact

districts”), where applicable, notifying sampled schools of their selection for the survey and inviting them to complete short Screener Surveys to establish a point of contact at their school. Additional materials may be added to this package after the 60-day public comment period is complete, in time for the subsequent 30-day public comment period that will begin in December 2023/January 2024. In spring of 2024, a clearance for main study data collection activities with schools and districts, including instruments for the first quarter of monthly collections, will be submitted 60-day and 30-day public comment. Subsequent quarterly content submissions will be submitted for 30-day public comment. Because the School Pulse Panel Survey is designed to collect data on timely questions, materials for SPP are cleared under two OMB Number sequences. Materials for SPP 2022 were cleared under OMB# 1850–0969, while 23–24 SPP were cleared primarily under OMB# 1850–0975. For 24–25 we return to OMB# 1850–0969.

Dated: September 21, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–20964 Filed 9–26–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0171]

Agency Information Collection Activities; Comment Request; Generic Application Package for Departmental Generic Grant Programs

AGENCY: Office of Finance and Operations (OFO), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 27, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2023–SCC–0171. 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 www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 4C210, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Cleveland Knight, (202) 987–0064.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand the Department’s information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Generic Application Package for Departmental Generic Grant Programs.

OMB Control Number: 1894–0006.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: State, Local, or Tribal Government.

Total Estimated Number of Annual Responses: 9,861.

Total Estimated Number of Annual Burden Hours: 447,089.

Abstract: The Department is requesting an extension of the approval for the Generic Application Package that numerous ED discretionary grant programs use to provide to applicants the forms and information needed to apply for new grants under those grant program competitions. The Department will use this Generic Application package for discretionary grant programs that: (1) Use the standard ED or Federal-wide grant applications forms that have been cleared separately through OMB under the terms of this generic clearance as approved by OMB and (2) use selection criteria from the Education Department General Administrative Regulations (EDGAR); selection criteria that reflect statutory or regulatory provisions that have been developed under 34 CFR 75.209, or a combination of EDGAR, statutory or regulatory criteria or other provisions, as authorized under 34 CFR 75.200 and 75.209. The use of the standard ED grant application forms and the use of EDGAR and/or criteria developed under §§ 75.200 and 75.209 promotes the standardization and streamlining of ED discretionary grant application packages.

Dated: September 21, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–20958 Filed 9–26–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0169]

Agency Information Collection Activities; Comment Request; Comprehensive Literacy State Development Annual Performance Report

AGENCY: Office of Elementary and Secondary Education (OESE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 27, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2023–SCC–0169. 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 www.regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Michael Berry, (202) 453–7088.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the

respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: CSLD Annual Performance Report.

OMB Control Number: 1810–NEW.

Type of Review: New ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 58.

Total Estimated Number of Annual Burden Hours: 638.

Abstract: The Comprehensive Literacy State Development (CLSD) program is authorized under the Elementary and Secondary Education Act of 1965, as amended (ESEA), sections 2222–2225. The CLSD program awards competitive grants to advance literacy skills—using evidence-based practices, activities, and interventions, including preliteracy skills, reading, and writing—for children from birth through grade 12, with an emphasis on disadvantaged children, including children living in poverty, English learners, and children with disabilities. Eligible entities include the state education agencies (SEAs) of the 50 states, the District of Columbia, and Puerto Rico. Additionally, directed awards are made to four (4) Outlying Areas: American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands. A portion of funds is also awarded directly to the Bureau of Indian Education.

CLSD requires that at least 95% of funds awarded to SEAs be distributed to local education agencies through a subgrant award process. However, the current OMB-approved ED generic grant performance report does not include fields to capture program (subgrantee) demographic data or performance measures to ensure grantees are meeting statutory and regulatory requirements and making progress toward meeting the goals and objectives of their approved projects. The proposed performance report metrics reflect the need to collect pertinent grantee- and subgrantee-level data that could be used to guide future program policy and practice and respond to stakeholder, congressional, and agency inquiries. Thus, the CLSD program staff would better understand whom they serve, programmatic needs, strategies to meet those needs, and how collecting program-level data would benefit the students and support their learning. The new CLSD performance report metrics would (a) collect programmatic data that demonstrate aggregate program-level impact; (b) provide subgrantees' aggregated data,

such as the number of students and professionals served, how funds have been used (e.g., professional learning, curricular materials), and staffing; and (c) provide the CLSD program staff the data to report the performance and outcomes of the CLSD program, at both the grantee and the subgrantee levels. These new measures also would help to add specificity to ED's monitoring efforts.

Dated: September 21, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–20941 Filed 9–26–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–1045–000.

Applicants: Venture Global Gator Express, LLC.

Description: § 4(d) Rate Filing: Normal filing version 1 2023 to be effective 10/31/2023.

Filed Date: 9/20/23.

Accession Number: 20230920–5084.

Comment Date: 5 p.m. ET 10/2/23.

Docket Numbers: RP23–1046–000.

Applicants: MountainWest Pipeline, LLC.

Description: § 4(d) Rate Filing: 2023 Housekeeping Filing to be effective 10/20/2023.

Filed Date: 9/20/23.

Accession Number: 20230920–5115.

Comment Date: 5 p.m. ET 10/2/23.

Docket Numbers: RP23–1047–000.

Applicants: MountainWest Overthrust Pipeline, LLC.

Description: § 4(d) Rate Filing: 2023 Housekeeping to be effective 10/20/2023.

Filed Date: 9/20/23.

Accession Number: 20230920–5116.

Comment Date: 5 p.m. ET 10/2/23.

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

before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP23–886–001.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Compliance filing: Compliance Filing—IT Feeder to FT—McMullen Lateral to be effective 11/1/2023.

Filed Date: 9/21/23.

Accession Number: 20230921–5045.

Comment Date: 5 p.m. ET 10/3/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

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

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: September 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–21096 Filed 9–26–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15315–000]

County of Coconino, AZ; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On June 12, 2023, Western Navajo Pumped Storage 2, LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the to be located near the City of Page in Coconino County, Arizona. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The project is proposed as a closed loop pumped storage hydroelectric-generating facility, which would involve the construction of new water storage, water conveyance, and generation facilities at off-channel locations where no such facilities exist at this time. The project would utilize water from Lake Powell to fill and periodically refill the project reservoirs. The lower reservoir would be located approximately 4,200 feet west from the proposed upper reservoir. A zoned rockfill embankment dike approximately 75 feet high and 6,200 feet long is proposed to be constructed to enclose the perimeter of the 55-acre lower reservoir with a water surface elevation of 5,475 feet mean sea level (msl). The upper reservoir would be located approximately 4,200 feet east from the proposed lower reservoir. A zoned rockfill embankment dike approximately 75 feet high and 6,500 feet long is proposed to be constructed to enclose the perimeter of the 55-acre upper reservoir with a water surface elevation of 6,475 feet msl. Both embankment ring dikes would have an impermeable clay core and an impermeable concrete liner.

During pumping operations, water would be drawn through the four reversible Francis pump-turbine units into four 12-foot-diameter steel pipes that would merge into a 24 foot-diameter penstock, which would convey water to the upper reservoir. During generation, operations would be reversed. The total installed generation

capacity would be 396 megawatts with a hydraulic head of 1,000 feet.

The proposed project would also include a new 30-mile-long, 230-kilovolt overhead transmission line that would extend from a proposed substation near the proposed powerhouse to an interconnection point with the substation located adjacent to Glen Canyon Dam approximately 2 miles northwest of Page, Arizona. The transmission route would follow an approximately 150-foot-wide corridor west until the proposed route meets an existing 200-foot-wide transmission corridor. The proposed substation would include two 200 MVA Generator Step-up Units, relays and controls, breakers, and switches as required by the existing substation owner/electric service provider.

Applicant Contact: Mr. Erik Steimle, Western Navajo Pumped Storage 1, LLC, 100 S Olive Street, West Palm Beach, FL 33401; erik@ryedevelopment.com; phone: (503) 998–0230.

FERC Contact: Everard Baker; email: everard.baker@ferc.gov; phone: (202) 502–8554.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members, and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov. Comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications should be submitted within 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at <https://ferconline.ferc.gov/FEROnline.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FEROnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of

electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Secretary Kimberly Bose, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P-15315-000.

More information about this project, including a copy of the application, can be viewed or printed on the “eLibrary” link of Commission’s website at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P-15315) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21104 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23-2895-000]

Hardin Solar Energy II 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 Hardin Solar Energy II 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 October 11, 2023.

The Commission encourages electronic submission of protests and

interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission’s Home Page (<http://www.ferc.gov>) using the “eLibrary” link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission’s Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission’s Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21094 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6115-000]

Pyrites Hydro, LLC; Notice of Authorization for Continued Project Operation

The license for the Pyrites Hydroelectric Project No. 6115 was issued for a period ending August 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project’s prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 6115 is issued to Pyrites Hydro, LLC for a period effective September 1, 2023, through August 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Pyrites Hydro, LLC is authorized to continue operation of the Pyrites Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for

the project or other disposition under the FPA, whichever comes first.

Dated: September 21, 2023.
Debbie-Anne A. Reese,
Deputy Secretary.
[FR Doc. 2023–21107 Filed 9–26–23; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3211–010]

Power Authority of the State of New York; Notice of Revised Procedural Schedule for Final Environmental Assessment for the Proposed Project Relicense

On July 31, 2020, the Power Authority of the State of New York (NYPA) filed an application with the Federal Energy Regulatory Commission (Commission or FERC) for a new license to continue to operate and maintain the Hinckley (Gregory B. Jarvis) Hydroelectric Project No. 3211 (Jarvis Project). On June 27, 2022, Commission staff issued a notice of intent to prepare a draft and final Environmental Assessment (EA) to evaluate the effects of relicensing the Jarvis Project. The notice of intent included a schedule for preparing a draft and final EA.

On September 6, 2023, Commission staff issued the draft EA. By this notice, Commission staff is updating the procedural schedule for completing a final EA. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue Final EA	March 2024.

Any questions regarding this notice may be directed to Andy Bernick at (202) 502–8660, or by email at andrew.bernick@ferc.gov.

Dated: September 21, 2023.
Debbie-Anne A. Reese,
Deputy Secretary.
[FR Doc. 2023–21110 Filed 9–26–23; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5261–000]

Green Mountain Power Corporation; Notice of Authorization for Continued Project Operation

The license for the Newbury Hydroelectric Project No. 5261 was issued for a period ending August 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 5261 is issued to Green Mountain Power Corporation for a period effective September 1, 2023, through August 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Green Mountain Power Corporation is authorized to continue operation of the Newbury Hydroelectric Project under the terms and conditions of the

prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: September 21, 2023.
Debbie-Anne A. Reese,
Deputy Secretary.
[FR Doc. 2023–21108 Filed 9–26–23; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2853–073]

Montana Department of Natural Resources and Conservation; Notice of Intent To Prepare an Environmental Assessment

On June 30, 2022, the Montana Department of Natural Resources and Conservation (Montana DNRC) filed an application for a new major license for the 9.66-megawatt Broadwater Hydroelectric Project (Broadwater Project; FERC No. 2853). The Broadwater Project is located on the Missouri River near the town of Toston in Broadwater County, Montana. The project includes Federal lands administered by the Bureau of Land Management.

In accordance with the Commission's regulations, on July 7, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA Notice). Based on the information in the record, including comments filed on the REA Notice, staff does not anticipate that licensing the project would constitute a major Federal action significantly affecting the quality of the human environment. Therefore, staff intends to prepare a draft and final Environmental Assessment (EA) on the application to relicense the Broadwater Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to

contact OPP at (202) 502-6595 or *OPP@ferc.gov*.

The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues draft EA.	March 2024.
Comments on draft EA.	April 2024.
Commission issues final EA.	July 2024. ¹

¹ The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) (2022) require that EAs be completed within 1 year of the Federal action agency's decision to prepare an EA. See National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, as amended by section 107(g)(1)(B)(iii) of the Fiscal Responsibility Act of 2023, Public Law 118-5, 4336a, 137 Stat. 42.

Any questions regarding this notice may be directed to Ingrid Brofman at (202) 502-8347, or *Ingrid.brofman@ferc.gov*.

Dated: September 20, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023-21048 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Docket Numbers: EG23-300-000.

Applicants: Proxima Solar, LLC.

Description: Proxima Solar, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 9/19/23.

Accession Number: 20230919-5131.

Comment Date: 5 p.m. ET 10/10/23.

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

Docket Numbers: ER23-2889-000.

Applicants: Bayou Galion Solar Project, LLC.

Description: Request for Limited and Prospective Tariff Waiver, et al. of Bayou Galion Solar Project, LLC.

Filed Date: 9/19/23.

Accession Number: 20230919-5055.

Comment Date: 5 p.m. ET 10/10/23.

Docket Numbers: ER23-2897-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6725; Queue No. AE2-117 to be effective 11/20/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5017.

Comment Date: 5 p.m. ET 10/12/23.

Docket Numbers: ER23-2898-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of NSA, Service Agreement No. 6266; Queue No. AB2-175 to be effective 11/20/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5032.

Comment Date: 5 p.m. ET 10/12/23.

Docket Numbers: ER23-2899-000.

Applicants: MS Solar 6, LLC.

Description: Baseline eTariff Filing: MS Solar 6, LLC MBR Application Filing to be effective 10/15/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5036.

Comment Date: 5 p.m. ET 10/12/23.

Docket Numbers: ER23-2900-000.

Applicants: Southern California Edison Company.

Description: Tariff Amendment: Termination Kramer Junction 6 TOT695/Kramer Junction 7 TOT696Q LGIAs to be effective 11/21/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5052.

Comment Date: 5 p.m. ET 10/12/23.

Docket Numbers: ER23-2901-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5729; Queue No. AF1-021 to be effective 11/20/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5097.

Comment Date: 5 p.m. ET 10/12/23.

Docket Numbers: ER23-2902-000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Amendment to Rate Schedule FERC No. 6 to be effective 11/20/2023.

Filed Date: 9/21/23.

Accession Number: 20230921-5105.

Comment Date: 5 p.m. ET 10/12/23.

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

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing

requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

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Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21097 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23-542-000]

Golden Triangle Storage, L.L.C.; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Golden Triangle Storage Expansion 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 Golden Triangle Storage Expansion Project involving construction and operation of facilities by Golden Triangle Storage, L.L.C. (GTS) in Jefferson County, Texas. 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 the 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 October 20, 2023. Comments may be submitted in written form. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission *before* the opening of this docket on September 12, 2023, you will need to file those comments in Docket No. CP23–542–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission’s current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, the pipeline company could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with State law. The Commission does not subsequently

grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

GTS provided landowners with a fact sheet prepared by the FERC entitled “*An Interstate Natural Gas Facility On My Land? What Do I Need To Know?*” which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission’s proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (www.ferc.gov) under the Natural Gas, *Landowner Topics* link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or FercOnlineSupport@ferc.gov.

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission’s website (www.ferc.gov) under the link to *FERC Online*. Using *eComment* is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature, which is located on the Commission’s website (www.ferc.gov) under the link to *FERC Online*. With *eFiling*, you can provide comments in a variety of formats by attaching them as a file with your submission. New *eFiling* users must first create an account by clicking on “*eRegister*.” You will be asked to select the type of filing you are making; a comment on a particular project is considered a “Comment on a Filing”; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–542–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Additionally, the Commission offers a free service called *eSubscription* which makes it easy to stay informed of all

issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to <https://www.ferc.gov/ferc-online/overview> to register for *eSubscription*.

The Commission’s Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Summary of the Proposed Project

GTS proposes to construct and operate two underground natural gas storage caverns, six compressor units, a new brine disposal well and brine pipeline, and appurtenant facilities, in Jefferson County, Texas. The Golden Triangle Storage Expansion Project would add about 14.4 billion cubic feet of natural gas storage capacity to the existing storage facilities.

The Golden Triangle Storage Expansion Project would consist of the following activities:

- developing and operating two new salt dome natural gas storage caverns;
- constructing and operating appurtenant facilities related to the two storage caverns;
- constructing and operating a brine disposal well and brine disposal pipeline;
- constructing and operating six new compressor units and appurtenances; and
- constructing and operating two new service corridors and three new permanent access roads.

The general location of the project facilities is shown in Appendix 1.¹

Land Requirements for Construction

Construction of the proposed facilities would temporarily disturb about 31

¹ The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at www.ferc.gov using the link called “*eLibrary*”. For instructions on connecting to *eLibrary*, refer to the last page of this notice. At this time, the Commission has suspended access to the Commission’s Public Reference Room. For assistance, contact FERC at FercOnlineSupport@ferc.gov or call toll free, (866) 208–3676 or TTY (202) 502–8659.

acres of land. Following construction, GTS would maintain about 5.2 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses. About 81 percent of the proposed construction would occur within GTS' existing Central Storage Site.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- environmental justice;
- air quality and noise; and
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/ Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the

public record through eLibrary² and the Commission's natural gas environmental documents web page (<https://www.ferc.gov/industries-data/natural-gas/environmental/environmental-documents>). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.³ Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with the applicable State Historic Preservation 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.⁴ The environmental document for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground

facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to GasProjectAddressChange@ferc.gov stating your request. You must include the docket number CP23-542-000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address as it appeared on this notice. *This email address is unable to accept comments.* OR

(2) Return the attached "Mailing List Update Form" (Appendix 2).

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208-FERC, or on the FERC website at www.ferc.gov using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number in the "Docket Number" field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

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: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21095 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

² For instructions on connecting to eLibrary, refer to the last page of this notice.

³ The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at title 40, Code of Federal Regulations, section 1501.8.

⁴ The Advisory Council on Historic Preservation's regulations are at title 36, Code of Federal Regulations, part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Project No. 15248–000]****RAMM Power Group, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications**

On November 18, 2021, RAMM Power Group LLC, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Sacaton Energy Storage Project (Sacaton Project or project) to be located in Pinal County, Arizona. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed 150-megawatt (MW) closed-loop pumped storage project would consist of the following: (1) an existing 1200-foot-deep open pit mine for the lower reservoir, which will have a storage capacity of 1,500 acre-feet at a maximum water surface elevation of 455 feet above mean sea level (msl); (2) an adjacent waste-rock dump for the upper reservoir, which will have a storage capacity of 1,300 acre-feet at a maximum water surface elevation of 1,456 feet msl; (3) a new 28-foot-high, 6,000-foot long upper reservoir dam; (4) a single 200-foot-long, 12-foot-diameter steel penstock connecting the upper and lower reservoirs; (5) a new underground powerhouse with two 75-MW pump/turbine generating units; (6) a single 14-foot-diameter low-pressure draft tube that would extend approximately 2,200 feet from the powerhouse to the lower reservoir; (7) a new 200-megavolt-ampere substation located adjacent to the upper reservoir; and (8) a new 2,500-foot-long, 137-kilovolt transmission line connecting the new substation to the grid interconnection at a transmission line owned by Arizona Public Service. Initial fill water for the project would come from the mine and purchased from existing water rights holders. The proposed project would have an estimated average annual generation of 400,000 megawatt-hours.

Applicant Contact: Dr. Michael A. Werner, RAMM Power Group, 14575 S Avenida Cucana, Sahuarita, Arizona 85629; phone: (509) 280–7486.

FERC Contact: Khatoon Melick, (202) 502–8433, khatoon.melick@ferc.gov.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at <https://ferconline.ferc.gov/eFiling.aspx>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <https://ferconline.ferc.gov/QuickComment.aspx>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov, (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15248–000.

More information about this project, including a copy of the application, can be viewed or printed on the “eLibrary” link of Commission's website at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P–15248) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: September 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–21105 Filed 9–26–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. CP23–542–000]****Golden Triangle Storage, LLC; Notice of Application and Establishing Intervention Deadline**

Take notice that on September 12, 2023, Golden Triangle Storage, LLC (GTS), 919 Milam Street, Suite 2425, Houston, Texas 77002, filed an application under section 7(c) of the Natural Gas Act (NGA), and part 157 of the Commission's regulations requesting authorization for its Expansion Project (Project). The Project consists of expanding its existing natural gas storage facility in Jefferson County, Texas, through the construction and operation of two new salt dome storage caverns, additional compression, and other appurtenant facilities. The Project will meet documented market demand for increased storage capacity, enhance operational capabilities at the existing storage facilities, and ensure that GTS will be able to continue to offer safe, reliable storage services for both existing and new customers. Further, GTS requests reaffirmation of its market-based rate authority and related authorizations and waivers, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

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 (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. For assistance, contact the Federal Energy Regulatory Commission at FercOnlineSupport@ferc.gov or call toll-free, (866) 208–3676 or TTY (202) 502–8659.

Any questions regarding the proposed project should be directed to James F. Bowe, Jr., King & Spalding LLP, 1700 Pennsylvania Avenue, Suite 900, Washington, DC 20006 by phone at

(202) 626-9601, or by email at jbowe@kslaw.com.

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,¹ within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Water Quality Certification

GTS's application states that a water quality certificate under section 401 of the Clean Water Act is required for the project from the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC). The request for certification must be submitted to the certifying agency and to the Commission concurrently. Proof of the certifying agency's receipt date must be filed no later than five (5) days after the request is submitted to the certifying agency.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5 p.m. eastern time on October 11, 2023. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and

assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502-6595 or OPP@ferc.gov.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)² and 385.211³ of the Commission's regulations under the NGA, any person⁴ may file a protest to the application. Protests must comply with the requirements specified in section 385.2001⁵ of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before October 11, 2023.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP23-542-000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; first select "General" and then select "Comment on a Filing"; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number (CP23-542-000).

² 18 CFR 157.10(a)(4).

³ 18 CFR 385.211.

⁴ Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

⁵ 18 CFR 385.2001.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502-8258 or FercOnlineSupport@ferc.gov.

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,⁶ has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁷ and the regulations under the NGA⁸ by the intervention deadline for the project, which is October 11, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://>

⁶ 18 CFR 385.102(d).

⁷ 18 CFR 385.214.

⁸ 18 CFR 157.10.

¹ 18 CFR (Code of Federal Regulations) 157.9.

www.ferc.gov/resources/guides/how-to-intervene.asp.

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP23–542–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. 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; first select "General" and then select "Intervention." The eFiling feature includes a document-less intervention option; for more information, visit <https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf>; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP23–542–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail or email at: James F. Bowe, Jr., King & Spalding LLP, 1700 Pennsylvania Avenue, Suite 900, Washington, DC 20006, or at jbowe@kslaw.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed⁹ motions to intervene are automatically granted by operation of Rule 214(c)(1).¹⁰ Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the

time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.¹¹ A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at www.ferc.gov using the "eLibrary" link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Intervention Deadline: 5 p.m. eastern time on October 11, 2023.

Dated: September 20, 2023.

Kimberly D. Bose,
Secretary.

[FR Doc. 2023–21047 Filed 9–26–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2701–061]

Erie Boulevard Hydropower, L.P.; Notice of Revised Procedural Schedule for Final Environmental Assessment for the Proposed Project Relicense

On February 26, 2021, Erie Boulevard Hydropower, L.P. filed an application for a new major license to continue to operate and maintain the 39.75-megawatt (MW) West Canada Creek Hydroelectric Project No. 2701 (West Canada Creek Project). On June 27, 2022, Commission staff issued a notice of intent to prepare a draft and final Environmental Assessment (EA) to evaluate the effects of relicensing the West Canada Creek Project. The notice

of intent included a schedule for preparing a draft and final EA.

On September 6, 2023, Commission staff issued the draft EA. By this notice, Commission staff is updating the procedural schedule for completing a final EA. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue Final EA	March 2024.

Any questions regarding this notice may be directed to Laurie Bauer at (202) 502–6519, or by email at laurie.bauer@ferc.gov.

Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–21111 Filed 9–26–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6240–000]

Watson Associates L.P.; Notice of Authorization for Continued Project Operation

The license for the Watson Dam Project No. 6240 was issued for a period ending August 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

⁹ The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

¹⁰ 18 CFR 385.214(c)(1).

¹¹ 18 CFR 385.214(b)(3) and (d).

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 6240 is issued to Watson Associates L.P. for a period effective September 1, 2023, through August 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Watson Associates L.P. is authorized to continue operation of the Watson Dam Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21106 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5089-000]

Fall River Rural Electric Cooperative, Inc.; Notice of Authorization for Continued Project Operation

The license for the Felt Hydroelectric Project No. 5089 was issued for a period ending August 31, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires,

until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 5089 is issued to Fall River Rural Electric Cooperative, Inc., for a period effective September 1, 2023, through August 31, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Fall River Rural Electric Cooperative, Inc., is authorized to continue operation of the Felt Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: September 21, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-21109 Filed 9-26-23; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA- HQ-OECA-2011-0824; FRL-11432-01-OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Pesticide Establishment Application, Notification of Registration, and Pesticide Production Reports for Pesticide-Producing and Device- Producing Establishments (Renewal)

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), Pesticide Establishment Application, Notification of Registration, and Pesticide

Production Reports for Pesticide-Producing and Device-Producing Establishments (EPA ICR Number 0160.13, OMB Control Number 2070-0078) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. Public comments were previously requested via the **Federal Register** on February 14, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before October 27, 2023.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OECA-2011-0824 to, EPA online using www.regulations.gov (our preferred method), by email to doCKET.oeca@epa.gov or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Michelle Yaras, Office of Compliance, Monitoring, Assistance, and Media Programs Division, Pesticides, Waste & Toxics Branch 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564-4153; email address: yaras.michelle@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through September 30, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on February 14, 2023 during a 60-day comment period (88 FR 9516). This

notice allows for an additional 30 days for public comments. This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 7(a) requires that any person who produces pesticides, active ingredients or devices subject to the Act must register with the Administrator of EPA the establishment in which the pesticide, active ingredient or device is produced. This section further requires that application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such an establishment. EPA Form 3540-8, Application for Registration of Pesticide-Producing and Device-Producing Establishments, is used to collect the establishment registration information required by this section.

FIFRA section 7(c) requires that any producer operating an establishment registered under section 7 report to the Administrator within 30 days after it is registered, and annually thereafter by March 1st for certain pesticide or device production and sales or distribution information. The producers must report which types and amounts of pesticides, active ingredients, or devices are currently being produced, were produced during the past year, sold or distributed in the past year. The supporting regulations at 40 CFR part 167 provide the requirements and time schedules for submitting production information. EPA Form 3540-16, Pesticide Report for Pesticide-Producing and Device-Producing Establishments, is used to collect the pesticide production information required by section 7(c) of FIFRA.

Establishment registration information, collected on EPA Form 3540-8, is a one-time requirement for all pesticide-producing and device-producing establishments. Pesticide and device production information, reported on EPA Form 3540-16, is required to be submitted within 30 days after the company is notified of their pesticide-producing or device-producing establishment number, and annually thereafter on or before March 1st.

Pesticide-producing and device-producing establishments optionally can electronically enter and submit their establishment registration information and pesticide production information through EPA's Central Data Exchange (CDX).

Form Numbers: EPA Forms 3540-8 and 3540-16.

Respondents/affected entities:

Establishments producing pesticides.

Respondent's obligation to respond: Mandatory (40 CFR part 167).

Estimated number of respondents: 20,607 (total).

Frequency of response: Annually.

Total estimated burden: 33,219.69 hours (per year). Burden is defined at 5 CFR 1320.03(b)

Total estimated cost: \$2,733,968.15 (per year), includes \$0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 6,084.43 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is a result of the COVID-19 pandemic causing a 109.1 percent increase in the average number of new establishments (815 in 2019 to 1703 in 2023) and a 32.67 percent increase in the total number of establishments (14,248 in 2019 to 18,904 in 2023). Additional increases are due to changes in the salary tables used in the calculations. There have only been minor changes in the time used to calculate each individual activity.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2023-21037 Filed 9-26-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-11420-01-OW]

Notice of Public Meeting of the Environmental Financial Advisory Board (EFAB) With Webcast

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA) announces a public meeting with a webcast of the Environmental Financial Advisory Board (EFAB). The meeting will be shared in real-time via webcast and public comments may be provided in writing in advance or virtually via webcast. Please see **SUPPLEMENTARY INFORMATION** for further details. The

purpose of the meeting will be for the EFAB to discuss possible future advisory charges, provide updates on previous EFAB deliverables, and to understand and consider environmental finance issues in the Great Lakes region and Michigan. The meeting will be conducted in a hybrid format of in-person and virtual via webcast.

DATES: The meeting will be held on:

1. October 24, 2023, from 9 a.m. to 4 p.m. eastern time; and

2. October 25, 2023, from 9 a.m. to 12 p.m. eastern time.

ADDRESSES:

In-Person: Doubletree by Hilton Ann Arbor North, 3600 Plymouth Road, Ann Arbor, Michigan 48105.

Webcast: Information to access the webcast will be provided upon registration in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants information about the meeting may contact Tara Johnson via telephone/voicemail at (202) 564-6186 or email to efab@epa.gov. General information concerning the EFAB is available at www.epa.gov/waterfinancecenter/efab.

SUPPLEMENTARY INFORMATION:

Background: The EFAB is an EPA advisory committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2, to provide advice and recommendations to EPA on innovative approaches to funding environmental programs, projects, and activities. Administrative support for the EFAB is provided by the Water Infrastructure and Resiliency Finance Center within EPA's Office of Water. Pursuant to FACA and EPA policy, notice is hereby given that the EFAB will hold a public meeting with a webcast for the following purposes:

(1) Discuss potential future EFAB charges;

(2) Provide updates on recent EFAB deliverables; and

(3) Receive briefings on environmental finance issues in the Great Lakes region and Michigan.

Registration for the Meeting: To register for the meeting, please visit www.epa.gov/waterfinancecenter/efab#meeting. Interested persons who wish to attend the meeting must register by October 18, 2023, to attend in person or by October 20, 2023, to attend via webcast. Pre-registration is strongly encouraged. In the event the meeting cannot be held, an announcement will be made on the EFAB website at www.epa.gov/waterfinancecenter/efab and all registered attendees will be notified.

Availability of Meeting Materials: Meeting materials, including the

meeting agenda and briefing materials, will be available on EPA's website at www.epa.gov/waterfinancecenter/efab.

Procedures for Providing Public Input: Public comment for consideration by EPA's Federal advisory committees has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a Federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees provide independent advice to EPA. Members of the public may submit comments on matters being considered by the EFAB for consideration as the Board develops its advice and recommendations to EPA.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public meeting will be limited to three minutes each. Persons interested in providing oral statements at the October 2023 meeting should register in advance and provide notification, as noted in the registration confirmation, by October 18, 2023, to be placed on the list of registered speakers.

Written Statements: Written statements should be received by October 16, 2023, so that the information can be made available to the EFAB for its consideration prior to the meeting. Written statements should be sent via email to efab@epa.gov. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the EFAB website. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities or to request accommodations for a disability, please register for the meeting and list any special requirements or accommodations needed on the registration form at least 10 business days prior to the meeting to allow as much time as possible to process your request.

Andrew D. Sawyers,

*Director, Office of Wastewater Management,
Office of Water.*

[FR Doc. 2023-21112 Filed 9-26-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2023-0138; FRL-11433-01-OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Regional Haze Regulations (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Regional Haze Regulations (EPA ICR Number 2540.04, OMB Control Number 2060-0704) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2023. Public comments were previously requested via the **Federal Register** on March 31, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments must be submitted on or before October 27, 2023.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OAR-2023-0138 to EPA online using www.regulations.gov (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Macie Moore, Air Quality Policy Division, Office of Air Quality Planning and Standards, mail code C539-04, U.S. Environmental Protection Agency, Research Triangle Park, NC 27709; telephone number: (919) 541-7873; email address: moore.macie@epa.gov.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through September 30, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on March 31, 2023 during a 60-day comment period (88 FR 19301). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at www.regulations.gov or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202-566-1744. For additional information about EPA's public docket, visit <http://www.epa.gov/dockets>.

Abstract: This ICR is for activities related to the implementation of the EPA's regional haze rule, for the time period between September 30, 2023, and September 30, 2026, and renews the previous ICR. The regional haze rule codified at 40 CFR parts 308 and 309, as authorized by sections 169A and 169B of the Clean Air Act, requires states to develop implementation plans to protect visibility in 156 federally protected Class I areas. Tribes may choose to develop implementation plans. For this time period, all 50 states, the District of Columbia, and the U.S. Virgin Islands will be developing and submitting periodic progress reports. Further, 14 states/territories will be developing and submitting periodic comprehensive implementation plan revisions to comply with the regulations.

Form Numbers: None.

Respondents/affected entities: State, local and tribal air quality agencies, regional planning organizations and facilities potentially regulated under the Regional Haze Rule.

Respondent's obligation to respond: Mandatory [40 CFR 51.308(b), (f) and (g)].

Estimated number of respondents: 52 (total).

Frequency of response:

Approximately every 5 years.

Total estimated burden: 15,846 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: \$932,062 (per year), which includes \$0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is decrease of 22,409 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease in burden reflects changes in the activities conducted due to the normal progression of the program, especially the fact that all 50 states, the District of Columbia, and the U.S. Virgin Islands will be developing and submitting progress reports by January 31, 2025, while 14 states/territories will be submitting periodic comprehensive State Implementation Plan (SIP) revisions. In the previous ICR period, we assumed 52 states/territories would be developing and submitting comprehensive SIP revisions.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2023–21036 Filed 9–26–23; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2023–6050]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Notice of Claim and Proof of Loss, Working Capital Guarantee

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

DATES: Comments must be received on or before November 27, 2023 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on <http://www.regulations.gov> (EIB 10–04) or by email to donna.schneider@exim.gov, or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571.

SUPPLEMENTARY INFORMATION: By neutralizing the effect of export credit support offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. Under the Working

Capital Guarantee Program, Ex-Im Bank provides repayment guarantees to lenders on secured, short-term working capital loans made to qualified exporters. The guarantee may be approved for a single loan or a revolving line of credit. In the event that a borrower defaults on a transaction guaranteed by Ex-Im Bank the guaranteed lender may seek payment by the submission of a claim.

This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant working capital guarantee. The Notice of Claim and Proof of Loss, Working Capital Guarantee is used to determine compliance with the terms of the guarantee and the appropriateness of paying a claim. Export-Import Bank customers are submitting this form electronically.

The information collection tool can be reviewed at: <http://www.exim.gov/pub/pending/eib10-04.pdf>.

Title and Form Number: EIB 10–04 Notice of Claim and Proof of Loss, Working Capital Guarantee.

OMB Number: 3048–0035.

Type of Review: Renewal.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 10.
Estimated Time per Respondent: 6 hours.

Annual Burden Hours: 60 hours.

Frequency of Reporting of Use: As needed to request a working capital claim payment.

Dated: September 22, 2023.

Kalesha Malloy,

IT Specialist.

[FR Doc. 2023–21044 Filed 9–26–23; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0584; FR ID 173363]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection.

Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before November 27, 2023. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to nicole.ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0584.

Title: Administration of U.S. Certified Accounting Authorities in Maritime Mobile and Maritime Mobile-Satellite Radio Services, FCC Forms 44 and 45.

Form Number(s): FCC Form 44 and FCC Form 45.

Type of Review: Extension a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 10 respondents and 22 responses.

Estimated Time per Response: 1 hour–3 hours.

Frequency of Response: On occasion, annually and semi-annually reporting requirements; annual recordkeeping requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C.

154(i), 154(j), 161, 201–205, and 303(r). *Total Annual Burden:* 24 hours.

Total Annual Cost: \$250,000.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60-day comment period in order to obtain the full three-year clearance from them.

The FCC has standards for accounting authorities in the maritime mobile and

maritime-satellite radio services. The Commission will use the information to determine eligibility of applicants for certification as an accounting authority, to monitor activity, to ensure compliance, and to identify accounting authorities to the International Telecommunications Union. Respondents are entities seeking certification or those already certified to be accounting authorities.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–20972 Filed 9–26–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of Intent To Terminate Receiverships

Notice is Hereby Given that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

Fund	Receivership name	City	State	Date of appointment of receiver
10029	Bank of Clark County	Vancouver	WA	01/16/2009
10221	Lincoln Park Savings Bank	Chicago	IL	04/23/2010
10334	Firstier Bank	Louisville	CO	01/28/2011
10524	Seaway Bank and Trust	Chicago	IL	01/27/2017
10535	Ericson State Bank	Ericson	NE	02/14/2020
10538	Almena State Bank	Almena	KS	10/23/2020

The liquidation of the assets for each receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors. Based upon the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person wishes to comment concerning the termination of any of the receiverships, such comment must be made in writing, identify the receivership to which the comment pertains, and be sent within thirty days of the date of this notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Section, 600 North Pearl, Suite 700, Dallas, TX 75201. No comments concerning the termination of the above-mentioned receiverships will be considered which are not sent within this timeframe.

(Authority: 12 U.S.C. 1819)

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on September 22, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–21039 Filed 9–26–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

TIME AND DATE: 10:00 a.m., Tuesday, October 10, 2023.

PLACE: The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument in the matter *Thomas v. CalPortland Co.*, Docket Nos. WEST 2018–0402–DM and WEST 2019–0205. (Issues include whether the Judge erred in ruling that the miner had established that the operator had discriminated against him under section 105(c)(3) of the Mine Act.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO:

Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

PHONE NUMBER FOR LISTENING TO

MEETING: 1 (866) 236–7472, Passcode: 678–100.

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

Dated: September 22, 2023.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2023–21162 Filed 9–25–23; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

TIME AND DATE: 2:00 p.m., Tuesday, October 10, 2023.

PLACE: The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Thomas v. CalPortland Co.*, Docket Nos. WEST 2018–0402–DM and WEST 2019–0205. (Issues include whether the Judge erred in ruling that the miner had established that the operator had discriminated

against him under section 105(c)(3) of the Mine Act.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO:

Emogene Johnson (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

PHONE NUMBER FOR LISTENING TO

MEETING: 1 (866) 236-7472, Passcode: 678-100.

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

Dated: September 22, 2023.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2023-21163 Filed 9-25-23; 11:15 am]

BILLING CODE 6735-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551-0001, not later than October 12, 2023.

A. Federal Reserve Bank of Kansas City Jeffrey Imgarten, Assistant Vice President, 1 Memorial Drive, Kansas

City, Missouri, 64198, KCApplicationcomments@kc.frb.org:

1. *Jeffrey Alan Svajgr, Omaha, Nebraska*; to join the Olson/Svajgr Family Group, a group acting in concert, to acquire voting shares of Midwest Banco Corporation, and thereby indirectly acquire voting shares of Waypoint Bank, both of Cozad, Nebraska.

Board of Governors of the Federal Reserve System.

Erin Cayce,

Assistant Secretary of the Board.

[FR Doc. 2023-21075 Filed 9-26-23; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Senior Executive Service Performance Review Board

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Notice.

SUMMARY: This notice announces the appointment of the members of the Senior Executive Service Performance Review Board for the Federal Retirement Thrift Investment Board. The purpose of the Performance Review Board is to make written recommendations on each executive's annual summary ratings, performance-based pay adjustment, and performance awards to the appointing authority.

DATES: This notice is applicable on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Kelly Powell, HR Specialist, at 202-942-1681.

SUPPLEMENTARY INFORMATION: Title 5, U.S. Code, 4314(c)(4), requires that the appointment of Performance Review Board members be published in the **Federal Register** before Board service commences. The following persons will serve on the Federal Retirement Thrift Investment Board's Performance Review Board which will review initial summary ratings to ensure the ratings are consistent with established performance requirements, reflect meaningful distinctions among senior executives based on their relative performance and organizational results and provide recommendations for ratings, awards, and pay adjustments in a fair and equitable manner: Vijay Desai,

Gisile Goethe, Sean McCaffrey, and Dharmesh Vashee.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2023-21055 Filed 9-26-23; 8:45 am]

BILLING CODE 6760-01-P

GENERAL SERVICES ADMINISTRATION

[Notice—MG—2023—03; Docket No. 2023—0002; Sequence No. 34]

Office of Federal High-Performance Green Buildings; Green Building Advisory Committee; Notification of Upcoming Public Meetings

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, this notice provides the agenda for one in-person and Web-based (hybrid) meeting of the Green Building Advisory Committee (the Committee) and a series of Web-based meetings of the Committee's Federal Building Decarbonization Task Group (the Task Group).

The meetings are open to the public to observe; online attendees are required to register in advance to attend as instructed below.

DATES: The Committee's hybrid meeting will be held Thursday, November 2, 2023, from 10 a.m. to 4 p.m., Eastern Time (ET). In addition, the Committee's Federal Building Decarbonization Task Group will continue to hold a series of web-based meetings on consecutive Mondays from October 16, 2023 to October 30, 2023 and alternative Mondays from November 13, 2023 through February 26, 2024, from 3 p.m. to 4 p.m., Eastern Time (ET). This is a continuation of a series of meetings previously announced in 87 FR 61322 (<https://www.federalregister.gov/documents/2022/10/11/2022-21964/office-of-federal-high-performance-buildings-green-building-advisory-committee-notification-of>).

ADDRESSES: GSA Headquarters, 1800 F Street NW, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Bloom, Designated Federal Officer, Office of Federal High-Performance Green Buildings, Office of Government-wide Policy, GSA, 1800 F Street NW, (Mail-code: MG), Washington, DC 20405, at gbac@gsa.gov or 312-805-6799. Additional

information about the Committee, including meeting materials and agendas, will be made available on-line at <https://www.gsa.gov/gbac>.

SUPPLEMENTARY INFORMATION:

Procedures for Attendance and Public Comment

To register to attend the November 2nd meeting as a public observer, please send the following information via email to gbac@gsa.gov: your first and last name, organization and email address and whether you would like to provide public comment. Requests to observe the November 2nd, 2023 meeting must be received by 12 p.m. ET, on Monday, October 30, 2023 to receive the meeting information.

Requests to observe the full series of Task Group meetings must be received by 5 p.m. ET on the Monday before the meeting in question. Since Task Group meetings are conducted as a series, it will be most useful to observe all or most of them from the start.

For all online meetings, Web meeting attendance information will be provided following registration. Time will be provided at all meetings for public comment wherever possible.

GSA will be unable to provide technical assistance to any listener experiencing technical difficulties. Testing access to the Web meeting site before the calls is recommended. To request an accommodation, such as closed captioning, or to ask about accessibility, please contact Mr. Bloom at gbac@gsa.gov at least five business days prior to the meeting to give GSA as much time as possible to process the request.

Background

The Administrator of GSA established the Committee on June 20, 2011 (**Federal Register**/Vol. 76, No. 118) pursuant to Section 494 of the Energy Independence and Security Act of 2007 (EISA, 42 U.S.C. 17123). Under this authority, the Committee provides independent policy advice and recommendations to GSA to advance federal building innovations in planning, design, and operations to reduce costs, enable agency missions, enhance human health and performance, and minimize environmental impacts.

November 2nd Meeting Agenda

- Welcome
- Introductions
- Task Group Presentations, Recommendations and Vote (as needed)
 - Federal Building Decarbonization
 - Green Leasing

- Working Lunch with Speaker
- Discussion of Next Potential Committee Topics
- Public Comments
- Adjourn

Green Building Advisory Committee

Federal Building Decarbonization Task Group

The Federal Building Decarbonization Task Group will work to develop recommendations to the full Committee to propose to GSA, to prioritize federal building decarbonization strategies. This phase of the Task Group builds on the findings of the first two phases of this Task Group with a deeper investigation of issues related to beneficial federal building electrification.

Kevin Kampschroer,

Federal Director, Office of Federal High-Performance Green Buildings, General Services Administration.

[FR Doc. 2023-20967 Filed 9-26-23; 8:45 am]

BILLING CODE 6820-14-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2023-0079]

Advisory Committee on Immunization Practices

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice and request for comment.

SUMMARY: In accordance with regulatory provisions, the Centers for Disease Control and Prevention (CDC) announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. Time will be available for public comment.

DATES: The meeting will be held on October 25, 2023, from 8 a.m. to 5 p.m., EDT, October 26, 2023, from 8 a.m. to 5 p.m., EDT, and October 27, 2023, from 8 a.m. to 12 p.m., EDT (times subject to change; see the ACIP website for updates: <https://www.cdc.gov/vaccines/acip/index.html>).

Written comments must be received between October 2-13, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CDC-2023-0079, by either of the methods listed below. CDC does not accept comments by email.

• *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

• *Mail:* Ms. Stephanie Thomas, ACIP Meeting, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24-8, Atlanta, Georgia 30329-4027. Attn: Docket No. CDC-2023-0079.

Instructions: All submissions received must include the Agency name and docket number. All relevant comments received in conformance with the <https://www.regulations.gov> suitability policy will be posted without change to <https://www.regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

The meeting will be webcast live via the World Wide Web. The webcast link can be found on the ACIP website at <https://www.cdc.gov/vaccines/acip/index.html>.

FOR FURTHER INFORMATION CONTACT:

Stephanie Thomas, Committee Management Specialist, Advisory Committee on Immunization Practices, National Center for Immunization and Respiratory Diseases, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop H24-8, Atlanta, Georgia 30329-4027. Telephone: (404) 639-8836; Email: ACIP@cdc.gov.

SUPPLEMENTARY INFORMATION: Purpose:

The Advisory Committee on Immunization Practices (ACIP) is charged with advising the Director, Centers for Disease Control and Prevention (CDC), on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the Committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under applicable provisions of the Affordable Care Act and section 2713 of the Public Health Service Act, immunization recommendations of ACIP that have been approved by the Director, CDC, and appear on CDC immunization schedules generally must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussions on child and adolescent immunization schedules, adult immunization schedule, influenza vaccines, chikungunya vaccine, COVID-19 vaccines, meningococcal vaccines, mpox vaccine, pneumococcal vaccines, polio vaccines, and respiratory syncytial

virus vaccines for older adults. Recommendation votes on child and adolescent immunization schedules, adult immunization schedule, meningococcal vaccines, and mpox vaccine are scheduled. A Vaccines for Children vote on meningococcal vaccines and mpox vaccine is scheduled. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda, visit <https://www.cdc.gov/vaccines/acip/meetings/index.html>.

Meeting Information: The meeting will be webcast live via the World Wide Web. For more information on ACIP, please visit the ACIP website: <https://www.cdc.gov/vaccines/acip/index.html>.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near-duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Written Public Comment: The docket will be opened to receive written comments on October 2, 2023. Written comments must be received by October 13, 2023.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes, including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the October 25–27, 2023, ACIP meeting must submit a request at <https://www.cdc.gov/>

[vaccines/acip/meetings/index.html](https://www.cdc.gov/vaccines/acip/meetings/index.html) between October 2, 2023, and no later than 11:59 p.m., EDT, October 13, 2023, according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by October 17, 2023. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to three minutes, and each speaker may speak only once per meeting.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–20949 Filed 9–26–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–2540–23 and CMS–10448]

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 November 27, 2023.

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, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William 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–2540–23—Skilled Nursing Facility and Skilled Nursing Facility Healthcare Complex Report
CMS–10448—Essential Health Benefits Benchmark Plans

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:* Reinstatement with change; *Title of Information Collection:* Skilled Nursing Facility and Skilled Nursing Facility Complex Cost Report; *Use:* The primary function of the cost report is to implement the principles of cost reimbursement that require that SNFs maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Specifically, CMS–2540–23 collects discrete data, previously reported in summary form, used in determining the cost weights for the SNF market basket and for payment adequacy analyses. SNFs and SNF health care complexes participating in the Medicare program submit these cost reports annually to report cost and statistical data used by CMS to determine reasonable costs. Essentially the methods of determining costs payable under Medicare involve making use of data available from the provider’s accounting records, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries.; *Form Number:* CMS–2540–23 (OMB control number: 0938–0463); *Frequency:* Annually; *Affected Public:* Private Sector, (Business or other for-profits), Not-for-profit institutions; *Number of Respondents:* 14,189; *Total Annual Responses:* 14,189; *Total Annual Hours:* 2,866,178. (For policy questions regarding this collection contact Luann Piccione at 410–786–5423.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Essential Health Benefits Benchmark Plans; *Use:* On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA; Pub. L. 111–148) was signed into law, and on

March 30, 2010, the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) was signed into law. The two laws implement various health insurance policies, including the essential health benefits (EHB). Beginning in 2014, all non-grandfathered health plans in the individual and small group market must cover EHB, as defined by the Secretary of Health and Human Services.

In the final rule entitled *HHS Notice of Benefit and Payment Parameters for 2023* (2023 Payment Notice; CMS–9911–F),² we repealed the ability for States to permit between category substitution of the EHBs at 45 CFR 156.115. Thus, we revise this Supporting Statement to remove any burden associated with States opting to permit between category substitution of the EHBs and remove the form Essential Health Benefits (EHB) State Substitution Notification (Appendix F) from this collection.

For annual reporting of state mandates, in the final rule entitled *HHS Notice of Benefit and Payment Parameters for 2021* (2021 Payment Notice; CMS–9916–F),³ we finalized amendments to § 156.111(d) and adding new § 156.111(f) to require states to annually notify HHS in a format and manner specified by HHS, and by a date determined by HHS, of any state-required benefits applicable to QHPs in the individual and/or small group market that are considered to be “in addition to EHB” in accordance with § 155.170(a)(3).

In the final rule entitled *HHS Notice of Benefit and Payment Parameters for 2023* (2023 Payment Notice; CMS–9911–F), we repealed the annual reporting requirement at § 156.111(d) and (f), including revising the section heading to § 156.111 to instead read, “State selection of EHB benchmark plan for PYs beginning on or after January 1, 2020.” Thus, we have revised this Supporting Statement to reflect that States are no longer required to annually notify HHS of any State-required benefits applicable to QHPs in the individual or small group market that are considered to be “in addition to EHB” or any benefits the State has identified as not in addition to EHB and not subject to defrayal. We also remove the forms State Annual Report on State-Required Benefits (Appendix G) and State Certification of Annual Report on State-Required Benefits (Appendix H) from this collection.

This information collection also previously included estimates for the burden on issuers to report their intent to offer SADPs. We no longer collect this information from issuers; we revise

this Supporting Statement to remove the burden associated with this report. In this package, we make minimum required revisions to reflect only the regulatory changes that have occurred since it was last authorized in 2021. *Form Number:* CMS–10448 (OMB control number: 0938–1174); *Frequency:* Annually; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 10; *Number of Responses:* 10; *Total Annual Hours:* 470. (For questions regarding this collection, contact Ken Buerger at 410–786–1190).

Dated: September 22, 2023.

William N. Parham, III,
Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–21122 Filed 9–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10398 #34]

Medicaid and Children’s Health Insurance Program (CHIP) Generic Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: On May 28, 2010, the Office of Management and Budget (OMB) issued Paperwork Reduction Act (PRA) guidance related to the “generic” clearance process. Generally, this is an expedited process by which agencies may obtain OMB’s approval of collection of information requests that are “usually voluntary, low-burden, and uncontroversial collections,” do not raise any substantive or policy issues, and do not require policy or methodological review. The process requires the submission of an overarching plan that defines the scope of the individual collections that would fall under its umbrella. On October 23, 2011, OMB approved our initial request to use the generic clearance process under control number 0938–1148 (CMS–10398). It was last approved on April 26, 2021, via the standard PRA process which included the publication of 60- and 30-day **Federal Register** notices. The scope of the April 2021 umbrella accounts for Medicaid and CHIP State plan amendments, waivers, demonstrations, and reporting. This

Federal Register notice seeks public comment on one or more of our collection of information requests that we believe are generic and fall within the scope of the umbrella. Interested persons are invited to submit 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 October 11, 2023.

ADDRESSES: When commenting, please reference the applicable form number (see below) and the OMB control number (0938–1148). 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: CMS–10398 (#64)/OMB control number: 0938–1148, 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, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Following is a summary of the use and burden associated with the subject information collection(s). More detailed information can be found in the collection's supporting statement and associated materials (see **ADDRESSES**).

Generic Information Collection

1. *Title of Information Collection:* Model Application Template and Instructions for State Child Health Plan Under Title XXI of the Social Security Act, State Children's Health Insurance Program; *Type of Information Collection Request:* Revision of a currently approved collection; *Use:* This 2023 iteration proposes to revise the State plan template by adding a new section 6.5-Vaccine coverage, which consists of three new assurances to the state plan template to report compliance with the coverage requirements for age-appropriate vaccines. The revisions are intended to conform to statutory amendments made by section 11405(b)(1) of the Inflation Reduction Act. *Form Number:* CMS–10398 (#34) (OMB control number: 0938–1148); *Frequency:* Once; *Affected Public:* State, local, or Tribal governments; *Number of Respondents:* 40; *Total Annual Responses:* 40; *Total Annual Hours:* 160. (For policy questions regarding this collection contact: Chanelle Parkar at (667)-290–9798.)

Dated: September 22, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–21062 Filed 9–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities: Proposed Collection; Public Comment Request; of the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) Grantee Annual Performance Reporting (APR) and Final Report Forms; OMB No.: 0985–0050

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish a 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 IC Extension solicits comments on the information collection requirements relating to the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) Grantee Annual Performance Reporting (APR) and Final Report Forms OMB Control Number 0985–0050.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by November 27, 2023.

ADDRESSES: Submit electronic comments on the collection of information to: Myrial.Earl@acl.hhs.gov. Submit written comments on the collection of information to Administration for Community Living, 330 C Street SW, Washington, DC 20201, Attention: Myrial Earl.

FOR FURTHER INFORMATION CONTACT: Earl Myrial at Myrial.Earl@acl.hhs.gov, Administration for Community Living or (202) 795–7341.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The PRA 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, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including: (1) whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility; (2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates; (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.

The National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) Grantee Annual Performance Reporting (APR) and Final Report Forms collect data from all NIDILRR grantees via a web-based reporting system and addresses specific HHS regulations that shall be met by applicants and grantees. HHS regulations that apply to NIDILRR Grant programs include Part 75 of the Uniform Administrative Requirements, Cost Principles and Audit requirements for HHS Awards. Specifically, § 75.342, which requires grantees to submit an annual performance report or, for the last year of a project, a final report that evaluates: (a) the grantee's progress in achieving the objectives in its approved application, (b) the effectiveness of the project in meeting the purposes of the program, and (c) the results of research and related activities.

Additionally, GPRA requires all Federal agencies to implement performance measurement systems that include: (1) a five-year strategic plan, (2) an annual performance plan, and (3) an annual performance report. Currently, NIDILRR has met these requirements and has established performance indicators to meet the reporting requirements. The NIDILRR APR System currently includes reporting forms for all 10 of NIDILRR's grant programs.

This information collection system covers 10 grant programs funded or administered by NIDILRR/ACL, and each grantee submits its information using a reporting form that is unique to the program mechanism under which it is funded. The 10 forms meet the reporting requirements for the following programs:

1. Rehabilitation Research Training Centers (RRTC)

2. Rehabilitation Engineering Research Centers (RERC)
 3. Field Initiated Research Projects (FIP)
 4. Advanced Rehabilitation Research Training Projects (ARRT)
 5. Model Systems—(includes spinal cord injury, traumatic brain injury, burn centers)
 6. Disability and Rehabilitation Research Projects (DRRP)
 7. Knowledge Translation (KT) Projects
 8. ADA National Network Centers (ADAs)
 9. Small Business Innovation Research Projects (SBIR)
 10. Research Fellowships Program (RFP)
- Reporting forms for all 10 programs are Web-based.

Data collected through these forms: (a) facilitate program planning and management; (b) respond to ACL/HHS Grants Policy Administration Manual (GPAM) requirements; and (c) respond to the reporting requirements of the Government Performance and Results Act (GPRA) of 1993 (Pub. L. 103–62).

NIDILRR/ACL uses the information gathered annually from these data collection efforts to provide Congress with the information mandated in GPRA, provide OMB information required for assessment of performance on GPRA indicators, and support its evaluation activities. Data collected from the 10 grant programs will provide a national description of the research activities of approximately 313 NIDILRR grantees. NIDILRR's GPRA plan must collect information to meet the following mandates: (a) implementation of a comprehensive plan that includes goals and objectives; (b) measurement of the program's progress in meeting its objectives; and (c) submission of an annual report on program performance, including plans for program improvement, as appropriate. The data collection system addresses nearly all of

the agency's GPRA indicators, either directly or by providing information for the agency's other review processes.

An important gap in sociodemographic information in the Web-based Reporting System for NIDILRR Grantees is a lack of items collecting sexual orientation and gender identify. Adding sexual orientation and gender identify items to the Annual Performance Reporting Forms for NIDILRR Grantees is part of ACL's strategy to address "Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation." Issued in January 2021, Executive Order 13988 called upon agencies to identify existing and new policies to promote equal treatment under the law and ensure that all persons can access healthcare and other essential services without being subjected to sex discrimination. To support alignment with Executive Order 13988, as well as Executive Orders 13985 and 14075, three items will be added to the Annual Performance Reporting Forms for NIDILRR Grantees to collect sexual orientation and gender identity. Including sexual orientation and gender identity questions in this information collection will provide data on topics such as accessibility and utilization of services and programs funded by ACL by lesbian, gay, bisexual, and transgender populations and the health disparities that impact this community. Understanding these disparities can and should lead to improved service delivery for ACL's programs and populations served.

The proposed data collection tools may be found on the ACL website for review at: <https://www.acl.gov/about-acl/public-input>.

Estimated Program Burden: ACL estimates the burden of this collection of information as follows:

	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
New Grantees	* 71	1	52	3,692
Continuations of Major Programs	138	1	22	3,036
Other Continuances	104	1	10	1,040
Total	313	.....	.....	7,768

* Does not include SBIR Phase I grants, which do not use the system.

Dated: September 21, 2023.

Alison Barkoff,

Senior Official Performing the Duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023-21045 Filed 9-26-23; 8:45 am]

BILLING CODE 4154-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Announcing the Intent To Award a Single-Source Supplement the Link Center: Bridging Intellectual and/or Developmental Disabilities (I/DD) and Mental Health Systems Cooperative Agreement

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) announces the intent to award a single-source supplement to the current cooperative agreement held by the National Association for State Directors of Developmental Disabilities Services (NASDDDS) for the Link Center: Bridging I/DD and Mental Health Systems cooperative agreement. The purpose of this project is to improve the quality of life for people with intellectual and/or developmental disabilities (I/DD) and mental health conditions by supporting state agencies with policy development, service design, and service coordination resources, and sharing resources to individuals, families, direct support professionals, clinicians, and other policymakers. The administrative supplement for FY 2023 will amount to \$540,000, bringing the total award for FY 2023 to \$1,214,978.

FOR FURTHER INFORMATION CONTACT: For further information or comments regarding this program supplement, contact Allison Cruz, U.S. Department of Health and Human Services, Administration for Community Living, Administration on Disabilities, (202) 795-7334 or via email allison.cruz@acl.hhs.gov.

SUPPLEMENTARY INFORMATION: This supplementary funding from the Substance Abuse and Mental Health Services Administration (SAMHSA) will expand The Link Center: Bridging I/DD and Mental Health Systems by coordinating, planning, and implementing activities to support 988 call centers to support people with I/DD and mental health conditions. A key activity will be the 988 Policy Academy. As a result of this funding, ACL and SAMHSA expect that:

- Up to 6 States will improve their systems to more effectively address the needs of individuals with I/DD and mental health conditions.

- Targeted State teams will have engaged in six (6) virtual learning engagements and participated in a two-day session to finalize actions steps. These States will receive follow-along supports towards implementations and sustainability activities to more effectively address the needs of individuals with I/DD and mental health conditions.

This supplement will fund the following.

Academy Structure

Membership

The policy academy will be open to 5–6 states. Each state will bring a team of partners, including:

- SAMHSA 988 Office and CMHS leadership and/or key staff, including the representatives from the Lifeline network administrator
- State mental health authority leadership and core staff involved in 988 and Crisis Response
- State I/DD authority leadership and core staff involved in supporting individuals with complex support needs
- State Medicaid leader(s) with knowledge and oversight of MH and/or LTSS
- State Head Injury Administrators/core staff or partner organizations
- People with lived experience
- One or more State DD Act Partner organizations (DD Councils, UCEDDs, Protection and Advocacy Organizations)
- Leadership from the National Association of County Behavioral Health & Developmental Disability Directors

Optional:

- Child welfare officials, especially those supporting children with complex support needs
- Law enforcement
- Other partners as determined by the state

Each team should be led by 2–3 individuals from State Mental Health, 988/Lifeline and I/DD Agencies. Each state team may consist of 8–10 individuals. Team composition should reflect a lens toward ensuring that the state-level solutions will be informed by diversity, equity, and inclusion. States may include team members that are key to building a responsive network of information sharing, potential warm hand-offs, and available supports.

Approach

Exploratory survey/Environmental scan:

- Prior to selection of state participants, collect information related to general

areas of need that will inform and give an aggregate scope of focus for succeeding academy activities

State Tailored Interventions:

- State specific planning meetings with state leads
 - Convene state-level (virtual) town hall discussions to provide landscape information on areas of need
 - Develop target areas for state team
- Virtual Learning Opportunities:
- Based on state target areas, develop series of six (6) virtual learning engagements for cross-state participation (identifying peers for both elevation of good practice and group solution identification)

In Person Academy:

- Convene a two-day symposium in the Washington DC area focused on cultivating sustainable networks and ongoing information sharing (Strongly encourage in-person participation, accommodate virtual if needed). Will include group learning and state-specific breakout sessions to optimize learning, sharing and action plan development.

- Will include pre-planning with each state (two meetings)

- Will include post-meeting follow up activities, including plan for implementation and sustainability

Post Meeting Activities and Follow-Along Technical Assistance:

- TA Collaborative will meet with state teams to finalize action steps developed from in person meeting;
- TA Collaborative will meet monthly with state teams to provide follow-along support toward implementation and sustainability activities.
- A post convening synthesis will be developed as a resource for partners engaged in this work.

Program Name: The Link Center: Bridging I/DD and Mental Health Systems.

Recipient: The National Association of State Directors of Developmental Disabilities Services.

Period of Performance: The supplement award will be issued for the second year of the five-year project period of September 30, 2023, through August 31, 2024.

Total Supplement Award Amount: \$540,000.

Award Type: Cooperative Agreement.

Statutory Authority: This program is authorized under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 Public Law 106-402, section 161(2)(B), (C), and (D).

Basis for Award: The National Association of State Directors of Developmental Disabilities Services is

currently funded to carry out The Link Center Project for the period of September 1, 2022, through August 31, 2027. Much work has already been completed and further tasks are currently being accomplished. It would be unnecessarily time consuming and disruptive to the Link Center project and the beneficiaries being served for ACL to establish a new grantee at this time when critical services are presently being provided in an efficient manner. SAMHSA also has determined that the award of another contract or grant to provide these services would duplicate the activities carried out under this cooperative agreement. SAMHSA has further determined that a grant supplement to support the 988 State Policy Academy through this cooperative agreement is likely to be less expensive than a separate arrangement. This agreement promotes government efficiency and reduces the possibility of costly duplication of effort.

Dated: September 21, 2023.

Alison Barkoff,

Senior Official Performing the Duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–21046 Filed 9–26–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–2343]

Hazard Analysis and Risk-Based Preventive Controls for Human Food; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of two additional draft chapters of a multichapter draft guidance for industry entitled “Hazard Analysis and Risk-Based Preventive Controls for Human Food.” This multichapter draft guidance, when finalized, will explain FDA’s current thinking on how to comply with the requirements for hazard analysis and risk-based preventive controls under FDA’s regulation entitled “Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food.” The newly available draft chapters are entitled “Chapter 11—Food Allergen Program”

and “Chapter 16—Acidified Foods.” This draft guidance is not final nor is it in effect at this time.

DATES: Submit either electronic or written comments on the draft guidance by March 25, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

Instructions: All submissions received must include the Docket No. FDA–2016–D–2343 for “Hazard Analysis and Risk-Based Preventive Controls for Human Food.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the

Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Office of Food Safety (HFS–300), Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Linda Kahl, Center for Food Safety and Applied Nutrition (HFS–300), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2784.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of two draft chapters entitled “Chapter 11—Food Allergen Program” and “Chapter 16—Acidified Foods” of a multichapter draft guidance for industry entitled “Hazard Analysis and Risk-Based Preventive Controls for Human Food.” We previously announced the availability of several chapters of that draft guidance as shown in table 1.

TABLE 1—AVAILABLE DRAFT CHAPTERS IN HAZARD ANALYSIS AND RISK-BASED PREVENTIVE CONTROLS FOR HUMAN FOOD

Chapter No.	Chapter title	Publication
N/A	Introduction	81 FR 57816, August 24, 2016.
1	The Food Safety Plan	81 FR 57816, August 24, 2016.
2	Conducting a Hazard Analysis	81 FR 57816, August 24, 2016.
3	Potential Hazards Associated with the Manufacturing, Processing, Packing, and Holding of Human Food.	81 FR 57816, August 24, 2016.
4	Preventive Controls	81 FR 57816, August 24, 2016.
5	Application of Preventive Controls and Preventive Control Management Components	81 FR 57816, August 24, 2016.
6	Use of Heat Treatments as a Process Control	82 FR 41364, August 31, 2017.
14	Recall plan	84 FR 53347, October 7, 2019.
15	Supply-Chain Program for Human Food Products	83 FR 3449, January 25, 2018.
Appendix 1	Potential Hazards for Foods and Processes	81 FR 57816, August 24, 2016.
Appendix 2	Food Safety Plan Forms	81 FR 57816, August 24, 2016.
Appendix 3	Bacterial Pathogen Growth and Inactivation	81 FR 57816, August 24, 2016.

We also are announcing changes to the expected table of contents for the complete multichapter guidance.

We are issuing these chapters of the draft guidance consistent with our good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on how to comply with the requirements for hazard analysis and risk-based preventive controls under part 117 (21 CFR part 117), principally in subparts C and G. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

The FDA Food Safety Modernization Act (FSMA) (Pub. L. 111–353) enables FDA to better protect public health by helping to ensure the safety and security of the food supply. FSMA enables FDA to focus more on preventing food safety problems rather than relying primarily on reacting to problems after they occur. FSMA recognizes the important role industry plays in ensuring the safety of the food supply, including the adoption of modern systems of preventive controls in food production.

Section 103 of FSMA amended the Federal Food, Drug, and Cosmetic Act (FD&C Act) by adding section 418 (21 U.S.C. 350g) with requirements for hazard analysis and risk-based preventive controls for establishments that are required to register as food facilities under our regulations in 21 CFR part 1, subpart H, in accordance with section 415 of the FD&C Act (21 U.S.C. 350d). We have established regulations to implement these requirements within part 117.

We intend to announce the availability for public comment of additional chapters of the draft guidance as we complete them. The titles of the additional chapters that we expect to make available for public comment are included in the table of contents for the complete multichapter guidance.

III. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in part 117 have been approved under OMB control number 0910–0751.

IV. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/FoodGuidances>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>. Use the FDA website listed in the previous sentence to find the most current version of the guidance.

Dated: September 20, 2023.

Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2023–20738 Filed 9–26–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–D–1158]

Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled “Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions.” As more medical devices are becoming interconnected, cybersecurity threats have become more numerous, more frequent, more severe, and more clinically impactful. As a result, ensuring medical device safety and effectiveness includes adequate medical device cybersecurity, as well as its security as part of the larger system. This final guidance supersedes the final guidance “Content of Premarket Submissions for Management of Cybersecurity in Medical Devices,” issued October 2, 2014.

DATES: The announcement of the guidance is published in the **Federal Register** on September 27, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand Delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2021-D-1158 for "Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential

with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled "Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions" to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Suzanne Schwartz, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5410, Silver Spring, MD 20993-0002, 301-796-6937; or Anne Taylor, Center for Biologics Evaluation and Research, Food and

Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

With the increasing integration of wireless, internet- and network-connected capabilities, portable media (e.g., USB or CD), and the frequent electronic exchange of medical device-related health information and other information, the need for robust cybersecurity controls to ensure medical device safety and effectiveness has become more important. In addition, cybersecurity threats to the healthcare sector have become more frequent and more severe, carrying increased potential for clinical impact. Cybersecurity incidents have rendered medical devices and hospital networks inoperable, disrupting the delivery of patient care across healthcare facilities in the United States and globally. Such cyberattacks and exploits may lead to patient harm as a result of clinical hazards, such as delay in diagnoses and/or treatment. As a result, ensuring device safety and effectiveness includes adequate device cybersecurity, as well as its security as part of the larger system.

Additionally, section 3305 of the Consolidated Appropriations Act, 2023, enacted on December 29, 2022, added section 524B "Ensuring Cybersecurity of Medical Devices" to the Federal Food, Drug, and Cosmetic Act (FD&C Act). Under section 524B(a) of the FD&C Act, a person who submits a 510(k), premarket approval application (PMA), product development protocol, De Novo, or Humanitarian Device Exemption for a device that meets the definition of a cyber device, as defined under section 524B(c) of the FD&C Act, is required to submit information to ensure that cyber devices meet the cybersecurity requirements under section 524B(b) of the FD&C Act. Section 524B(c) of the FD&C Act defines "cyber device" as a device that includes software validated, installed, or authorized by the sponsor as a device or in a device; has the ability to connect to the internet; and contains any such technological characteristics validated, installed, or authorized by the sponsor that could be vulnerable to cybersecurity threats. The recommendations in this guidance are intended to help manufacturers meet their obligations under section 524B of the FD&C Act.

This final guidance supersedes the final guidance "Content of Premarket

Submissions for Management of Cybersecurity in Medical Devices,” issued October 2, 2014. The changes since the 2014 guidance are intended to further emphasize the importance of ensuring that devices are designed securely and are designed to be capable of mitigating emerging cybersecurity risks throughout the total product lifecycle (TPLC), and to clearly outline FDA’s recommendations for premarket submission information to address cybersecurity concerns. As discussed in the guidance, one way these TPLC considerations for devices can be achieved is through the implementation and adoption of the Secure Product Development Framework. The recommendations in this guidance are intended to promote consistency, facilitate efficient premarket review, and help ensure that marketed medical devices are sufficiently resilient to cybersecurity threats.

A notice of availability of the draft guidance appeared in the **Federal Register** of April 8, 2022 (87 FR 20873). FDA considered comments received and revised the guidance as appropriate in response to the comments, including aligning with industry best practices, as well as further clarifying the level of

documentation recommended. Additionally, we have clarified interoperability considerations and that cybersecurity controls should not be intended to prohibit a user from accessing their device data.

This guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on “Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products>. This

guidance document is also available at <https://www.regulations.gov>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents> or <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics>. Persons unable to download an electronic copy of “Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions” may send an email request to CDRH-Guidance@fda.hhs.gov to receive an electronic copy of the document. Please use the document number GUI00001825 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no new collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The collections of information in the following FDA regulations, guidance, and forms have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB Control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
814, subpart H	Humanitarian Use Devices; Humanitarian Device Exemption ..	0910–0332
812	Investigational Device Exemption	0910–0078
860, subpart D	De Novo classification process	0910–0844
“Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program”.	Q-Submissions and early payor feedback request programs for medical devices.	0910–0756
800, 801, 809, and 830	Medical device labeling regulations; Unique device identification.	0910–0485
820	Current good manufacturing practice (CGMP); Quality system (QS) regulation.	0910–0073

Dated: September 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–20955 Filed 9–26–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0487]

Discussion Paper: Artificial Intelligence in Drug Manufacturing, Notice; Request for Information and Comments; Reopening of the Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for information and comments; reopening of the comment period.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is reopening the comment period for the notice, published in the **Federal Register** of March 1, 2023, establishing a public docket and requesting information and comments. FDA is reopening the comment period to update comments and to receive any new information.

DATES: FDA is reopening the comment period on the notice published March 1, 2023 (88 FR 12943). Either electronic or written comments must be submitted by November 27, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of November 27, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically,

including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2023-N-0487 for "Discussion Paper: Artificial Intelligence in Drug Manufacturing, Notice; Request for Information and Comments." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." 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: Elizabeth Giaquinto Friedman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4162, Silver Spring, MD 20993, 240-402-7930, Elizabeth.Giaquinto@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 1, 2023 (88 FR 12943), FDA established a public docket to solicit comments on the "Discussion Paper: Artificial Intelligence in Drug Manufacturing." The discussion paper presents areas for consideration and policy development identified by the Center for Drug Evaluation and Research (CDER) scientific and policy experts associated with application of artificial intelligence to pharmaceutical manufacturing. The discussion paper includes a series of questions to stimulate feedback from the public, including CDER and the Center for Biologics Evaluation and Research stakeholders.

Interested persons were originally given until May 1, 2023, to comment on the content of the discussion paper.

Following publication of the March 1, 2023, notice, FDA has decided to reopen the public docket to allow interested persons additional time to comment on the discussion paper. We note that there is also a public workshop organized by FDA and the Product Quality Research

Institute entitled "Regulatory Framework for the Utilization of Artificial Intelligence in Pharmaceutical Manufacturing: An Opportunity for Stakeholder Engagement," which is scheduled for September 26 and 27, 2023 (<https://pqri.org/fda-pqri-aiworkshop/>).

Dated: September 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023-20902 Filed 9-26-23; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS-0990-0324]

Agency Information Collection Request; 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before November 27, 2023.

ADDRESSES: Submit your comments to Sherrette.Funn@hhs.gov or by calling (202) 264-0041 and PRA@HHS.GOV.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990-0324-60D and project title for reference, to Sherrette A. Funn, email: Sherrette.Funn@hhs.gov, PRA@HHS.GOV or call (202) 264-0041 the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: Report of Dental Examination of Applicants to the Public Health Service Commissioned Corps.

Type of Collection: Reinstatement without change.

OMB No.: 0990-0324.

Abstract: Pursuant to the Paperwork Reduction Act of 1995, the Commissioned Corps Headquarters (CCHQ), Office of the Secretary, Department of Health and Human Services (HHS), requests that the Office

of Management and Budget (OMB) renew the form PHS-6355 Report of Dental Examination of Applicants to the Commissioned Corps of the Public Health Service for use in determining the medical qualifications of applicants to the Commissioned Corps of the U.S. Public Health Service (Corps).

Applicants to the Corps must meet the Corps' medical standards for appointment.

This is a 3-year request for OMB approval.

Likely Respondents: U.S. citizens applying to the United States Public Health Service.

ANNUALIZED BURDEN HOUR TABLE

Forms (if necessary)	Respondents (if necessary)	Number of respondents	Number of responses per respondents	Average burden per response	Total burden hours
PHS-6355	Applicants	1,000	1	1	1,000
Total .....	.....	.....	.....	.....	1,000

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023-21098 Filed 9-26-23; 8:45 am]

BILLING CODE 4150-49-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Allergy, Immunology, and Transplantation Research Committee.

Date: October 17-18, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51A, Bethesda, MD 20892, 240-507-9685, thomas.conway@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: September 21, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-20978 Filed 9-26-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies, A Study Section.

Date: October 17-18, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, 10 Thomas Circle NW, Washington, DC 20005.

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435-1712, ryansj@csr.nih.gov.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Guided Interventions and Surgery Study Section.

Date: October 19-20, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Blvd., Gaithersburg, MD 20878.

Contact Person: Ella Fung Jones, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496-0777, ella.jones@nih.gov.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Cellular and Molecular Biology of Glia Study Section.

Date: October 19-20, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Sung-Wook Jang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 812P, Bethesda, MD 20892, (301) 435-1042, jangs2@csr.nih.gov.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Lung Injury, Repair, and Remodeling Study Section.

Date: October 19-20, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ghenima Dirami, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7814, Bethesda, MD 20892, 240-498-7546, diramig@csr.nih.gov.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Clinical Integrative Cardiovascular and Hematological Sciences Study Section.

Date: October 19–20, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Alexandria Old Town, 1900 Diagonal Road, Alexandria, VA 22314.

Contact Person: Margaret Chandler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7814, Bethesda, MD 20892, (301) 435–1743, margaret.chandler@nih.gov.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biodata Management and Analysis Study Section.

Date: October 19–20, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bethesda Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: E. Bryan Crenshaw, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–7129, bryan.crenshaw@nih.gov.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Clinical Translational Imaging Science Study Section.

Date: October 19–20, 2023.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road North, Bethesda, MD 20852.

Contact Person: Eleni Apostolos Liapi, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, (301) 867–5309, eleni.liapi@nih.gov.

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Interdisciplinary Clinical Care in Specialty Care Settings Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Bethesda Hotel, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Abu Saleh Mohammad Abdullah, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 827–4043, abuabdullah.abdullah@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 21, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20980 Filed 9–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive Patent License: Development and Commercialization of Engineered T Cell Therapies for the Treatment of Cancer

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice to Moonlight Bio, Inc. (“Moonlight”), headquartered in Seattle, WA.

DATES: Only written comments and/or applications for a license which are received by the National Cancer Institute’s Technology Transfer Center on or before October 12, 2023 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Andrew Burke, Ph.D., Senior Technology Transfer Manager, NCI Technology Transfer Center, Telephone: (240)-276–5484; Email: andy.burke@nih.gov.

SUPPLEMENTARY INFORMATION:

Intellectual Property

1. United States Provisional Patent Application No. 63/492,256 filed March 27, 2023, entitled “T Cell Receptors Targeting Y220C or R175H Mutation in P53” [HHS Reference No. E–054–2023–0–US–01].

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide, and the field of use may be limited to the following:

“Development, manufacture and commercialization of autologous T cell therapy products genetically engineered

to express a P53 R175H-reactive TCR claimed in the Licensed Patent Rights for the treatment of cancer in humans.”

The E–054–2023 patent family is primarily directed to isolated T cell receptors (TCRs) reactive to certain mutated forms of tumor protein 53 (TP53 or P53), within the context of several human leukocyte antigens. P53 is the archetypal tumor suppressor gene and the most frequently mutated gene in cancer. Contemporary estimates suggest that >50% of all tumors carry mutations in P53. Because of its prevalence in cancer and its restricted expression to precancerous and cancerous cells, this antigen may be targeted on mutant P53-expressing tumors with minimal normal tissue toxicity.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially and may be made publicly available.

License applications submitted in response to this notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: September 21, 2023.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center, National Cancer Institute.

[FR Doc. 2023–21050 Filed 9–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the

provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; R13 Conference Grant Review.

Date: November 14–15, 2023.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W542, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Biman Chandra Paria, Ph.D., Scientific Review Officer, Program Coordination and Referral Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W542, Rockville, Maryland 20850, 240–858–3814, pariab@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; SBIR Phase IIB Bridge Awards.

Date: November 16, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, decluej@mail.nih.gov.

Name of Committee: National Cancer Institute Special Emphasis Panel; Small Business Transition Grant for Early Career Scientists.

Date: November 30, 2023.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, decluej@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399,

Cancer Control, National Institutes of Health, HHS)

Dated: September 21, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–20956 Filed 9–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Translational Immuno-oncology Study Section.

Date: October 19–20, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Maria Elena Cardenas-Corona, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20817, 301–867–5309, maria.cardenas-corona@nih.gov.

Name of Committee: Infectious Diseases and Immunology B Integrated Review Group; Transplantation, Tolerance, and Tumor Immunology Study Section.

Date: October 19–20, 2023.

Time: 8:30 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Canopy by Hilton, 940 Rose Avenue, North Bethesda, MD 20852.

Contact Person: Carmen Angeles Ufret-Vincenty, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892,

(301) 594–0912, carmen.ufret-vincenty@nih.gov.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Molecular and Cellular Neuropharmacology Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vanessa S Boyce, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 4185, MSC 7850, Bethesda, MD 20892, (301) 402–3726, boycevs@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Collaborative Applications: Clinical Studies of Mental Illness.

Date: October 19, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Allison Kurti, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007J, Bethesda, MD 20892, (301) 594–1814, kurtian@csr.nih.gov.

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Neurological, Mental and Behavioral Health Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Allison Kurti, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1007J, Bethesda, MD 20892, (301) 594–1814, kurtian@csr.nih.gov.

Name of Committee: Vascular and Hematology Integrated Review Group; Hemostasis, Thrombosis, Blood Cells and Transfusion Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Vivian Tang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594-6208, tangvw@csr.nih.gov.

Name of Committee: Emerging Technologies and Training Neurosciences Integrated Review Group; Bioengineering of Neuroscience, Vision and Low Vision Technologies Study Section, Bioengineering of Neuroscience and Vision Technologies.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Tina Tze-Tsang Tang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Suite 3030, Bethesda, MD 20817, (301) 435-4436, tangt@mail.nih.gov.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Learning, Memory and Decision Neuroscience Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Roger Janz, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402-8515, janrz2@csr.nih.gov.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Guoqin Yu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435-1276, guoqin.yu@nih.gov.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Molecular Cancer Diagnosis and Classification Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Lawrence Ka-Yun Ng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7804 Bethesda, MD 20892, 301-435-1719, ngkl@csr.nih.gov.

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Adult Psychopathology and Disorders of Aging Study Section.

Date: October 19–20, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Benjamin G Shapero, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3182, MSC 7848, Bethesda, MD 20892, (301) 402-4786, shaperobg@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: September 21, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023-20977 Filed 9-26-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651-0121]

Agency Information Collection Activities; Revision of Existing Collection; Trusted Traveler Programs and U.S. APEC Business Travel Card

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

ACTION: 30-Day Notice and request for comments; revision of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork

Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than October 27, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT:

Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION:

CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (87 FR 33178) on June 01, 2022, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of

information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Trusted Traveler Programs and U.S. APEC Business Travel Card.

OMB Number: 1651–0121.

Form Number: 823S (SENTRI) and 823F (FAST).

Current Actions: Revision of an existing information collection.

Type of Review: Revision.

Affected Public: Individuals and Businesses.

Abstract: This collection of information is for CBP's Trusted Traveler Programs including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows dedicated processing at specified southwest land border ports of entry; the Free and Secure Trade program (FAST), which provides dedicated processing for known, low-risk commercial drivers; and Global Entry (GE) which allows pre-approved, low-risk, air travelers dedicated processing clearance upon arrival into the United States.

The purpose of all of these programs is to provide prescreened travelers dedicated processing into the United States. The benefit to the traveler is less time spent in line waiting to be processed. These Trusted Traveler programs are provided for in 8 CFR 235.7 and 235.12.

This information collection also includes the U.S. APEC Business Travel Card (ABTC) Program, which is a voluntary program that allows U.S. citizens to use fast-track immigration lanes at airports in the 20 other Asia-Pacific Economic Cooperation (APEC) member countries. This program is mandated by the Asia-Pacific Economic Cooperation Business Travel Cards Act of 2011, Public Law 112–54 and provided for by 8 CFR 235.13.

These collections of information include the data collected on legacy kiosks (machines which are permanently installed in airports and print a paper receipt for verification of the traveler's arrival), websites, mobile phone applications, and portals (mobile processing units that CBP can position anywhere inside the Federal Inspection Area) for these programs. Applicants

may apply to participate in these programs by using the Trusted Traveler Program Systems website (TTP) at <https://tpp.dhs.gov/> or at Trusted Traveler Enrollment Centers.

After arriving at the Federal Inspection Services area of the airport, participants in Global Entry can undergo a self-serve process to report their arrival and facilitate inspection process using a legacy kiosk, portal, or Global Entry (GE) Mobile application. During the self-service process at a legacy kiosk, participants have their photograph and fingerprints taken, submit identifying information, and answer several questions about items they are bringing into the United States. When using the legacy kiosks, participants are required to declare all articles being brought into the United States pursuant to 19 CFR 148.11.

Proposed Changes

CBP will be updating the Trusted Travel Programs to align with the U.S. Department of State's Passport Options: CBP will modify the Trusted Traveler Program application by adding a third gender marker, "X" for applicants identifying as non-binary, intersex, and/or gender non-conforming (in addition to the existing "male and "female" gender markers). The "X" marker will be categorized as "Unspecified or Another Gender Identity", in the document sections of the electronic Trusted Traveler Programs application.

In addition, coinciding with agency wide efforts to reduce burden on the public, CBP's new Global Entry (GE) portals and the new Global Entry (GE) Mobile application are replacing legacy kiosks, enabling quicker, touchless processing for participants. The portal or app will take the traveler's facial image and match it with the existing image from the application process. The questions previously asked by the legacy kiosk will now be a verbal attestation when exiting the area.

Type of Information Collection: SENTRI (823S).

Estimated Number of Respondents: 276,579.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 276,579.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 185,308.

Type of Information Collection: FAST (823F).

Estimated Number of Respondents: 20,805.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20,805.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 13,939.

Type of Information Collection: Global Entry Enrollment.

Estimated Number of Respondents: 1,392,862.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,392,862.

Estimated Time per Response: 40 minutes (0.67 hours).

Estimated Total Annual Burden Hours: 933,217.

Type of Information Collection: ABTC.

Estimated Number of Respondents: 9,858.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 9,858.

Estimated Time per Response: 10 minutes (0.17 hours).

Estimated Total Annual Burden Hours: 1,676.

Type of Information Collection: Global Entry (GE) Admissions.

Estimated Number of Respondents: 10,275,367.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10,275,367.

Estimated Time per Response: 5 seconds (0.00138889 hours).

Estimated Total Annual Burden Hours: 14,271.

Dated: September 22, 2023.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2023–21072 Filed 9–26–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4702–DR; Docket ID FEMA–2023–0001]

Kentucky; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–

4702-DR), dated April 10, 2023, and related determinations.

DATES: This change occurred on July 31, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John E. Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Myra M. Shird as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21006 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4652-DR; Docket ID FEMA-2023-0001]

New Mexico; Amendment No. 15 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of New Mexico (FEMA-4652-DR), dated May 4, 2022, and related determinations.

DATES: This amendment was issued August 8, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 8, 2023, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), in a letter to Deanne Criswell, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in certain areas of the State of New Mexico resulting from wildfires, straight-line winds, flooding, mudflows, and debris flows during the period of April 5 to July 23, 2022, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I amend my declarations of May 4, 2022, June 9, 2022, June 27, 2022, and August 24, 2022, to authorize Federal funds for Public Assistance, including direct Federal assistance, at 100 percent of the total eligible costs for projects undertaken in response to the Cerro Pelado Fire in Los Alamos and Sandoval Counties.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-20999 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4726-DR; Docket ID FEMA-2023-0001]

Montana; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Montana (FEMA-4726-DR), dated August 12, 2023, and related determinations.

DATES: This change occurred on August 14, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Alana B. Kuhn, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Jon K. Huss as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21026 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA–4711–
DR; Docket ID FEMA–2023–0001]

**Kentucky; Amendment No. 1 to Notice
of a Major Disaster Declaration**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4711–DR), dated May 9, 2023, and related determinations.

DATES: This change occurred on July 31, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John E. Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Myra M. Shird as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

*Administrator, Federal Emergency
Management Agency.*

[FR Doc. 2023–21007 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA–4720–
DR; Docket ID FEMA–2023–0001]

**Vermont; Amendment No. 6 to Notice
of a Major Disaster Declaration**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA–4720–DR), dated

July 14, 2023, and related determinations.

DATES: This amendment was issued July 26, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Vermont is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 14, 2023.

Orleans County for Individual Assistance (already designated for Public Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

*Administrator, Federal Emergency
Management Agency.*

[FR Doc. 2023–21016 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA–4492–
DR; Docket ID FEMA–2023–0001]

**South Carolina; Amendment No. 9 to
Notice of a Major Disaster Declaration**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of South Carolina (FEMA–4492–DR), dated March 27, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

*Administrator, Federal Emergency
Management Agency.*

[FR Doc. 2023–20988 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4691-DR; Docket ID FEMA-2023-0001]

Tennessee; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA-4691-DR), dated March 8, 2023, and related determinations.

DATES: This change occurred on August 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Yolanda J. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Andrew D. Friend as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21001 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2372]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA

Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA

Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,
Deputy Assistant Administrator for Risk
Management, Federal Emergency
Management Agency, Department of
Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Colorado:						
Adams	City of Thornton (23-08-0196P).	The Honorable Janifer Kulmann, Mayor, City of Thornton, 9500 Civic Center Drive, Thornton, CO 80229.	City Hall, 9500 Civic Center Drive, Thornton, CO 80229.	https://msc.fema.gov/portal/advanceSearch .	Oct. 13, 2023	080007
Arapahoe	Unincorporated areas of Arapahoe County (23-08-0051P).	Carrie Warren-Gully, Chair, Arapahoe County Board of Commissioners, 5334 South Prince Street, Littleton, CO 80120.	Arapahoe County Public Works and Development Department, 6924 South Lima Street, Centennial, CO 80112.	https://msc.fema.gov/portal/advanceSearch .	Nov 3, 2023	080011
Connecticut: Middlesex	Town of Old Saybrook (22-01-0701P).	Carl P. Fortuna, Jr., First Selectman, Town of Old Saybrook Board of Selectmen, 302 Main Street, Old Saybrook, CT 06475.	Town Hall, 302 Main Street, Old Saybrook, CT 06475.	https://msc.fema.gov/portal/advanceSearch .	Nov 17, 2023	090069
Florida:						
Broward	City of Pompano Beach (22-04-5491P).	The Honorable Rex Hardin, Mayor at Large, City of Pompano Beach, 100 West Atlantic Boulevard, Pompano Beach, FL 33060.	Building Department, 100 West Atlantic Boulevard, Pompano Beach, FL 33060.	https://msc.fema.gov/portal/advanceSearch .	Nov 3, 2023	120055
Charlotte	Unincorporated areas of Charlotte County (23-04-1652P).	Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Building Department, 18500 Murdock Circle, Port Charlotte, FL 33948.	https://msc.fema.gov/portal/advanceSearch .	Oct. 13, 2023	120061
Georgia: Effingham	Unincorporated areas of Effingham County (23-04-0200P).	Tim Callanan, Manager, Effingham County 804 South Laurel Street, Springfield, GA 31329.	Effingham County Administrative Complex, 804 South Laurel Street, Springfield, GA 31329.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	130076
Massachusetts:						
Essex	City of Gloucester (23-01-0347P).	The Honorable Greg Varga, Mayor, City of Gloucester, 9 Dale Avenue, Gloucester, MA 01930.	City Hall, 3 Pond Road, 2nd Floor, Gloucester, MA 01930.	https://msc.fema.gov/portal/advanceSearch .	Oct. 19, 2023	250082
Suffolk	City of Boston (21-01-1039P).	The Honorable Michelle Wu, Mayor, City of Boston, 1 City Hall Square, Suite 500, Boston, MA 02201.	City Hall, 1 City Hall Square, Suite 500, Boston, MA 02201.	https://msc.fema.gov/portal/advanceSearch .	Oct. 20, 2023	250286
Suffolk	City of Revere (21-01-1039P).	The Honorable Brian M. Arrigo, Mayor, City of Revere, 281 Broadway, Revere, MA 02151.	City Hall, 281 Broadway, Revere, MA 02151.	https://msc.fema.gov/portal/advanceSearch .	Oct. 20, 2023	250288
Nevada: Clark	City of Henderson (23-09-0205P).	Richard Derrick, Manager, City of Henderson, 240 South Water Street, Henderson, NV 89015.	City Hall, 240 South Water Street, Henderson, NV 89015.	https://msc.fema.gov/portal/advanceSearch .	Nov. 22, 2023	320005
Oklahoma:						
Wagoner	City of Broken Arrow (22-06-0519P).	The Honorable Debra Wimpee, Mayor, City of Broken Arrow, 220 South 1st Street, Broken Arrow, OK 74012.	Operations Building, 485 North Poplar Avenue, Broken Arrow, OK 74012.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	400236
Wagoner	Unincorporated areas of Wagoner County (22-06-0519P).	Chris Edwards, Chair, Wagoner County Commissioners, 908 Southwest 15th Street, Wagoner, OK 74467.	Wagoner County Courthouse, 307 East Cherokee Street, Wagoner, OK 74467.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	400215

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Tennessee: Sumner	Unincorporated areas of Sumner County (23-04-0309P).	The Honorable John C. Isbell, Mayor, Sumner County, 355 North Belvedere Drive, Room 102, Gallatin, TN 37066.	Sumner County Administration Building, 355 North Belvedere Drive, Gallatin, TN 37066.	https://msc.fema.gov/portal/advanceSearch .	Nov. 24, 2023	470349
Texas:						
Bexar	Unincorporated areas of Bexar County (22-06-2616P).	The Honorable Peter Sakai, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 1948 Probandt Street, San Antonio, TX 78214.	https://msc.fema.gov/portal/advanceSearch .	Nov. 6, 2023	480035
Collin	City of Anna (22-06-2931P).	The Honorable Nate Pike, Mayor, City of Anna, P.O. Box 776, Anna, TX 75409.	Public Works, Building Department, 3223 North Powell Parkway, Anna, TX 75409.	https://msc.fema.gov/portal/advanceSearch .	Nov. 3, 2023	480132
Collin	City of Murphy (22-06-2774P).	The Honorable Scott Bradley, Mayor, City of Murphy, 206 North Murphy Road, Murphy, TX 75094.	City Hall, 206 North Murphy Road, Murphy, TX 75094.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480137
Collin	City of Plano (22-06-2774P).	The Honorable John Muns, Mayor, City of Plano, 1520 K Avenue, Suite 250, Plano, TX 75074.	Engineering Department, 1520 K Avenue, Suite 250, Plano, TX 75074.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480140
Collin	City of Richardson (22-06-2774P).	The Honorable Bob Dubey, Mayor, City of Richardson, 411 West Arapaho Road, Richardson, TX 75080.	Engineering Department, 1302 East Collins Boulevard, Richardson, TX 75081.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480184
Collin	Unincorporated areas of Collin County (22-06-2774P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480130
Denton	City of Lewisville (23-06-0197P).	The Honorable T. J. Gilmore, Mayor, City of Lewisville, P.O. Box 299002, Lewisville, TX 75057.	Engineering Department, 151 West Church Street, Lewisville, TX 75057.	https://msc.fema.gov/portal/advanceSearch .	Oct. 30, 2023	480195
Ellis	Unincorporated areas of Ellis County (23-06-1297P).	The Honorable Todd Little, Ellis County Judge, 101 West Main Street, Waxahachie, TX 75165.	Ellis County Public Works Department, 109 South Jackson Street, Waxahachie, TX 75165.	https://msc.fema.gov/portal/advanceSearch .	Nov. 2, 2023	480798
Rockwall	City of Rockwall (23-06-0308P).	The Honorable Trace Johannesen, Mayor, City of Rockwall 385 South Goliad Street, Rockwall, TX 75087.	City Hall, 385 South Goliad Street, Rockwall, TX 75087.	https://msc.fema.gov/portal/advanceSearch .	Dec. 4, 2023	480547
Tarrant	City of Arlington (23-06-0467P).	The Honorable Jim Ross, Mayor, City of Arlington, P.O. Box 90231, Arlington, TX 76004.	City Hall, 101 West Abram Street, Arlington, TX 76010.	https://msc.fema.gov/portal/advanceSearch .	Nov. 16, 2023	485454
Tarrant	City of Everman (23-06-0333P).	The Honorable Ray Richardson, Mayor, City of Everman, 212 North Race Street, Everman, TX 76140.	City Hall, 212 North Race Street, Everman, TX 76140.	https://msc.fema.gov/portal/advanceSearch .	Oct. 16, 2023	480594
Tarrant	City of Fort Worth (22-06-1840P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480596
Tarrant	City of Fort Worth (23-06-0164P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Oct. 23, 2023	480596
Tarrant	City of Fort Worth (23-06-0655P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Department of Transportation and Public Works, Engineering Vault and Map Repository, 200 Texas Street, Fort Worth, TX 76102.	https://msc.fema.gov/portal/advanceSearch .	Nov. 17, 2023	480596

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Travis	Unincorporated areas of Travis County (23–06–0466P).	The Honorable Andy Brown, Travis County Judge, P.O. Box 1748, Austin, TX 78767.	Travis County Transportation and Natural Resources Department, 700 Lavaca Street, 5th Floor, Austin, TX 78701.	https://msc.fema.gov/portal/advanceSearch .	Dec. 11, 2023	481026
Wilson	Unincorporated areas of Wilson County (22–06–3006P).	The Honorable Henry L. Whitman, Jr., Wilson County Judge, 1420 3rd Street, Suite 101, Floresville, TX 78114.	Wilson County Courthouse, 1420 3rd Street, Suite 101, Floresville, TX 78114.	https://msc.fema.gov/portal/advanceSearch .	Nov. 30, 2023	480230
Virginia: Loudoun	Unincorporated areas of Loudoun County (23–03–0047P).	Tim Hemstreet, Loudoun County Administrator, 1 Harrison Street, Southeast, 5th Floor, Leesburg, VA 20175.	Loudoun County Government Center, 1 Harrison Street, Southeast, 3rd Floor, MSC #60, Leesburg, VA 20175.	https://msc.fema.gov/portal/advanceSearch .	Nov. 6, 2023	510090
Prince William	Unincorporated areas of Prince William County (22–03–1081P).	Christopher Shorter, Prince William County Executive, 1 County Complex Court, Prince William, VA 22192.	Prince William County Watershed Management Branch, 5 County Complex Court, Suite 170, Prince William, VA 22192.	https://msc.fema.gov/portal/advanceSearch .	Oct. 27, 2023	510119

[FR Doc. 2023–21033 Filed 9–26–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Vermont (FEMA–4720–DR), dated July 14, 2023, and related determinations.

DATES: This amendment was issued July 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident for this disaster has been expanded to include landslides and mudslides.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster

Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21013 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4652–DR; Docket ID FEMA–2023–0001]

New Mexico; Amendment No. 14 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Mexico (FEMA–4652–DR), dated May 4, 2022, and related determinations.

DATES: This change occurred on June 27, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the

Administrator, under Executive Order 12148, as amended, David R. Gervino, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of José M. Gil Montañez as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20998 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA–4720–DR), dated July 14, 2023, and related determinations.

DATES: This amendment was issued July 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Vermont is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 14, 2023.

Bennington County for debris removal [Category A] and permanent work [Categories C–G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Orange and Washington Counties for debris removal [Category A] and permanent work [Categories C–G] (already designated for Individual Assistance and emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21012 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–3592–EM; Docket ID FEMA–2023–0001]

California; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of California (FEMA–3592–EM), dated March 10, 2023, and related determinations.

DATES: This amendment was issued July 14, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 10, 2023.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20984 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4591–DR; Docket ID FEMA–2023–0001]

Poarch Band of Creek Indians; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Poarch Band Creek Indians (FEMA–4591–DR), dated March 28, 2021, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20995 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4528-DR; Docket ID FEMA-2023-0001]

Mississippi; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA-4528-DR), dated April 5, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-20993 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2370]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before December 26, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2370, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and

Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/>

prelimdownload and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the

tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,
Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Amherst County, Virginia and Incorporated Areas Project: 20–03–0032S Preliminary Date: February 28, 2023	
Town of Amherst	County Administrative Offices, 174 South Main Street, Amherst, VA 24521.
Unincorporated Areas of Amherst County	Amherst County Administrative Offices, 153 Washington Street, Amherst, VA 24521.

[FR Doc. 2023–21031 Filed 9–26–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4728–DR; Docket ID FEMA–2023–0001]

Illinois; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Illinois (FEMA–4728–DR), dated August 15, 2023, and related determinations.

DATES: The declaration was issued August 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 15, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of Illinois resulting from severe storms and flooding during the period of June 29 to July 2, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of Illinois.

In order to provide Federal assistance, you are hereby authorized to allocate from funds

available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Hazard Mitigation in the designated areas. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Andrew D. Friend, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Illinois have been designated as adversely affected by this major disaster:

Cook County for Individual Assistance. Cook County is eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036,

Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21028 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2367]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified

for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before December 26, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2367, to Rick Sacbabit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbabit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbabit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbabit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard

determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to

review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
McLean County, North Dakota and Incorporated Areas Project: 20-08-0037S Preliminary Date: March 1, 2023	
City of Washburn	McLean County Courthouse, 712 5th Avenue, Washburn, ND 58577.
Unincorporated Areas of McLean County	McLean County Courthouse, 712 5th Avenue, Washburn, ND 58577.
Mercer County, North Dakota and Incorporated Areas Project: 20-08-0037S Preliminary Date: March 1, 2023	
City of Stanton	Mercer County Courthouse, 1021 Arthur Street, Stanton, ND 58571.
Unincorporated Areas of Mercer County	Mercer County Courthouse, 1021 Arthur Street, Stanton, ND 58571.
Oliver County, North Dakota and Incorporated Areas Project: 20-08-0037S Preliminary Date: March 1, 2023	
Unincorporated Areas of Oliver County	Oliver County Courthouse, 115 West Main Street, Center, ND 58530.

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4721-DR; Docket ID FEMA-2023-0001]

Oklahoma; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Oklahoma (FEMA-4721-DR), dated July 19, 2023, and related determinations.

DATES: This amendment was issued August 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Oklahoma is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 19, 2023.

Atoka, McIntosh, Muskogee, and Wagoner Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21019 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4715-DR; Docket ID FEMA-2023-0001]

Guam; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the territory of Guam (FEMA-4715-DR), dated May 25, 2023, and related determinations.

DATES: This amendment was issued August 8, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 8, 2023, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), in a letter to Deanne Criswell, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in the territory of Guam resulting from Typhoon Mawar during the period of May 22 to May 29, 2023, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I amend my declaration of May 25, 2023, to authorize Federal funds for all categories of Public Assistance, Hazard Mitigation, and the Other Needs Assistance portion of the Individual Assistance program at 90 percent of total eligible costs.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals

and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21009 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4486-DR; Docket ID FEMA-2023-0001]

Florida; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA-4486-DR), dated March 25, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20986 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0021; OMB No. 1660–0142]

Agency Information Collection Activities: Proposed Collection, Comment Request; Shelter Resident Assessment Tool V2.0

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the transition of the Survivor Shelter Assessment Tool (SSAT), renamed the Shelter Resident Assessment Tool V 2.0 (SRAT), to the Mass Care/Emergency Assistance Section and how the interview process was simplified and streamlined.

DATES: Comments must be submitted on or before November 27, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at www.regulations.gov under Docket ID FEMA–2023–0021. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used to submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is

available via a link on the homepage of www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Ronan Dalcross, Mass Care & Emergency Assistance Section Chief, Individual Assistance Division, FEMA Recovery Directorate, fema-hq-mass-care@fema.dhs.gov, (202) 212–7269. You may contact the Information Management Division for copies of the proposed collection of information at email address: FEMA-Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (Pub. L. 93–288, as amended) is the legal basis for FEMA to provide financial assistance and services to individuals who apply for disaster assistance in the event of a declared Emergency or Major disaster. The Individuals and Households Program provides financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a major disaster or emergency declaration, have uninsured or under-insured necessary expenses, a serious need and are unable to meet such expenses or needs through other means under section 408 of the Stafford Act, as codified at 42 U.S.C. 5174, and its implementing regulations at 44 CFR 206.110. FEMA requires the ability to collect information regarding the housing needs of shelter residents expressing interest in or seeking disaster assistance to provide services and assistance to transition them out of shelters and into temporary or permanent housing solutions expeditiously. Additionally, aggregated reports resulting from the individualized data collection about shelter residents and their unmet housing and related needs will support planning activities for FEMA, state entities, and Non-Governmental Organizations to transition residents out of the shelter.

Collection of Information

Title: Shelter Resident Assessment Tool (SRAT) V2.0.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0142.

FEMA Forms: FEMA Form FF–104–FY–21–168 (formerly 009–0–42), Shelter Resident Assessment Tool (SRAT) V2.0.

Abstract: FEMA requires the ability to collect information regarding the housing needs of shelter residents to provide services and assistance to

transition them out of shelters and into temporary or permanent housing solutions expeditiously. FEMA may provide Public Assistance funding to State, Tribal, and Territorial governments for costs related to emergency shelter under section 403 of the Stafford Act, as codified at 42 U.S.C. 5170b. Aggregated reports resulting from the individualized data collection will support state, Non-Governmental Organizations and FEMA planning activities to transition the shelter population.

Affected Public: Individuals or Households (Primary); Federal Government; State, Local or Tribal Government; Not-For-Profit.

Estimated Number of Respondents: 7,500.

Estimated Number of Responses: 7,500.

Estimated Total Annual Burden Hours: 1,625.

Estimated Total Annual Respondent Cost: \$70,119.

Estimated Respondents' Operation and Maintenance Costs: \$0.

Estimated Respondents' Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$73,090.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–20981 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–24–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4723-DR; Docket ID FEMA-2023-0001]

New York; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New York (FEMA-4723-DR), dated July 22, 2023, and related determinations.

DATES: This amendment was issued August 3, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of New York is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 22, 2023.

Franklin County for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21022 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4720-DR; Docket ID FEMA-2023-0001]

Vermont; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA-4720-DR), dated July 14, 2023, and related determinations.

DATES: This amendment was issued July 26, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Vermont is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 14, 2023.

Addison and Orleans Counties for debris removal [Category A] and permanent work [Categories C-G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program). Caledonia, Chittenden, Lamoille, Rutland, Windham, and Windsor Counties for debris removal [Category A] and permanent work [Categories C-G] (already designated for Individual Assistance and emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023-21015 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4727-DR; Docket ID FEMA-2023-0001]

Mississippi; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Mississippi (FEMA-4727-DR), dated August 12, 2023, and related determinations.

DATES: The declaration was issued August 12, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 12, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Mississippi resulting from severe storms, straight-line winds, and tornadoes during the period of June 14 to June 19, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Mississippi.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Darryl L. Dragoo, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Mississippi have been designated as adversely affected by this major disaster:

Jackson and Jasper Counties for Individual Assistance.

Claiborne, Copiah, Covington, Jackson, Jasper, Jefferson, Jefferson Davis, Lawrence, Leake, Neshoba, Newton, Rankin, Scott, Simpson, Smith, and Wayne Counties and the Mississippi Band of Choctaw Indians for Public Assistance.

All areas within the State of Mississippi are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21027 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4723–DR; Docket ID FEMA–2023–0001]

New York; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New York (FEMA–4723–DR), dated July 22, 2023, and related determinations.

DATES: The declaration was issued July 22, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 22, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of New York resulting from severe storms and flooding during the period of July 9 to July 10, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of New York.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lai Sun Yee, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of New York have been designated as adversely affected by this major disaster:

Clinton, Dutchess, Essex, Hamilton, Ontario, Orange, Putnam, and Rockland Counties for Public Assistance.

All areas within the State of New York are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030,

Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21021 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4712–DR; Docket ID FEMA–2023–0001]

Tennessee; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–4712–DR), dated May 17, 2023, and related determinations.

DATES: This change occurred on August 15, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Yolanda J. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Andrew D. Friend as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA);

97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21008 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4643–DR; Docket ID FEMA–2023–0001]

Kentucky; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4643–DR), dated February 27, 2022, and related determinations.

DATES: This change occurred on July 31, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John E. Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Myra M. Shird as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—

Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20997 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Vermont (FEMA–4720–DR), dated July 14, 2023, and related determinations.

DATES: The declaration was issued July 14, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 14, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in the State of Vermont resulting from severe storms and flooding beginning on July 7, 2023, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I declare that such a major disaster exists in the State of Vermont.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program in the designated areas,

Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs).

Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, William F. Roy, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Vermont have been designated as adversely affected by this major disaster:

Chittenden, Lamoille, Rutland, Washington, Windham, and Windsor Counties for Individual Assistance.

Addison, Bennington, Caledonia, Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans, Rutland, Washington, Windham, and Windsor Counties for emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program.

All areas within the State of Vermont are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21010 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4721–DR; Docket ID FEMA–2023–0001]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4721–DR), dated July 19, 2023, and related determinations.

DATES: The declaration was issued July 19, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 19, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Oklahoma resulting from severe storms, straight-line winds, and tornadoes during the period of June 14 to June 18, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Oklahoma.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Adam D. Burpee, of FEMA is appointed to act as the Federal

Coordinating Officer for this major disaster.

The following areas of the State of Oklahoma have been designated as adversely affected by this major disaster:

Beaver, Cimarron, Comanche, Cotton, Craig, Creek, Delaware, Harper, Jefferson, Love, Major, Mayes, McCurtain, Payne, Pushmataha, Rogers, Stephens, Tulsa, and Woodward Counties for Public Assistance.

All areas within the State of Oklahoma are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21018 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA–4720–DR), dated July 14, 2023, and related determinations.

DATES: This amendment was issued July 17, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 17, 2023, the President amended the cost-sharing arrangements regarding

Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), in a letter to Deanne Criswell, Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage in the State of Vermont resulting from severe storms and flooding beginning on July 7, 2023, and continuing, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I amend my declaration of July 14, 2023, to authorize Federal funds for emergency protective measures, including direct Federal assistance at 100 percent of the total eligible costs for a continuous 30-day period of the State’s choosing within the first 120 days from the start of the incident period.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21014 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4514–DR; Docket ID FEMA–2023–0001]

Tennessee; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–4514–DR),

dated April 2, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20992 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4729–DR; Docket ID FEMA–2023–0001]

Tennessee; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–4729–DR), dated August 17, 2023, and related determinations.

DATES: This change occurred on August 17, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Yolanda J. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Andrew D. Friend as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21029 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2373]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood

Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood

hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the

National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard

determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Maricopa	City of Glendale (23-09-0431P).	The Honorable Jerry Weiers, Mayor, City of Glendale, 5850 West Glendale Avenue, Suite 451, Glendale, AZ 85301.	City Hall, 5850 West Glendale Avenue, Glendale, AZ 85338.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	040045
Maricopa	City of Goodyear (23-09-0431P).	The Honorable Joe Pizzillo, Mayor, City of Goodyear, 1900 North Civic Square, Goodyear, AZ 85395.	Engineering Department, 14455 West Van Buren Street, Suite D101, Goodyear, AZ 85338.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	040046
Maricopa	City of Surprise (22-09-1771P).	The Honorable Skip Hall, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	040053
Maricopa	Unincorporated Areas of Maricopa County (22-09-1771P).	The Honorable Clint L. Hickman, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	040037
Maricopa	Unincorporated Areas of Maricopa County (23-09-0431P).	The Honorable Clint L. Hickman, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	https://msc.fema.gov/portal/advanceSearch .	Dec. 8, 2023	040037
California:						
Fresno	City of Clovis (22-09-0533P).	The Honorable Lynne Ashbeck, Mayor, City of Clovis, 1033 5th Street, Clovis, CA 93612.	City Clerk's Office, Civic Center, 1033 5th Street, Clovis, CA 93612.	https://msc.fema.gov/portal/advanceSearch .	Dec. 28, 2023	060044
Placer	Unincorporated Areas of Placer County (23-09-0551P).	The Honorable Jim Holmes, Chair, Board of Supervisors, Placer County, 175 Fulweiler Avenue, Auburn, CA 95603.	Placer County Public Works, 3091 County Center Drive, Suite 220, Auburn, CA 95603.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	060239
Riverside	City of Hemet (23-09-0353P).	The Honorable Joe Males, Mayor, City of Hemet, 445 East Florida Avenue, Hemet, CA 92543.	Engineering Department, 510 East Florida Avenue, Hemet, CA 92543.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2023	060253
Riverside	Unincorporated Areas of Riverside County (22-09-1127P).	The Honorable Kevin Jeffries, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	https://msc.fema.gov/portal/advanceSearch .	Jan. 11, 2024	060245

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Riverside	Unincorporated Areas of Riverside County (23-09-0353P).	The Honorable Kevin Jeffries, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2023	060245
San Diego	Unincorporated Areas of San Diego County (22-09-0129P).	The Honorable Nora Vargas, Chair, Board of Supervisors, San Diego County, 1600 Pacific Highway Room 335, San Diego, CA 92101.	San Diego County Flood Control District, Department of Public Works, 5510 Overland Avenue, Suite 410, San Diego, CA 92123.	https://msc.fema.gov/portal/advanceSearch .	Dec. 27, 2023	060284
Florida:						
Duval	City of Jacksonville (23-04-2806P).	The Honorable Lenny Curry, Mayor, City of Jacksonville, Mayor's Office, 117 West Duval Street, Suite 400, Jacksonville, FL 32202.	Edward Ball Building Development Services, 214 North Hogan Street, Room 2100, Jacksonville, FL 32202.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2023	120077
St. Johns	Unincorporated Areas of St. Johns County, Florida (23-04-0792P).	Henry Dean, Commissioner, District 5, St. Johns County, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County, Permit Center, 4040 Lewis Speedway, St. Johns County, FL 32084.	https://msc.fema.gov/portal/advanceSearch .	Dec. 14, 2023	125147
St. Johns	Unincorporated Areas of St. Johns County, Florida (23-04-0824P).	Henry Dean, Commissioner, District 5, St. Johns County, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Permit Center, 4040 Lewis Speedway, St. Augustine, FL 32084.	https://msc.fema.gov/portal/advanceSearch .	Dec. 19, 2023	125147
Illinois:						
DuPage	City of Naperville (22-05-2659P).	The Honorable Scott A. Wehrli, Mayor, City of Naperville, Municipal Center, 400 South Eagle Street, Naperville, IL 60540.	Municipal Center, 400 South Eagle Street, Naperville, IL 60540.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2024	170213
DuPage	Unincorporated Areas of DuPage County (22-05-2659P).	Deborah Conroy, Chair, DuPage County Board, 421 North County Farm Road, Wheaton, IL 60187.	DuPage County Administration Building, Stormwater Management, 421 North County Farm Road, Wheaton, IL 60187.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2024	170197
Will	City of Joliet (23-05-1511P).	The Honorable Terry D'Arcy, Mayor, City of Joliet, 150 West Jefferson Street, Joliet, IL 60432.	City Hall, 150 West Jefferson Street, Joliet, IL 60432.	https://msc.fema.gov/portal/advanceSearch .	Jan. 2, 2024	170702
Will	Village of Plainfield (23-05-0385P).	John Argoudelis, Village President, Village of Plainfield, 24401 West Lockport Street, Plainfield, IL 60544.	Village Hall, 24401 West Lockport Street, Plainfield, IL 60544.	https://msc.fema.gov/portal/advanceSearch .	Jan. 8, 2024	170771
Missouri:						
Jackson	City of Kansas City (23-07-0053P).	The Honorable Quinton Lucas, Mayor, City of Kansas City, 414 East 12th Street, 29th Floor, Kansas City, MO 64106.	Federal Office Building, 911 Walnut Street, Kansas City, MO 64106.	https://msc.fema.gov/portal/advanceSearch .	Dec. 13, 2023	290173
St. Charles	City of Cottleville (22-07-0821P).	The Honorable Bob Ronkoski, Mayor, City of Cottleville, 5490 5th Street, Cottleville, MO 63304.	City Hall, 5490 5th Street, Cottleville, MO 63304.	https://msc.fema.gov/portal/advanceSearch .	Sep. 22, 2023	290898
St. Charles	City of O'Fallon (22-07-0821P).	The Honorable Bill Hennessy, Mayor, City of O'Fallon, 100 North Main Street, O'Fallon, MO 63366.	City Hall, 100 North Main Street, O'Fallon, MO 63366.	https://msc.fema.gov/portal/advanceSearch .	Sep. 22, 2023	290316
St. Charles	Unincorporated Areas of St. Charles County (22-07-0821P).	Steve Ehlmann, County Executive, St. Charles County, 100 North Second Street, Suite 318, St. Charles, MO 63301.	St. Charles County Administration Building, 201 North Second Street, Suite 420, St. Charles, MO 63301.	https://msc.fema.gov/portal/advanceSearch .	Sep. 22, 2023	290315
Oregon:						
Multnomah	City of Gresham (23-10-0228P).	The Honorable Travis Stovall, Mayor, City of Gresham, City Hall, 1333 Northwest Eastman Parkway, 3rd Floor, Gresham, OR 97030.	City Hall, 1333 Northwest Eastman Parkway, Gresham, OR 97030.	https://msc.fema.gov/portal/advanceSearch .	Dec. 28, 2023	410181

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Virginia:						
Roanoke	City of Roanoke (23-03-0152P).	The Honorable Sherman P. Lea, Sr., Mayor, City of Roanoke, Noel C. Taylor Municipal Building, 215 Church Avenue, Roanoke, VA 24011.	Engineering Department, Noel C. Taylor Municipal Building, 215 Church Avenue, Roanoke, VA 24011.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	510130
Roanoke	City of Salem (23-03-0152P).	The Honorable Renee Turk, Mayor, City of Salem, 114 North Broad Street, Salem, VA 24153.	Office of the Building Official, 1238 West Main Street, Salem, VA 24153.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	510141
Roanoke	Town of Vinton (23-03-0152P).	The Honorable Bradley E. Grose, Mayor, Town of Vinton, 311 South Pollard Street, Vinton, VA 24179.	Planning and Zoning Department, 311 South Pollard Street, Vinton, VA 24179.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	510131
Roanoke	Unincorporated Areas of Roanoke County (23-03-0152P).	Martha B. Hooker, Chair, Roanoke County Board of Supervisors, P.O. Box 29800, Roanoke, VA 24018.	Roanoke County Community Development, 5204 Bernard Drive Southwest, Roanoke, VA 24018.	https://msc.fema.gov/portal/advanceSearch .	Dec. 22, 2023	510190
Wisconsin:						
Outagamie	City of Kaukauna (22-05-2660P).	The Honorable Anthony Penterman, Mayor, City of Kaukauna, 144 West Second Street, Kaukauna, WI 54130.	City Hall, 201 West Second Street, Kaukauna, WI 54130.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2024	550305
Outagamie	Unincorporated Areas of Outagamie County (22-05-2660P).	Thomas Nelson, Executive, Outagamie County, County Building, 410 South Walnut Street, Appleton, WI 54911.	Outagamie County Building, 410 South Walnut Street, Appleton, WI 54911.	https://msc.fema.gov/portal/advanceSearch .	Jan. 4, 2024	550302

[FR Doc. 2023-21034 Filed 9-26-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Internal Agency Docket No. FEMA-4630-DR; Docket ID FEMA-2023-0001]****Kentucky; Amendment No. 11 to Notice of a Major Disaster Declaration****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.**SUMMARY:** This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA-4630-DR), dated December 12, 2021, and related determinations.**DATES:** This change occurred on July 31, 2023.**FOR FURTHER INFORMATION CONTACT:** Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John E. Brogan, of

FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Myra M. Shird as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2023-20996 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****[Internal Agency Docket No. FEMA-4503-DR; Docket ID FEMA-2023-0001]****Alabama; Amendment No. 9 to Notice of a Major Disaster Declaration****AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Notice.**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA-4503-DR), dated March 29, 2020, and related determinations.**DATES:** This change occurred on June 29, 2023.**FOR FURTHER INFORMATION CONTACT:** Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20991 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4701–DR; Docket ID FEMA–2023–0001]

Tennessee; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Tennessee (FEMA–4701–DR), dated April 7, 2023, and related determinations.

DATES: This change occurred on August 15, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Yolanda J. Jackson, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Andrew D. Friend as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21005 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4725–DR; Docket ID FEMA–2023–0001]

New Jersey; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of New Jersey (FEMA–4725–DR), dated August 11, 2023, and related determinations.

DATES: The declaration was issued August 11, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 11, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of New Jersey

resulting from a severe storm and flooding during the period of July 14 to July 15, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of New Jersey.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated area and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert Little III, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of New Jersey have been designated as adversely affected by this major disaster:

Warren County for Public Assistance.

All areas within the State of New Jersey are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21024 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA-4487-
DR; Docket ID FEMA-2023-0001]

**North Carolina; Amendment No. 9 to
Notice of a Major Disaster Declaration**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Carolina (FEMA-4487-DR), dated March 25, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
*Administrator, Federal Emergency
Management Agency.*

[FR Doc. 2023-20987 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA-4722-
DR; Docket ID FEMA-2023-0001]

**Minnesota; Major Disaster and Related
Determinations**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Minnesota (FEMA-4722-DR), dated July 19, 2023, and related determinations.

DATES: The declaration was issued July 19, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 19, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Minnesota resulting from severe storms and flooding during the period of April 11 to April 30, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Minnesota.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Joseph P. Cirone, of FEMA is appointed to act as the Federal

Coordinating Officer for this major disaster.

The following areas of the State of Minnesota have been designated as adversely affected by this major disaster:

Aitkin, Big Stone, Carlton, Chippewa, Clay, Grant, Houston, Kittson, Lac qui Parle, Lake of the Woods, Mahanomen, Marshall, Morrison, Norman, Pine, Pope, Renville, Roseau, St. Louis, Stevens, Swift, Traverse, and Wilkin Counties and the Prairie Island Indian Community for Public Assistance.

All areas within the State of Minnesota are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
*Administrator, Federal Emergency
Management Agency.*

[FR Doc. 2023-21020 Filed 9-26-23; 8:45 am]

BILLING CODE 9111-23-P

**DEPARTMENT OF HOMELAND
SECURITY****Federal Emergency Management
Agency**

[Internal Agency Docket No. FEMA-4724-
DR; Docket ID FEMA-2023-0001]

**Hawaii; Amendment No. 1 to Notice of
a Major Disaster Declaration**

AGENCY: Federal Emergency
Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Hawaii (FEMA-4724-DR), dated August 10, 2023, and related determinations.

DATES: This amendment was issued August 21, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the

State of Hawaii is hereby amended to include permanent work under the Public Assistance program for those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of August 10, 2023.

Maui County for permanent work [Categories C–G] (already designated for Individual Assistance and assistance for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21023 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4699–DR; Docket ID FEMA–2023–0001]

California; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4699–DR), dated April 3, 2023, and related determinations.

DATES: This amendment was issued July 24, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of California is hereby amended to

include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 3, 2023.

Alameda, Imperial, San Joaquin, Stanislaus, and Ventura Counties for Public Assistance.

San Bernardino County for Public Assistance (already designated for Individual Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21004 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4545–DR; Docket ID FEMA–2023–0001]

Seminole Tribe of Florida; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Seminole Tribe of Florida (FEMA–4545–DR), dated May 8, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order

12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20994 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2371]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain

management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before December 26, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2371, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and

other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Chesterfield County, South Carolina and Incorporated Areas Project: 20-04-0032S Preliminary Date: September 30, 2022	
Town of Cheraw	Town Hall, 200 Market Street, Cheraw, SC 29520.
Town of Chesterfield	Town Hall, 112 Main Street, Chesterfield, SC 29709.
Unincorporated Areas of Chesterfield County	Chesterfield County Administration Office, 178 Mill Street, Chesterfield, SC 29709.
Darlington County, South Carolina and Incorporated Areas Project: 20-04-0032S Preliminary Date: September 30, 2022	
City of Darlington	City Hall, 400 Pearl Street, Darlington, SC 29532.
Unincorporated Areas of Darlington County	Darlington County Courthouse, 1 Public Square, Room 303, Darlington, SC 29532.
Florence County, South Carolina and Incorporated Areas Project: 20-04-0032S Preliminary Date: September 30, 2022	
City of Florence	City Center, 324 West Evans Street, Florence, SC 29501.
Unincorporated Areas of Florence County	Florence County Planning and Building, 518 South Irby Street, Florence, SC 29501.
Carter County, Tennessee and Incorporated Areas Project: 20-04-0040S Preliminary Date: September 8, 2022	
City of Elizabethton	City Hall, 136 South Sycamore Street, Elizabethton, TN 37643.
Unincorporated Areas of Carter County	Carter County Planning and Zoning Office, 300 North Main Street, Elizabethton, TN 37643.

[FR Doc. 2023–21032 Filed 9–26–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2023–0015; OMB No. 1660–0040]

Agency Information Collection Activities: Submission for OMB Review, Comment Request; Standard Flood Hazard Determination Form (SFHDF)

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 30-day notice of revision and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the requirements of the Paperwork Reduction Act of 1995, this notice seeks comments concerning the conversion of this information collection to a common form, and the instrument under it which is used by Federally-regulated lending institutions when making, increasing, extending, renewing or purchasing each loan for the purpose of determining whether flood insurance is required and available.

DATES: Comments must be submitted on or before October 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Susan Bernstein, Insurance Specialist, Federal Insurance Directorate, Policyholder Services Division, Marketing and Outreach Branch at (303) 701–3595 or Susan.Bernstein@fema.dhs.gov. You may contact the Information Management Division for copies of the proposed collection of information at email address: FEMA-Information-Collections-Management@fema.dhs.gov.

SUPPLEMENTARY INFORMATION: Section 1365 of the National Flood Insurance Act of 1968 (NFIA) (42 U.S.C. 4104b), as added by section 528 of the National Flood Insurance Reform Act of 1994 (Pub. L. 103–325, Title V), requires that FEMA develop a standard hazard determination form for recording the determination of whether a structure is located within an identified Special Flood Hazard Area and whether flood insurance is available. Regulated lending institutions, Federal agency lenders, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association must complete this form for any loan made, increased, extended, renewed or purchased by these entities. The requirement for Federally-regulated lending institutions to determine whether a building or mobile home securing a loan is located in an area having special flood hazards and whether flood insurance is available has been in effect since the enactment of the Flood Disaster Protection Act of 1973, although the use of a standard form was not required until the enactment of the section 1365 of the NFIA. The establishment of the SFHDF has enabled lenders to provide consistent information.

This proposed information collection previously published in the **Federal Register** on June 7, 2023, at 88 FR 37259 with a 60-day public comment period. FEMA received two public comments. One comment requested FEMA to finalize the release of the instrument without change by the expiration date and the other comment noted that FEMA must provide the instrument for Federal agencies and others in the private sector to use, but FEMA does not collect any information itself and recommended that FEMA discontinue this information collection and have the other Federal agencies that actually require the use of the form to collect information from the public to create and submit their own information collections for OMB’s approval.

FEMA is converting this information collection into a common form collection to reflect more accurately that FEMA is providing this instrument pursuant to statutory mandate for other entities (including other Federal agencies) to use and that FEMA does not use the instrument to collect any information from the public. Other Federal agencies will be able to request approval from OMB to use the common form instrument under this information collection. FEMA will submit this revision to OMB before the current expiration date of September 30, 2023,

to prevent the current collection from expiring until OMB can review and approve this conversion. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: Standard Flood Hazard Determination Form (SFHDF).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0040.

FEMA Forms: FEMA Instruction FI–206–FY–22–102, Standard Flood Hazard Determination Form (SFHDF); FEMA Form FF–206–FY–21–116 (formerly 086–0–32), Standard Flood Hazard Determination Form (SFHDF).

Abstract: This instrument is used by Federally-regulated lending institutions, Federal agency lenders, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association. Federally-regulated lending institutions complete this form when making, increasing, extending, renewing or purchasing each loan for the purpose is of determining whether flood insurance is required and available. FEMA is responsible for maintaining the form and making it available but does not collect any information itself.

Affected Public: Federal Government.

Estimated Number of Respondents: 1.

Estimated Number of Responses: 1.

Estimated Total Annual Burden

Hours: 1.

Estimated Total Annual Respondent

Cost: \$29.

Estimated Respondents’ Operation and Maintenance Costs: \$0.

Estimated Respondents’ Capital and Start-Up Costs: \$0.

Estimated Total Annual Cost to the Federal Government: \$1,764.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the Agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the Agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those

who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–20982 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–52–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4497–DR; Docket ID FEMA–2023–0001]

Kentucky; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4497–DR), dated March 28, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049,

Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20989 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3595–EM; Docket ID FEMA–2023–0001]

Vermont; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Vermont (FEMA–3595–EM), dated July 10, 2023, and related determinations.

DATES: The declaration was issued July 10, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 10, 2023, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Vermont resulting from flooding beginning on July 9, 2023, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (“the Stafford Act”). Therefore, I declare that such an emergency exists in the State of Vermont.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for

emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care, including evacuation and sheltering support, under the Public Assistance program.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, William F. Roy, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Vermont have been designated as adversely affected by this declared emergency:

Addison, Bennington, Caledonia, Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans, Rutland, Washington, Windham, and Windsor Counties for emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care, including evacuation and sheltering support, under the Public Assistance program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20985 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4663–DR; Docket ID FEMA–2023–0001]

Kentucky; Amendment No. 13 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–4663–DR), dated July 29, 2022, and related determinations.

DATES: This change occurred on July 31, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, John E. Brogan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Myra M. Shird as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21000 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4699–DR; Docket ID FEMA–2023–0001]

California; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of California (FEMA–4699–DR), dated April 3, 2023, and related determinations.

DATES: This amendment was issued July 14, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective July 10, 2023.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21003 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4697–DR; Docket ID FEMA–2023–0001]

Mississippi; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–4697–DR), dated March 26, 2023, and related determinations.

DATES: This change occurred on July 14, 2023.

FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Darryl L. Dragoo, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of John F. Boyle as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21002 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA–4720–DR),

dated July 14, 2023, and related determinations.

DATES: This amendment was issued July 21, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Vermont is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 14, 2023.

Caledonia and Orange Counties for Individual Assistance (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21011 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4501–DR; Docket ID FEMA–2023–0001]

Georgia; Amendment No. 9 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.
ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Georgia (FEMA–4501–DR), dated March 29, 2020, and related determinations.

DATES: This change occurred on June 29, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Robert D. Samaan, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Gracia B. Szczech as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–20990 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4720–DR; Docket ID FEMA–2023–0001]

Vermont; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.
ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Vermont (FEMA–4720–DR), dated July 14, 2023, and related determinations.

DATES: This amendment was issued August 11, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency

Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective July 17, 2023.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,
Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21017 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4726–DR; Docket ID FEMA–2023–0001]

Montana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.
ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Montana (FEMA–4726–DR), dated August 12, 2023, and related determinations.

DATES: The declaration was issued August 12, 2023.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 12, 2023, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), as follows:

I have determined that the damage in certain areas of the State of Montana

resulting from flooding during the period of April 10 to April 26, 2023, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”). Therefore, I declare that such a major disaster exists in the State of Montana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Jon K. Huss, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Montana have been designated as adversely affected by this major disaster:

Blaine, Daniels, Hill, Park, Roosevelt, Sheridan, and Valley Counties and the Fort Peck Tribes for Public Assistance.

All areas within the State of Montana are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Deanne Criswell,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2023–21025 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0016]

Agency Information Collection Activities: Technical Assistance Request and Evaluation

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-day notice and request for comments.

SUMMARY: The Emergency Communications Division (ECD) within Cybersecurity and Infrastructure Security Agency (CISA) will submit the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance. CISA previously published this information collection request (ICR) in the **Federal Register** on June 6, 2023 for a 60-day public comment period. No comments were received by CISA. This is a revision and reinstatement of the existing collection. The purpose of this notice is to allow an additional 30-days for public comments.

DATES: Comments are encouraged and will be accepted until October 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT:

Kendall Carpenter, 202.744.1580, Kendall.Carpenter@cisa.dhs.gov.

SUPPLEMENTARY INFORMATION: The Emergency Communications Division, formed under title XVIII of the Homeland Security Act of 2002, 6 U.S.C. 571 *et seq.*, as amended, provides emergency communications-related technical assistance at no charge to State, regional, local, and tribal government officials. To receive this technical assistance, stakeholders must submit a request form identifying their priorities. For ECD to assess the value of the services it provides through technical assistance; an evaluation form is also requested of those receiving technical assistance.

ECD uses the Technical Assistance Request Form (DHS Form 9043) to identify the number and type of technical assistance services needed by the State, Territory, local, and Tribal agencies. This information enables ECD to plan and align resources accordingly. ECD considers each request based on the priority indicated by the State, as well as the anticipated impact of the service offering on the implementation of the Statewide Communications Interoperability Plan (SCIP) and the applicability to National Emergency Communications Plan (NECP).

The evaluation form (DHS Form 9042) is completed by stakeholders at the completion of ECD technical assistance services and enables ECD to assess the quality of technical assistance services provided and, in a holistic fashion, measure the value of the services. The information collected through these evaluations is used by ECD for continued improvement planning.

Approximately 100 percent of request and evaluation forms are submitted electronically by logging into the portal at <https://www.cisa.gov/safecom/ictapscip-resources>.

From the website, users are able to select the appropriate form, either the Technical Assistance Requests (DHS Form 9043) and/or the TA Evaluation forms (DHS Form 9042), to complete as a fillable PDF. Each form is then submitted by email to either TARrequest@cisa.dhs.gov or TAevaluations@cisa.dhs.gov, respectively.

The changes to the collection since the previous OMB approval include: Updating the web address, decreasing the estimated number of responses, decreasing the burden time, and increasing the cost estimates. This is a renewal of the existing information collection that expired on 7/31/2023. There are no substantial changes to the

current approval. TA services by category type (NAME) have been added or removed throughout the form lifecycle.

Analysis

Agency: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security.

Title of Collection: Technical Assistance Request and Evaluation.

OMB Number: 1670-0023.

Frequency: Annually.

Affected Public: State, local, Tribal, and Territorial governments.

Number of Respondents: 175.

Estimated Time per Respondent: 0.5 Hours.

Total Burden Hours: 50 Hours.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintaining): \$0.

Total Recordkeeping Burden: \$0.

Total Annual Burden Cost (operating/maintaining): \$2,372.50.

Robert J. Costello,

Chief Information Officer, Department of Homeland Security, Cybersecurity and Infrastructure Security Agency.

[FR Doc. 2023-21067 Filed 9-26-23; 8:45 am]

BILLING CODE 9110-9P-P

DEPARTMENT OF HOMELAND SECURITY

Notice Regarding the Uyghur Forced Labor Prevention Act Entity List

AGENCY: Department of Homeland Security.

ACTION: Notice.

SUMMARY: The U.S. Department of Homeland Security (DHS), as the Chair of the Forced Labor Enforcement Task Force (FLETF), announces the publication and availability of the updated Uyghur Forced Labor Prevention Act (UFLPA) Entity List, a consolidated register of the four lists required to be developed and maintained pursuant to section 2(d)(2)(B) of the UFLPA, on the DHS UFLPA website. The updated UFLPA Entity List is also published as an appendix to this notice. This update adds three entities to the section 2(d)(2)(B)(ii) list of the UFLPA, which identifies entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region. Details related to the process for revising the UFLPA

Entity List are included in this **Federal Register** notice.

DATES: This notice announces the publication and availability of the UFLPA Entity List updated as of September 27, 2023, included as an appendix to this notice.

ADDRESSES: Persons seeking additional information on the UFLPA Entity List should email the FLETF at FLETF.UFLPA.EntityList@hq.dhs.gov.

FOR FURTHER INFORMATION CONTACT:

Cynthia Echeverria, Director of Trade Policy, Trade and Economic Security, Office of Strategy, Policy, and Plans, DHS. Phone: (202) 938-6365, Email: FLETF.UFLPA.EntityList@hq.dhs.gov.

SUPPLEMENTARY INFORMATION: The U.S. Department of Homeland Security (DHS), on behalf of the Forced Labor Enforcement Task Force (FLETF), is announcing the publication of the updated UFLPA Entity List, a consolidated register of the four lists required to be developed and maintained pursuant to section 2(d)(2)(B) of the Uyghur Forced Labor Prevention Act (Pub. L. 117-78) (UFLPA), to <https://www.dhs.gov/uflpa-entity-list>. The UFLPA Entity List is available as an appendix to this notice. This update adds three entities to the section 2(d)(2)(B)(ii) list of the UFLPA, which identifies entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region. Future revisions to the UFLPA Entity List, which may include additions, removals or technical corrections, will be published to <https://www.dhs.gov/uflpa-entitylist> and in the appendices of future **Federal Register** notices. See Appendix 1.

Beginning on June 21, 2022, the UFLPA requires the Commissioner of U.S. Customs and Border Protection to apply a rebuttable presumption that goods mined, produced, or manufactured by entities on the UFLPA Entity List are made with forced labor, and therefore, prohibited from importation into the United States under 19 U.S.C. 1307. See section 3(a) of the UFLPA. As the FLETF revises the UFLPA Entity List, including by making additions, removals, or technical corrections, DHS, on its behalf, will post such revisions to the DHS UFLPA website (<https://www.dhs.gov/uflpa-entity-list>) and also publish the revised UFLPA Entity List as an appendix to a **Federal Register** notice.

Background

A. The Forced Labor Enforcement Task Force

Section 741 of the United States-Mexico-Canada Agreement Implementation Act established the FLETF to monitor United States enforcement of the prohibition under section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307). See 19 U.S.C. 4681. Pursuant to DHS Delegation Order No. 23034, the DHS Under Secretary for Strategy, Policy, and Plans serves as Chair of the FLETF, an interagency task force that includes the Department of Homeland Security, the Office of the U.S. Trade Representative, and the Departments of Labor, State, Justice, the Treasury, and Commerce (member agencies).¹ See 19 U.S.C. 4681; Executive Order 13923 (May 15, 2020). In addition, the FLETF includes six observer agencies: the Departments of Energy and Agriculture, the U.S. Agency for International Development, the National Security Council, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement Homeland Security Investigations.

B. The Uyghur Forced Labor Prevention Act: Preventing Goods Made With Forced Labor in the People's Republic of China From Being Imported Into the United States

The UFLPA requires, among other things, that the FLETF, in consultation with the Secretary of Commerce and the Director of National Intelligence, develop a strategy (UFLPA section 2(c)) for supporting enforcement of section 307 of the Tariff Act of 1930, to prevent the importation into the United States of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China. As required by the UFLPA, the *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China*, which was published on the DHS website on June 17, 2022 (see <https://www.dhs.gov/uflpa-strategy>), includes the initial UFLPA Entity List, a consolidated register of the four lists required to be developed and maintained pursuant to the UFLPA. See UFLPA section 2(d)(2)(B).

¹ The U.S. Department of Homeland Security, as the FLETF Chair, has the authority to invite representatives from other executive departments and agencies, as appropriate. See Executive Order 13923 (May 15, 2020). The U.S. Department of Commerce is a member of the FLETF as invited by the Chair.

C. UFLPA Entity List

The UFLPA Entity List addresses distinct requirements set forth in clauses (i), (ii), (iv), and (v) of section 2(d)(2)(B) of the UFLPA that the FLETF identify and publish the following four lists:

(1) a list of entities in Xinjiang that mine, produce, or manufacture wholly or in part any goods, wares, articles, and merchandise with forced labor;

(2) a list of entities working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of Xinjiang;

(3) a list of entities that exported products made by entities in lists 1 and 2 from the PRC into the United States; and

(4) a list of facilities and entities, including the Xinjiang Production and Construction Corps, that source material from Xinjiang or from persons working with the government of Xinjiang or the Xinjiang Production and Construction Corps for purposes of the “poverty alleviation” program or the “pairing-assistance” program or any other government-labor scheme that uses forced labor.

The UFLPA Entity List is a consolidated register of the above four lists. In accordance with section 3(e) of the UFLPA, effective June 21, 2022, entities on the UFLPA Entity List (listed entities) are subject to the UFLPA’s rebuttable presumption, and products they produce, wholly or in part, are prohibited from entry into the United States under 19 U.S.C. 1307. The UFLPA Entity List is described in Appendix 1 to this notice. The UFLPA Entity List should not be interpreted as an exhaustive list of entities engaged in the practices described in clauses (i), (ii), (iv), or (v) of section 2(d)(2)(B) of the UFLPA.

Revisions to the UFLPA Entity List, including all additions, removals, and technical corrections, will be published on the DHS UFLPA website (<https://www.dhs.gov/uflpa-entity-list>) and as an Appendix to a notice that will be published in the **Federal Register**. See Appendix 1. The FLETF will consider future additions to, or removals from, the UFLPA Entity List based on criteria described in clauses (i), (ii), (iv), or (v) of section 2(d)(2)(B) of the UFLPA. Any FLETF member agency may submit a recommendation(s) to add, remove or make technical corrections to an entry on the UFLPA Entity List. FLETF member agencies will review and vote on revisions to the UFLPA Entity List accordingly.

Additions to the Entity List

The FLETF will consider future additions to the UFLPA Entity List based on the criteria described in clauses (i), (ii), (iv), or (v) of section 2(d)(2)(B) of the UFLPA. Any FLETF member agency may submit a recommendation to the FLETF Chair to add an entity to the UFLPA Entity List. Following review of the recommendation by the FLETF member agencies, the decision to add an entity to the UFLPA Entity List will be made by majority vote of the FLETF member agencies.

Requests for Removal From the Entity List

Any listed entity may submit a request for removal (removal request) from the UFLPA Entity List along with supporting information to the FLETF Chair at FLETF.UFLPA.EntityList@hq.dhs.gov. In the removal request, the entity (or its designated representative) should provide information that demonstrates that the entity no longer meets or does not meet the criteria described in the applicable clause ((i), (ii), (iv), or (v)) of section 2(d)(B) of the UFLPA. The FLETF Chair will refer all such removal requests and supporting information to FLETF member agencies. Upon receipt of the removal request, the FLETF Chair or the Chair’s designated representative may contact the entity on behalf of the FLETF regarding questions on the removal request and may request additional information. Following review of the removal request by the FLETF member agencies, the decision to remove an entity from the UFLPA Entity List will be made by majority vote of the FLETF member agencies.

Listed entities may request a meeting with the FLETF after submitting a removal request in writing to the FLETF Chair at FLETF.UFLPA.EntityList@hq.dhs.gov. Following its review of a removal request, the FLETF may accept the meeting request at the conclusion of the review period and, if accepted, will hold the meeting prior to voting on the entity’s removal request. The FLETF Chair will advise the entity in writing of the FLETF’s decision on its removal request. While the FLETF’s decision on a removal request is not appealable, the FLETF will consider new removal

requests if accompanied by new information.

Robert Silvers,

Under Secretary, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security.

Appendix 1

This notice supersedes the UFLPA Entity List published in the **Federal Register** on August 2, 2023 (88 FR 50902). The UFLPA Entity List as of September 27, 2023 is available in this appendix and is published on <https://www.dhs.gov/uflpa-entity-list>. This update adds three entities to the section 2(d)(2)(B)(ii) list of the UFLPA, which identifies entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region:

- Xinjiang Tianmian Foundation Textile Co., Ltd.
- Xinjiang Tianshan Wool Textile Co. Ltd.
- Xinjiang Zhongtai Group Co. Ltd.

No technical corrections or removals are being made to the UFLPA Entity List at this time.

The UFLPA Entity List is a consolidated register of the four lists that are required to be developed and maintained pursuant to section 2(d)(2)(B) of the UFLPA. Twenty-seven entities that meet the criteria set forth in the four required lists (*see* sections 2(d)(2)(B)(i), (ii), (iv), and (v) of the UFLPA) are specified on the UFLPA Entity List.

UFLPA Entity List September 27, 2023

UFLPA Section 2 (d)(2)(B)(i) A List of Entities in Xinjiang That Mine, Produce, or Manufacture Wholly or in Part Any Goods, Wares, Articles, and Merchandise With Forced Labor

Baoding LYSZD Trade and Business Co., Ltd.
 Changji Esquel Textile Co. Ltd. (and one alias: Changji Yida Textile)
 Hetian Haolin Hair Accessories Co. Ltd. (and two aliases: Hotan Haolin Hair Accessories; and Hollin Hair Accessories)
 Hetian Taida Apparel Co., Ltd (and one alias: Hetian TEDA Garment)
 Hoshine Silicon Industry (Shanshan) Co., Ltd (including one alias: Hesheng Silicon Industry (Shanshan) Co.) and subsidiaries
 Xinjiang Daqo New Energy, Co. Ltd (including three aliases: Xinjiang Great New Energy Co., Ltd.; Xinjiang Daxin Energy Co., Ltd.; and Xinjiang Daqin Energy Co., Ltd.)

Xinjiang East Hope Nonferrous Metals Co. Ltd. (including one alias: Xinjiang Nonferrous)

Xinjiang GCL New Energy Material Technology, Co. Ltd (including one alias: Xinjiang GCL New Energy Materials Technology Co.)

Xinjiang Junggar Cotton and Linen Co., Ltd.

Xinjiang Production and Construction Corps (including three aliases: XPCC; Xinjiang Corps; and Bingtuan) and its subordinate and affiliated entities

UFLPA Section 2 (d)(2)(B)(ii) A List of Entities Working With the Government of Xinjiang To Recruit, Transport, Transfer, Harbor or Receive Forced Labor or Uyghurs, Kazakhs, Kyrgyz, or Members of Other Persecuted Groups out of Xinjiang

Aksu Huafu Textiles Co.—(including two aliases: Akesu Huafu and Aksu Huafu Dyed (Melange Yarn)

Camel Group Co., Ltd.

Hefei Bitland Information Technology Co., Ltd. (including three aliases: Anhui Hefei Baolongda Information Technology; Hefei Baolongda Information Technology Co., Ltd.; and Hefei Bitland Optoelectronic Technology Co., Ltd.)

Hefei Meiling Co. Ltd. (including one alias: Hefei Meiling Group Holdings Limited).

KTK Group (including three aliases: Jiangsu Jinchuang Group; Jiangsu Jinchuang Holding Group; and KTK Holding).

Lop County Hair Product Industrial Park Lop County Meixin Hair Products Co., Ltd.

Nanjing Synergy Textiles Co., Ltd. (including two aliases: Nanjing Xinyi Cotton Textile Printing and Dyeing; and Nanjing Xinyi Cotton Textile).

Ninestar Corporation and its eight Zhuhai-based subsidiaries, which include Zhuhai Ninestar Information Technology Co. Ltd., Zhuhai Pantum Electronics Co. Ltd., Zhuhai Apex Microelectronics Co., Ltd., Geehy Semiconductor Co., Ltd., Zhuhai Pu-Tech Industrial Co., Ltd., Zhuhai G&G Digital Technology Co., Ltd., Zhuhai Seine Printing Technology Co., Ltd., and Zhuhai Ninestar Management Co., Ltd.

No. 4 Vocation Skills Education Training Center (VSETC)

Tanyuan Technology Co. Ltd. (including five aliases: Carbon Yuan Technology; Changzhou Carbon Yuan Technology Development; Carbon Element Technology; Jiangsu Carbon Element Technology; and Tanyuan Technology Development).

Xinjiang Production and Construction Corps (XPCC) and its subordinate and affiliated entities

Xinjiang Tianmian Foundation Textile Co., Ltd.

Xinjiang Tianshan Wool Textile Co. Ltd.

Xinjiang Zhongtai Chemical Co. Ltd.

Xinjiang Zhongtai Group Co. Ltd

UFLPA Section 2 (d)(2)(B)(iv) A List of Entities That Exported Products Described in Clause (iii) From the PRC Into the United States

Entities identified in sections (i) and (ii) above may serve as both manufacturers and exporters. The FLETF has not identified additional exporters at this time but will continue to investigate and gather information about additional entities that meet the specified criteria.

UFLPA Section 2 (d)(2)(B)(v) A List of Facilities and Entities, Including the Xinjiang Production and Construction Corps, That Source Material From Xinjiang or From Persons Working With the Government of Xinjiang or the Xinjiang Production and Construction Corps for Purposes of the “poverty alleviation” Program or the “pairing-assistance” Program or Any Other Government Labor Scheme That Uses Forced Labor

Baoding LYSZD Trade and Business Co., Ltd.

Chenguang Biotech Group Co., Ltd. and its subsidiary Chenguang Biotechnology Group Yanqi Co. Ltd.

Hefei Bitland Information Technology Co. Ltd.

Hetian Haolin Hair Accessories Co. Ltd.

Hetian Taida Apparel Co., Ltd.

Hoshine Silicon Industry (Shanshan) Co., Ltd., and Subsidiaries

Xinjiang Junggar Cotton and Linen Co., Ltd.

Lop County Hair Product Industrial Park

Lop County Meixin Hair Products Co., Ltd.

No. 4 Vocation Skills Education Training Center (VSETC)

Xinjiang Production and Construction Corps (XPCC) and its subordinate and affiliated entities

Yili Zhuowan Garment Manufacturing Co., Ltd.

[FR Doc. 2023–21131 Filed 9–26–23; 8:45 am]

BILLING CODE 9110–9M–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0015]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Immigrant Petition for Alien Workers

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting 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. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until October 27, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at <https://www.regulations.gov> under e-Docket ID number USCIS–2007–0018. All submissions received must include the OMB Control Number 1615–0015 in the body of the letter, the agency name and Docket ID USCIS–2007–0018.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at <https://www.uscis.gov>, or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on June 28, 2023, at 88 FR 41976, allowing for a 60-day public comment period. USCIS received two

comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: <https://www.regulations.gov> and enter USCIS–2007–0018 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at <https://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <https://www.regulations.gov>.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Immigrant Petition for Alien Workers.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–140; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* **Primary:** Business or other for-profit; Not-for-profit institutions. The information collected on this form will be used by USCIS to determine eligibility for the requested immigration benefits under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Immigration and Nationality Act.

(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 I–140 is 172,090 and the estimated hour burden per response is 0.914 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 is 157,290 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 \$75,332,398.

Dated: September 22, 2023.

Samantha L. Deshommes,
Chief, Regulatory Coordination Division,
Office of Policy and Strategy, U.S. Citizenship
and Immigration Services, Department of
Homeland Security.

[FR Doc. 2023–21113 Filed 9–26–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between Cowlitz Indian Tribe and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Fourth Amendment to the Tribal-State Compact between the Cowlitz Indian Tribe and the State of Washington.

DATES: The Amendment takes effect on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–

497, 25 U.S.C. 2701 *et seq.*, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment authorizes the Tribe to offer Electronic Table Games at the Tribe's class III gaming facilities, establishes limitations on wagers, credit, gaming stations, and player terminals, and increases contributions to problem gaming resources. The Amendment is approved.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–20970 Filed 9–26–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between Suquamish Tribe and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Sixth Amendment to the Tribal-State Compact between the Suquamish Tribe and the State of Washington.

DATES: The Amendment takes effect on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment permits the Tribe to offer Electronic Table Games, updates the Compact to reflect this change in various sections, and incorporates Appendix G, Electronic

Table Games. The Amendment is approved.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–20973 Filed 9–26–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between Nisqually Indian Tribe and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Fifth Amendment to the Tribal-State Compact between the Nisqually Indian Tribe and the State of Washington.

DATES: The Amendment takes effect on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment permits the Tribe to offer Electronic Table Games, updates the Compact to reflect this change in various sections, and incorporates Appendix G, Electronic Table Games. The Amendment is approved.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–20968 Filed 9–26–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
A0A501010.999900]

Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of California (Middletown Rancheria of Pomo Indians of California & State of California)

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval by operation of law of the compact between the Middletown Rancheria of Pomo Indians of California (Tribe) and the State of California (State) providing for the conduct of Tribal class III gaming by the Tribe.

DATES: The compact takes effect on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701 *et seq.*, (IGRA) provides the Secretary of the Interior (Secretary) with 45 days to review and approve or disapprove the Tribal-State compact governing the conduct of Class III gaming activity on the Tribe's Indian lands. *See* 25 U.S.C. 2710(d)(8). If the Secretary does not approve or disapprove a Tribal-State compact within the 45 days, IGRA provides the Tribal-State compact is considered to have been approved by the Secretary but only to the extent the compact is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C). The IGRA also requires the Secretary of the Interior to publish in the **Federal Register** notice of the approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. *See* 25 U.S.C. 2710(d)(8)(D). The Department's regulations at 25 CFR 293.4 require all compacts and amendments to be reviewed and approved by the Secretary prior to taking effect. The Secretary took no action on the Compact between the Middletown Rancheria of Pomo Indians of California and the State of California within the 45-day statutory review period. Therefore, the Compact is considered to have been approved, but

only to the extent it is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–20971 Filed 9–26–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[234A2100DD/AAKC001030/
A0A501010.999900]

Indian Gaming; Approval of Tribal-State Class III Gaming Compact Amendment Between Jamestown S'Klallam Tribe and the State of Washington

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval of the Eighth Amendment to the Tribal-State Compact between the Jamestown S'Klallam Tribe and the State of Washington.

DATES: The Amendment takes effect on September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. As required by 25 CFR 293.4, all compacts and amendments are subject to review and approval by the Secretary. The Amendment authorizes the Tribe to offer Electronic Table Games at the Tribe's class III gaming facilities, establishes limitations on wagers, credit, gaming stations, and player terminals, and increases contributions to problem gaming resources. Additionally, the Amendment compels the Tribe to establish education and awareness programs for problem gaming and makes minor adjustments to accepted forms of payment, allows the Tribal Court jurisdiction to hear civil disputes arising from the conduct of gaming, and allows the Tribe to increase its maximum wagers and purchase prices

to match an increase in prices in the Washington State Lottery.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–20969 Filed 9–26–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[Docket ID BSEE–2023–0013; EEEE500000
234E1700D2 ET1SF0000.EAQ000; OMB
Control Number 1014–0034]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf

AGENCY: Bureau of Safety and Environmental Enforcement, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before October 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to Nikki Mason, BSEE ICCO, 45600 Woodland Road, Sterling, VA 20166; or by email to nikki.mason@bsee.gov. Please reference OMB Control Number 1014–0034 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Nikki Mason by email at nikki.mason@bsee.gov, or by telephone at (703) 787–1607. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may

also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public’s reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A Federal Register notice with a 60-day public comment period soliciting comments on this collection of information was published on July 13, 2023 (88 FR 44834). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

- (1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;
- (2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and
- (4) How might the agency minimize the burden of the collection of information on those who are to respond, including 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 response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: BSEE will use the information to oversee facility design,

fabrication, installation, and safety management systems; ensure the safety of operations, including inspection programs and incident reporting and investigations; enforce compliance with all applicable safety, environmental, and other laws and regulations through enforcement actions (such as noncompliance notices, cessation orders, and certain lease suspensions); and oversee decommissioning activities. These responsibilities include enforcement provisions under the existing part 285 subpart D, various information submittal requirements under subpart F, as well as provisions governing activities conducted under an approved plan, including the design, construction, operation, and decommissioning of facilities under subparts G, H, and I. The requirements for and standards of review regarding the Facility Design Report (FDR) and Facility Fabrication and Installation Report (FIR) are unchanged: the FDR and FIR will continue to be evaluated for consistency with the Construction and Operations Plan (COP) and applicable engineering standards. Decommissioning requirements related to rights-of-use and easement for alternate uses of existing OCS facilities (Alternate Use RUE) have also been transferred from the existing subpart J to part 285.

BSEE assumes the responsibility for ordering a lease or grant suspension when continued activities pose an imminent threat of serious or irreparable harm or damage to natural resources, life, property, the marine coastal, or human environment, or sites, structures, or objects of historical or archaeological significance. BSEE may also order a suspension when necessary to comply with a judicial decree. Under the rule, BSEE also assumes authority to issue cessation orders to address noncompliance on the part of the grantee or lessee.

The Department does not issue Suspensions for Alternate Use RUEs upon the grantee’s request, but only by order. BOEM will retain authority to order suspensions required for National security, and BSEE will assume authority to order suspensions to address a threat of harm from continued operations. Either bureau may order a suspension when necessary to comply with a judicial decree. BSEE will order suspensions when operations are halted on the existing facility and BSEE determines continuation of the alternate use is unsafe or causes undue interference with the facility.

Part 285 subpart D, Lease and Grant Administration, includes the authority to issue notices of noncompliance

(NONCs) and cessation orders, and to pursue civil penalties and recommend criminal penalties. BSEE assumes authority for oversight and enforcement of the design, construction, operation, and decommissioning phases of offshore wind development, as well as enforcement of requirements related to Alternate Use RUEs.

This ICR includes a new form: Form BSEE-1835, *Notification of Noncompliance* (NONC).

BSEE will use the information to determine that respondents have corrected all Notifications of Noncompliance (NONCs) identified during inspections. Everything on the NONC form is filled out by a BSEE inspector/representative. The only thing industry does with this form is sign the document upon receipt and respond to BSEE when each NONC has been corrected. Dependent on the severity of the non-compliance identified by the BSEE inspector, the responses are assigned different intervals and are described in the form table titled Enforcement Timeline:

1—At Time of Inspection
14—Within 14 Days
30—Within 30 Days
50—Prior to Returning to Service/ Operation
60—Prior to Next Scheduled Maintenance
70—During Next Scheduled Maintenance
80—Prior to Next scheduled Audit
90—During Next Scheduled Audit.
Title of Collection: 30 CFR part 285, Renewable Energy and Alternate Uses of Existing Facilities on the Outer Continental Shelf.

OMB Control Number: 1014-0034.

Form Number: Form BSEE-1835, *Notice(s) of Noncompliance.*

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Primary respondents comprise Federal OCS companies that submit unsolicited proposals or responses to **Federal Register** notices; or are lessees, designated operators, and ROW or RUE grant holders. Other potential respondents are companies or state and

local governments that submit information or comments relative to alternative energy-related uses of the OCS; certified verification agents (CVAs); and surety or third-party guarantors.

Total Estimated Number of Annual Respondents: Currently there are approximately 47 Lessees in the OCS. Not all the potential respondents will submit information in any given year, and some may submit multiple times.

Total Estimated Number of Annual Responses: 103.

Estimated Completion Time per Response: Varies from 30 minutes to 6,000 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 8,908

Respondent's Obligation: Responses are mandatory and are required to obtain or retain a benefit.

Frequency of Collection: generally occasional or annual.

Total Estimated Annual Nonhour Burden Cost: \$1,908,000.

BURDEN TABLE

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
Subpart A—General Provisions				
102; 105; 110	These sections contain general references to submitting comments, requests, applications, plans, notices, reports, and/or supplemental information for BSEE approval—burdens covered under specific requirements.			
103; 904;	Request general departures not specifically covered elsewhere in part 285.	.5	6 requests	3
105(c)	Make oral requests or notifications and submit written follow up within 3 business days not specifically covered elsewhere in part 285.	1	2 requests	2
1016	Request reconsideration and/or hearing	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0
111(b)(3); (b)(5); (b)(6)	Within 30 days of receiving bill, submit processing fee payments for BSEE document or study preparation to process applications and other requests.	.5	2 submissions ...	1
			2 payments × \$4,000 = \$8,000	
111(b)(2), (3)	Submit comments on proposed processing fee or request approval to perform or directly pay contractors for all or part of any document, study, or other activity, to reduce BSEE processing costs.	2	2 requests	4
111(b)(3)	Perform, conduct, develop, etc., all or part of any document, study, or other activity; and provide results to BSEE to reduce BSEE processing fee. Pay processing fee for all or part of any document, study, or other activity, and provide results to BSEE to reduce BSEE processing costs.	6,000	1 submission	6,000

BURDEN TABLE—Continued

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
	.....	.....	1 contractor payment × \$950,000 = \$950,000	
111(b)(7)	Appeal BSEE estimated processing costs, decisions, or orders pursuant to 30 CFR 290.	Exempt under 5 CFR 1320.4(a)(2), (c).		0
115	Request approval to use later edition of a document incorporated by reference or alternative compliance.	1	1 request	1
118	Request appeal within 15 days of bid rejection, request reconsideration of bid decision or rejection.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0

Subpart B—Reserved

Subpart C—Reserved

Subpart D—Lease and Grant Administration

400; 401; 402 NONCs	These sections contain references to information submissions, approvals, requests, applications, plans, payments, etc., the burdens for which are covered elsewhere in part 285.			0
401(b)	Take measures directed by BSEE in cessation order and submit reports to resume activities.	100	1 report	100
417(b)	Conduct, and if required pay for, site-specific study to evaluate cause of harm or damage; and submit copies of study and results, in format specified.	110	1 study/submission.	110
	.....	.....	1 study × \$950,000 = \$950,000	
437	Provide information for reconsideration of BSEE decision to contract or cancel lease or grant area.	Requirement not considered IC under 5 CFR 1320.3(h)(9).		0

Subpart E—Reserved

Subpart F—Plans and Information Requirements

** indicate the primary cites for Site Assessment Plans (SAPs), Construction and Operations Plans (COPs), and General Activities Plans (GAPs); and the burdens include any previous or subsequent references throughout part 285 to submission and approval. This subpart contains references to other information submissions, approvals, requests, applications, plans, etc., the burdens for which are covered elsewhere in part 285.

**606; 614; 810	Within time specified after issuance of a competitive lease or grant, or within time specified after determination of no competitive interest, submit copies of SAP, including required information to assist BSEE to comply with NEPA/CZMA such as hazard info, air quality, SMS, and all required information, certifications, requests, etc., in format specified.	48	2 SAPs	96
**621; 632; 637; 810	If requesting an operations term for commercial lease, within time specified before the end of site assessment term, submit copies of COP, or FERC license application, including required information to assist BSEE to comply with NEPA/CZMA such as hazard info, air quality, SMS, and all required information, surveys and/or their results, reports, certifications, project easements, supporting data and information, requests, etc., in format specified.	200	2 COPs	400

BURDEN TABLE—Continued

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
**641; 651; 810	Within time specified after issuance of a competitive lease or grant, or within time specified after determination of no competitive interest, submit copies of GAP, including required information to assist BSEE to comply with NEPA/CZMA such as hazard info, air quality, SMS, and all required information, surveys and reports, certifications, project easements, requests, etc., in format specified.	48	2 GAPs	96
**632(c); 907	Submit revised or modified COPs, including project easements, and all required additional information.	10	1 revised or modified COP.	10
602	Until BSEE releases financial assurance, respondents must maintain, and provide to BSEE if requested, all data and information related to compliance with required terms and conditions of SAP, COP, or GAP ² .	2	9 records/submissions.	18
615; 800(b)	Submit annual, or at other time periods as BSEE determines, SAP compliance certification, effectiveness statement, recommendations, reports, supporting documentation, etc.	40	4 certifications ...	160
633; 800(b)	Submit annual, or at other time periods as BOEM/BSEE determines, COP compliance certification, effectiveness statement, recommendations, reports, supporting documentation, etc.	45	9 certifications ...	405
636(a)	Notify BSEE in writing no later than 30 days after commencing activities associated with placement of facilities on lease area.	1	2 notices	2
636(b)	Notify BSEE in writing no later than 30 days after completion of construction and installation activities.	1	2 notices	2
636(c)	Notify BSEE in writing at least 7 days before commencing commercial operations.	1	1 notice	1
651	Before beginning construction of OCS facility described in GAP, demonstrate operational SMS identified in GAP, submit initial findings.	27.5	2 notices	55
653(a), (b); 800(b)	Submit annual, or at other time periods as BSEE determines, GAP compliance certification, recommendations, reports, etc.	40	4 certifications ...	160

Subpart G—Facility Design, Fabrication, and Installation

*** indicate the primary cites for the reports discussed in this subpart, and the burdens include any previous or subsequent references throughout part 285 to submitting and obtaining approval. This subpart contains references to other information submissions, approvals, requests, applications, plans, etc., the burdens for which are covered elsewhere in part 285.

*** 700(a) (1), (c); 701	Submit Facility Design Report, including copies of the cover letter, certification statement, and all required information (1–3 paper or electronic copies as specified).	200	1 report	200
*** 700(a) (2), (c); 702	Submit Fabrication and Installation Report, including copies of the cover letter, certification statement, and all required information, in format specified.	160	1 report	160
705(a); 707(a); 712	Certified Verification Agent (CVA) conducts independent assessment of the facility design and submits copies of all reports/certifications to lessee or grant holder and BSEE—interim reports if required, in format specified.	100	1 interim report ..	100

BURDEN TABLE—Continued

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
	.....	100	1 final report	100
705(a); 707(b); 708; 709; 710; 712; 637	CVA conducts independent assessments/inspections on the fabrication and installation activities, informs lessee or grant holder if procedures are changed or design specifications are modified; and submits copies of all reports/certifications to lessee or grant holder and BSEE—interim reports if required, in format specified.	100	1 interim report ..	100
	.....	100	1 final report	100
*** 703; 705(a); 712; 815	CVA/project engineer monitors major project modifications and repairs and submits copies of all reports/certifications to lessee or grant holder and BSEE—interim reports if required, in format specified.	20	1 interim report ..	20
	.....	15	1 final report	15
705(b), (c)	Request waiver of CVA requirement in writing; lessee must demonstrate standard design and best practices.	16	1 waiver	16
706	Submit for approval with SAP, COP, or GAP, initial nominations for a CVA or new replacement CVA nomination and required information.	6.5	2 nominations	13
708(b)(2)	Notify BSEE if modifications identified by CVA/project engineer are accepted.	1	1 notice	1
709(a); 710	Make fabrication quality control, installation towing, and other records available to CVA/project engineer for review (retention required by § 285.714).	1	3 records	3
713	Notify BSEE within 10 business days after commencing commercial operations.	1	1 notice	1
714; 703(b)	Until BOEM releases financial assurance, compile, retain, and make available to BSEE and/or CVA the as-built drawings, design assumptions/analyses, summary of fabrication and installation examination records, inspection results, and records of repairs not covered in inspection report. Record original and relevant material test results of all primary structural materials; retain records during all stages of construction ² .	100	1 lessee	100

Subpart H—Environmental and Safety Management, Inspections, and Facility Assessments for Activities Conducted Under SAPs, COPs, and GAPs

802(a); 902(e)	Notify BSEE of archaeological resource within 72 hours of discovery.	3	1 notice	3
802(d)	If applicable, submit payment for BSEE costs in carrying out National Historic Preservation Act responsibilities.	.5	1 payment	1
810; 614(b); 632(b); 651	Submit safety management system description with the SAP, COP, or GAP.	30	2 submissions ...	60
813(b)(1)	Report within 24 hours when any required equipment taken out of service for more than 12 hours; provide written confirmation if reported orally.	.5	2 reports	1
		1	1 written confirmation.	1

BURDEN TABLE—Continued

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
813(b)(3)	Notify BSEE when equipment returned to service; provide written confirmation if reported orally.	.5	2 notices	1
815	When required, analyze cable, P/L, or facility damage or failures to determine cause and as soon as available submit comprehensive written report.	1.5	1 report	2
816	Submit plan of corrective action report on observed detrimental effects on cable, P/L, or facility within 30 days of discovery; take remedial action and submit report of remedial action within 30 days after completion.	2	1 plan/report	2
822	Maintain records of design, construction, operation, maintenance, repairs, and investigation on or related to lease or ROW/RUE area; make available to BSEE for inspection ² .	1	4 records retention.	4
823	Request reimbursement within 90 days for food, quarters, and transportation provided to BSEE reps during inspection.	2	1 request	2
824(a)	Develop annual self-inspection plan covering all facilities; retain with records and make available to BSEE upon request.	24	2 plans	48
824(b)	Conduct annual self-inspection and submit report by November 1.	36	2 reports	72
825	Based on API RP 2A-WSD, perform assessment of structures, initiate mitigation actions for structures that do not pass assessment process, retain information, and make available to BSEE upon request.	60	2 assessments/actions.	120
830(a), (c); 831 thru 833	Immediately report incidents to BSEE via oral communications, submit written follow-up report within 15 business days after the incident, and submit any required additional information.	.5 Oral	2 incidents	1
		4 Written	1 incident	4
830(d)	Report oil spills as required by BSEE 30 CFR part 254	2	1 report	2

Subpart I—Decommissioning

**** indicate the primary cites for the reports discussed in this subpart, and the burdens include any previous or subsequent references throughout part 285 to submitting and obtaining approval. This subpart contains references to other information submissions, approvals, requests, applications, plans, etc., the burdens for which are covered elsewhere in parts 285.

**** 902; 905, 906; 907; 908(b), (c); 909; 638(a).	Submit for approval, in format specified, copies of the SAP, COP, or GAP decommissioning application and site clearance plan at least 2 years before decommissioning activities begin, 90 days after completion of activities, or 90 days after cancellation, relinquishment, or other termination of lease or grant. Include documentation of coordination efforts regarding requests that certain facilities remain in place for other activities, be converted to an artificial reef, or be toppled in place. Submit additional information/evidence requested or modify and resubmit application.	19	1 application	19
902(d); 908(a)	Notify BSEE at least 60 days before commencing decommissioning activities.	1	1 notice	1
910(b)	Within 60 days after removing a facility, verify to BSEE that site is cleared.	1	1 verification	1

BURDEN TABLE—Continued

Citations in 30 CFR 285	Reporting and recordkeeping requirement ¹	Hour burden	Average number of annual responses	Annual burden hours
			Non-hour cost burdens	
912	Within 60 days after removing a facility, cable, or pipeline, submit a written report.	8	1 report	8
BSEE does not anticipate decommissioning activities for at least 5 years, so the requirements have been given a minimal burden.				
Total Burden			103 Responses	8,908 Hours
			\$1,908,000 Non-Hour Costs Burdens	

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 authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Kirk Malstrom,

Chief, Regulations and Standards Branch.

[FR Doc. 2023–21038 Filed 9–26–23; 8:45 am]

BILLING CODE 4310–VH–P

views of the Commission are contained in USITC Publication 5461 (September 2023), entitled *Honey from China: Investigation No. 731–TA–893 (Fourth Review)*.

By order of the Commission.

Issued: September 22, 2023.

Sharon Bellamy,

Supervisory Hearings and Information Officer.

[FR Doc. 2023–21091 Filed 9–26–23; 8:45 am]

BILLING CODE 7020–02–P

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 DEC intends to file additional written notifications disclosing all changes in membership.

On April 12, 2023, DEC 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 August 8, 2023 (88 FR 53520).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–20951 Filed 9–26–23; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–893 (Fourth Review)]

Honey From China; Determination

On the basis of the record ¹ developed in the subject five-year review, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that revocation of the antidumping duty order on honey from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on March 1, 2023 (88 FR 12992) and determined on June 5, 2023 that it would conduct an expedited review (88 FR 44841, July 13, 2023).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on September 22, 2023. The

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Defense Electronics Consortium

Notice is hereby given that, on July 14, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (“the Act”), the Defense Electronics Consortium (“DEC”) 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, 3D Glass Solutions, Inc., Albuquerque, NM; Amida Technology Solutions LLC, Washington, DC; Ceritas, Inc., Gloucester, MA; CoolCAD Electronics LLC, College Park, MD; Spectrum Control, Inc., Fairview, PA; Synopsys, Inc., Mountainview, CA; and University of Florida Board of Trustees, Gainesville, FL, have been added as parties to this venture.

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1817]

Forensic Laboratory Needs–Technology Working Group

AGENCY: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) is seeking qualified individuals to serve on the Forensic Laboratory Needs–Technology Working Group (FLN–TWG). The FLN–TWG was established in 2018 to build upon the work of the National Commission of Forensic Sciences.

DATES: Individuals wishing to submit an application to the National Institute of Justice must do so by 5 p.m. Eastern Time on December 29, 2023, as instructed below.

FOR FURTHER INFORMATION CONTACT: Danielle McLeod-Henning, Physical Scientist, Office of Investigative and

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

Forensic Sciences, National Institute of Justice, 810 7th Street NW, Washington, DC 20531; telephone number: (202) 598-0562; email address: danielle.mcleod-henning@usdoj.gov.

SUPPLEMENTARY INFORMATION: The FLN-TWG is authorized under 6 U.S.C. 162(b)(2) and as such it will assess, advise, and provide relevant information regarding the technology needs of Federal, state, local, and tribal forensic laboratories to accomplish the mission of NIJ.

How To Respond and What To Include: To apply to serve on the FLN-TWG, please email a resume to the point of contact listed below by the deadline listed above. Please put "FLN-TWG" in the subject line. Application materials must be submitted electronically. Hardcopy application materials will not be accepted. There is no page limit or limit to the amount of information that an interested applicant may submit to demonstrate his, her, or their qualifications. More information on the individuals sought for the FLN-TWG is provided below. All materials submitted will be treated confidentially and discreetly and may be shared with U.S. Government staff or U.S. Government contractors for evaluation purposes related to selection for the FLN-TWG.

NIJ is seeking qualified individuals to serve on the FLN-TWG. The mission of the FLN-TWG is to advise, assess, and provide information to NIJ and its Federal partners on the technology needs of state, local, and tribal forensic laboratories to (1) improve coordination of technology transition or standardization, (2) identify localized or system-wide operational gaps or impediments to adoption, not including resource limitations, (3) increase the capacity and quality of forensic services within an ever-increasing demand for services nationwide.

NIJ anticipates that the FLN-TWG will be comprised of approximately 25 individuals who serve as forensic laboratory leaders or forensic science researchers and who are working in state and local forensic science laboratories, private forensic science laboratories, or academic settings. Laboratories can be independent or investigating agencies (such as associated with law enforcement). Federal employees can participate in an ex-officio capacity. Individuals will be selected to achieve the best possible balance of knowledge and expertise. Individuals who have recently retired from a leadership role in a forensic laboratory may be considered. Also, laboratory size, jurisdiction, and geographical dispersion will be

considered when selecting members. FLN-TWG members will be asked to serve a three-year term with an opportunity to serve three terms (nine years total). New members will be added to FLN-TWG annually, as needed.

Submitted materials must clearly demonstrate the applicant's qualifications to serve on the FLN-TWG. Candidates should have practical or research experience in the forensic sciences and may serve as laboratory directors, managers, quality assurance managers, or researchers.

NIJ anticipates that the FLN-TWG will meet twice a year for no more than two working days. Meetings may be virtual or in-person. FLN-TWG chairs will meet for two additional meetings each year to set the agenda for the full working group meeting. If warranted, the FLN-TWG may meet in person, location to be determined. Additional meetings may be necessary to complete goals as determined by the working group. The majority of the work will be conducted by web conference, telephone, and email. Participation time will not be reimbursed; however, should travel be permitted, it is expected that travel and per diem expenses for travel will be reimbursed. Any potential reimbursements are subject to, inter alia, the availability of appropriated funds, and to any modifications or additional requirements that may be imposed by law.

Nancy La Vigne,

Director, National Institute of Justice.

[FR Doc. 2023-21092 Filed 9-26-23; 8:45 am]

BILLING CODE 4410-18-P

MORRIS K. UDALL AND STEWART L. UDALL FOUNDATION

Sunshine Act Meetings

TIME AND DATE: Electronic Board of Trustees Meeting to be held via email exchanges Wednesday, October 4, 2023, 8:00 a.m. (MST-AZ), through Wednesday, October 11, 2023, 4:00 p.m. (MST-AZ).

PLACE: Board of Trustees meeting held via email exchanges.

STATUS: This special meeting of the Board of Trustees, to be held Electronically (in accordance with the Operating Procedures of the Board of Trustees of the Morris K. Udall and Stewart L. Udall Foundation), is open to the public. Members of the public who would like to observe this electronic meeting should email David Brown at brown@udall.gov prior to Wednesday, October 4, 2023, 8:00 a.m. (MST-AZ).

MATTERS TO BE CONSIDERED: (1) Call to Order and Chair's Remarks and (2) Board Operating Procedures Revisions (including a resolution regarding Amendment of Operating Procedures of the Board of Trustees of the Morris K. Udall and Stewart L. Udall Foundation).

CONTACT PERSON FOR MORE INFORMATION: David P. Brown, Executive Director, 434 E. University Blvd., Suite 300, Tucson, AZ, 85705, (520) 901-8560.

Dated: September 25, 2023.

David P. Brown

Executive Director, Morris K. Udall and Stewart L. Udall Foundation.

[FR Doc. 2023-21283 Filed 9-25-23; 4:15 pm]

BILLING CODE 6820-FN-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Office of Government Information Services

[NARA-2023-043]

Chief Freedom of Information Act Officers Council

AGENCY: Office of Government Information Services (OGIS), National Archives and Records Administration (NARA) and Office of Information Policy (OIP), U.S. Department of Justice (DOJ).

ACTION: Notice of meeting.

SUMMARY: We are announcing a meeting of the Chief Freedom of Information Act (FOIA) Officers Council, co-chaired by the Director of OGIS and the Director of OIP.

DATES: The meeting will be on Thursday, November 9, 2023, from 10 a.m. to 12:30 p.m. ET. Please register for the meeting no later than 11:59 p.m. ET on Tuesday, November 7, 2023 (registration information is detailed below).

ADDRESSES: The November 9, 2023, meeting will be a virtual meeting. We will send access instructions to those who register according to the instructions below.

FOR FURTHER INFORMATION CONTACT: Martha Murphy, by email at ogis@nara.gov with the subject line "Chief FOIA Officers Council," or by telephone at 202-741-5770.

SUPPLEMENTARY INFORMATION: This meeting is open to the public in accordance with the Freedom of Information Act (5 U.S.C. 552(k)). Additional details about the meeting, including the agenda, will be available on Chief FOIA Officers Council website

at <https://www.foia.gov/chief-foia-officers-council>.

Procedures: The virtual meeting is open to the public. If you wish to offer oral public statements during the public comment period, you must register in advance through Eventbrite at <https://www.eventbrite.com/o/office-of-government-information-services-7515239993>. You must provide an email address so that we can provide you with information to access the meeting online. Public comments will be limited to three minutes per individual. We will also live-stream the meeting on the National Archives YouTube channel, <https://www.youtube.com/usnationalarchives>, and include a captioning option. To request additional accommodations (e.g., a transcript), email ogis@nara.gov or call 202-741-5770. Members of the media who wish to register, those who are unable to register online, and those who require special accommodations, should contact Martha Murphy (contact information listed above).

Alina M. Semo,

Director, Office of Government Information Services.

[FR Doc. 2023-21049 Filed 9-26-23; 8:45 am]

BILLING CODE 7515-01-P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Proposal Review Panel for Materials Research (DMR)—Site Visit review of a Materials Innovation Platform on Automating the Synthesis of Rationally Designed Glycomaterials (GlycoMIP) (#1203)

Date and Time: October 26, 2023; 8 a.m.–6 p.m.; October 27, 2023; 8 a.m.–4 p.m.

Place: Complex Carbohydrate Research Center, University of Georgia, 315 Riverbend Road, Athens, GA 30602.

Type of Meeting: Part open.

Contact Person: Z. Charles Ying, Program Director, Division of Materials Research, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone (703) 292-8428.

Purpose of Meeting: Site visit to provide advice and recommendations concerning further support of the GlycoMIP at Virginia Polytechnic Institute and State University and the University of Georgia.

Agenda

Thursday, October 26, 2023

8 a.m.–8:30 a.m. Executive Session (Closed)
8:30 a.m.–11:45 a.m. Review of GlycoMIP (Open)
11:45 a.m.–2 p.m. Executive Session (Closed)
2 p.m.–3:45 p.m. Review of GlycoMIP (Open)
3:45 p.m.–6 p.m. Executive Session (Closed)

Friday, October 27, 2023

8 a.m.–4 p.m. Executive Session (Closed)

Reason for Closing: Topics to be discussed and evaluated during closed portions of the site review will include information of a proprietary or confidential nature, including technical information; and information on personnel. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 21, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023-20944 Filed 9-26-23; 8:45 am]

BILLING CODE 7555-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 07007004; EA-23-018; NRC-2023-0157]

In the Matter of American Centrifuge Operating, LLC; American Centrifuge Operating Oak Ridge

AGENCY: Nuclear Regulatory Commission.

ACTION: Confirmatory order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a Confirmatory Order (Order) to American Centrifuge Operating, LLC (ACO, the licensee), as a result of a successful alternative dispute resolution mediation session completed on June 27, 2023. The commitments outlined in the Order were made as part of a settlement agreement concerning apparent violations by ACO for failing to meet NRC regulatory requirements related to protection of classified information. Details regarding the apparent violations contain security-related information and are therefore documented in a non-public version of the Order. The Order is effective upon issuance.

DATES: The Order was issued on September 21, 2023.

ADDRESSES: Please refer to Docket ID NRC-2023-0157 when contacting the

NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2023-0157. Address questions about Docket IDs in [Regulations.gov](https://www.regulations.gov) to Stacy Schumann; telephone: 301-415-0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, at 301-415-4737, or by email to PDR.Resource@nrc.gov. The Confirmatory Order modifying the license of American Centrifuge Operating, LLC, is available in ADAMS under Accession No. ML23263B067.

- **NRC's PDR:** The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Matthew Toth, Region II, telephone: 404-997-4445; email: Matthew.Toth@nrc.gov and Mark Kowal, Region II, telephone: 404-997-4523, email: Mark.Kowal@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: September 22, 2023.

For the Nuclear Regulatory Commission.

Laura A. Dudes,

Regional Administrator, NRC Region II.

Attachment—Confirmatory Order Modifying License—American Centrifuge Operating—Oak Ridge

United States of America

Nuclear Regulatory Commission

In the Matter of American Centrifuge Operating, LLC, American Centrifuge Operating Oak Ridge.

Docket Number 07007004, License
Number SNM-2011, EA-23-018

Confirmatory Order Modifying License

I

American Centrifuge Operating, LLC (ACO or Licensee) is the holder of Materials License No. SNM-2011 issued by the U.S. Nuclear Regulatory Commission (NRC or Commission) pursuant to part 95 of Title 10 of the *Code of Federal Regulations* (10 CFR). The license authorizes the operation of the ACO facility in Piketon, Ohio (ACO-Piketon), the ACO facility in Oak Ridge, Tennessee (ACO-OR), and the ACO headquarters facility in Bethesda, Maryland, in accordance with conditions specified therein.

This Confirmatory Order (CO) is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on June 27, 2023, in Rockville, Maryland.

II

On March 30, 2023, the NRC issued Special Inspection Report (IR) 07007004/2023401 (Agencywide Documents Access and Management System (ADAMS) ML23074A222, public cover letter) to ACO-OR which documented the identification of apparent violations that were being considered for escalated enforcement action in accordance with the NRC Enforcement Policy. The apparent violations involved the licensee's failure to meet regulatory requirements. Details regarding the apparent violations contain security-related information and are therefore documented in the non-public version of the Confirmatory Order.

By the same letter, dated March 30, 2023, the NRC notified ACO of the results of the inspection with an opportunity to: (1) provide a response in writing, (2) attend a predecisional enforcement conference or (3) participate in an ADR mediation session in an effort to resolve these concerns.

In response to the NRC's letter of March 30, 2023, ACO requested the use of the NRC's ADR process to resolve differences it had with the NRC. On June 27, 2023, the NRC and ACO met in an ADR session mediated by a professional mediator arranged through the U.S. Department of Energy. The ADR process is one in which a neutral mediator, with no decision-making authority, assists the parties in reaching an agreement on resolving any differences regarding the dispute. This Confirmatory Order is issued pursuant to the agreement reached during the ADR process.

III

During the ADR session, ACO and the NRC reached a preliminary settlement agreement. The elements of the agreement include the following:

1. ACO acknowledged that the violations occurred as documented in NRC IR number 07007004/2023401 (ADAMS Accession No. ML23074A222, public cover letter) issued on March 30, 2023, and as described in Section II of this Order.

2. In recognition of the prompt and comprehensive corrective actions taken in response to the apparent violations, as documented in this CO, discussed at the ADR, and documented in IR 07007004/2023401 issued on March 30, 2023, ACO is not required to provide a written response in accordance with 10 CFR 2.201. The licensee initiated a root cause analysis investigation and established additional corrective actions based on results from that investigation. Corrective actions and enhancements completed by ACO contain security-related information and are therefore contained in the non-public version of the Confirmatory Order.

3. For the purposes of this agreement, portions of the Confirmatory Order, as designated herein, will apply to ACO Oak Ridge (Oak Ridge), ACO-Piketon (Piketon), or both.

4. Based on ACO's review of the incident and NRC's concerns with respect to precluding recurrence of the violations, ACO agrees to implement corrective actions and enhancements that contain security-related information and are therefore documented in the non-public version of the Confirmatory Order.

Within 15 months from the date of the Confirmatory Order, ACO will submit to the NRC for approval a revision to the Oak Ridge and Piketon Standard Practice Procedure Plans to reflect the commitments which include marking requirements, searching requirements, training, and root cause evaluation criteria. Details regarding the commitments contain security-related information and are in the described in the non-public version of the Confirmatory Order.

5. Upon implementation of all the actions required of ACO in the Confirmatory Order, ACO will notify the NRC Region II Regional Administrator.

6. The NRC considers the corrective actions discussed above to be appropriately prompt and comprehensive to address the causes which resulted in the incidents discussed in the NRC's IR dated March 30, 2023.

7. In consideration of the commitments delineated above, the

NRC agrees not to cite the violations and agrees not to propose a civil penalty for all matters discussed in the NRC's IR dated March 30, 2023.

8. The NRC agrees that the Confirmatory Order will not count as escalated enforcement in the civil penalty assessment process for future enforcement cases involving ACO.

9. The Regional Administrator, NRC Region II, may relax or rescind, in writing, any of the above conditions of the Confirmatory Order upon a showing by ACO of good cause.

10. The NRC and ACO agree that the above elements will be incorporated into issuance of a Confirmatory Order, with a Waiver of Hearing Rights.

11. This agreement is binding upon successors and assigns of ACO.

Based on the completed actions described above, and the commitments described in Section V below, the NRC agrees to not pursue any further enforcement action based on the apparent violations identified in the NRC's March 30, 2023, letter and the Order will not count as escalated enforcement in the civil penalty assessment process for future enforcement cases involving ACO.

On September 12, 2023, ACO consented to issuing this Confirmatory Order with the commitments, as described in Section V below. ACO further agreed that this Confirmatory Order is to be effective upon issuance, the agreement memorialized in this Confirmatory Order settles the matter between the parties, and that ACO has waived its right to a hearing.

IV

I find that ACO's actions completed and planned, as described in Section III above, combined with the commitments as set forth in Section V are acceptable and necessary, and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that ACO's commitments be confirmed by this Confirmatory Order. Based on the above and ACO's consent, this Confirmatory Order is effective upon issuance.

V

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 187 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 95, *it is hereby ordered, effective upon issuance, that ACO "License No. SNM-2011" is modified as follows:*

Within 15 months from the date of the Confirmatory Order, ACO will submit to

the NRC for approval a revision to the Oak Ridge and Piketon Standard Practice Procedure Plans to reflect the commitments which include marking requirements, searching requirements, training, and root cause evaluation criteria. Details regarding the commitments contain security-related information and are in the described in the non-public version of the Confirmatory Order.

This agreement is binding upon successors and assigns of ACO. The Regional Administrator, Region II, may, in writing, relax or rescind any of the above conditions upon demonstration by ACO or its successors of good cause.

VI

Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation:

A. This Confirmatory 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 such access. 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 requester 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 Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, 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 addresses for the Office of the Secretary and the Office of the General Counsel are Hearing.Docket@nrc.gov and OGCmailcenter@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 requester'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 requester has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requester 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 Order² 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 the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted 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 SUNSI

contentions by that later deadline. This provision does not extend the time for filing a request for a hearing and petition to intervene, which must comply with the requirements of 10 CFR 2.309.

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 need for access, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

2. The requester 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) officer if that officer has been designated to rule on information access issues.

H. Review of Grants of Access. A party other than the requester 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 with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

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

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. Attachment 2 to this Order summarizes the general target schedule for

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.

³ Requestors should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) 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.

processing and resolving requests under these procedures.

VII

In accordance with 10 CFR 2.202 and 10 CFR 2.309, any person adversely affected by this Confirmatory Order, other than ACO, may request a hearing within thirty (30) calendar days of the date of issuance of this Confirmatory Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene (hereinafter "petition"), and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, 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. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. 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, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the "Guidance for Electronic Submissions to the NRC" (ADAMS Accession No. ML13031A056) and on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>.

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 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>. After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on 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. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email 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 to 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., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have 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 in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at <https://adams.nrc.gov/ehd>, unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, 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. 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 should not include copyrighted materials in their submission.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

If a person (other than ACO) requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Confirmatory Order and shall address the criteria set forth in 10 CFR. 2.309(d) and (f).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be

whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 30 days from the date of this Confirmatory Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received.

For the Nuclear Regulatory Commission.

Laura A. Dudes,
Regional Administrator, NRC Region II.
Dated this 21st day of September 2023.

Attachments: As stated

All Facilities Owned and Operated by American Centrifuge Operating, LLC

- (1) American Centrifuge Operating, LLC
Larry Cutlip, President, 400
Centrifuge Way, Oak Ridge, TN
37830
(2) American Centrifuge Operating,
LLC—Piketon (ACO-Piketon)
Docket No.: 07007004
License No.: SNM-2011
Mathew Snider, Enrichment

Operations Plant Manager/
Operations Manager, 3930 U.S.
Route 23 South, P.O. Box 628, Mail
Stop 7560, Piketon, Ohio 45661
(3) American Centrifuge Operating,
LLC—Oak Ridge (ACO-OR)
Docket No.: 07007004
License No.: SNM-2011
Mark McClure, Site Director, 400
Centrifuge Way, Oak Ridge, TN
37830

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 requester of the status 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/requester 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.

Day	Event/activity
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 hearing or opportunity for hearing), 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/Intervener reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2023-21079 Filed 9-26-23; 8:45 am]

BILLING CODE 7590-01-P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023-278 and CP2023-281]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the

Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 29, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by

telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202-789-6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the

Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2023–278 and CP2023–281; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 63 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 21, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* September 29, 2023.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,

Alternate Certifying Officer.

[FR Doc. 2023–21118 Filed 9–26–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–178; CP2020–246; MC2023–276 and CP2023–279; MC2023–277 and CP2023–280]

New Postal Products

AGENCY: Postal Regulatory Commission.
ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 28, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505

(Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* Docket No(s): CP2020–178; *Filing Title:* Notice of the United States Postal Service of Filing Modification Three to Global Reseller Expedited Package 2 Negotiated Service Agreement; *Filing Acceptance Date:* September 20, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 28, 2023.

2. *Docket No(s):* CP2020–246; *Filing Title:* Notice of the United States Postal Service of Filing Modification Three to Priority Mail Express International, Priority Mail International, First-Class Package International Service & Commercial ePacket Contract 8 Negotiated Service Agreement; *Filing Acceptance Date:* September 20, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 28, 2023.

3. *Docket No(s):* MC2023–276 and CP2023–279; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 61 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:*

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Christopher C. Mohr; *Comments Due:* September 28, 2023.

4. *Docket No(s):* MC2023–277 and CP2023–280; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 62 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* September 28, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,
Secretary.

[FR Doc. 2023–20939 Filed 9–26–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 27, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 21, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 63 to Competitive Product List*. Documents are available at www.prc.gov, Docket Nos. MC2023–278, CP2023–281.

Sean Robinson,
Attorney, Corporate and Postal Business Law.
[FR Doc. 2023–20942 Filed 9–26–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98467; File No. SR–CboeBZX–2023–070]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the ARK 21Shares Ethereum ETF Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

September 21, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² notice is hereby given that on September 6, 2023, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to list and trade shares of the ARK 21Shares Ethereum ETF (the “Trust”),³ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of

the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of the ARK 21Shares Ethereum Trust⁴ under BZX Rule 14.11(e)(4),⁵ which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.⁶

According to the Registration Statement, the Trust is neither an investment company registered under the Investment Company Act of 1940, as amended,⁷ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

ARK 21Shares Ethereum Trust

21Shares US LLC is the sponsor of the Trust (the “Sponsor”). The Bank of New York Mellon will be the administrator (“Administrator”) and transfer agent (“Transfer Agent”). Foreside Global Services, LLC will be the marketing agent (“Marketing Agent”) in connection with the creation and redemption of “Baskets” of Shares. ARK Investment Management LLC (“ARK”) will provide assistance in the marketing of the Shares and serve as a sub-adviser. Coinbase Custody Trust Company, LLC, a third-party regulated custodian (the “Custodian”), will be responsible for custody of the Trust's ether.

According to the Registration Statement, each Share will represent a fractional undivided beneficial interest in the ether held by the Trust. The Trust's assets will consist of ether held by the Custodian on behalf of the Trust. The Trust generally does not intend to

⁴ On September 6, 2023 the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁵ The Commission approved BZX Rule 14.11(e)(4) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

⁶ All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

⁷ 15 U.S.C. 80a–1.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ The Trust was formed as a Delaware statutory trust on September 5, 2023 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.

The Trust will be neither an investment company registered under the Investment Company Act of 1940, as amended,⁸ nor a commodity pool for purposes of the Commodity Exchange Act (“CEA”), and neither the Trust nor the Sponsor is subject to regulation as a commodity pool operator or a commodity trading adviser in connection with the Shares.

When the Trust sells or redeems its Shares, it will do so in “in-kind” transactions in blocks of 5,000 Shares (a “Creation Basket”) at the Trust’s NAV. Authorized participants will deliver, or facilitate the delivery of, ether to the Trust’s account with the Custodian in exchange for Shares when they purchase Shares, and the Trust, through the Custodian, will deliver ether to such authorized participants when they redeem Shares with the Trust. Authorized participants may then offer Shares to the public at prices that depend on various factors, including the supply and demand for Shares, the value of the Trust’s assets, and market conditions at the time of a transaction. Shareholders who buy or sell Shares during the day from their broker may do so at a premium or discount relative to the NAV of the Shares of the Trust.

As noted above, the Trust is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ether, on centralized platforms. Specifically, the Trust is designed to protect investors as follows:

(i) Assets of the Trust Protected From Insolvency

The Trust’s ether will be held by its Custodian,⁹ which is a New York chartered trust company overseen by the NYDFS and a qualified custodian under Rule 206–4 of the Investment Adviser Act. The Custodian will custody the Trust’s ether pursuant to a custody agreement, which requires the Custodian to maintain the Trust’s ether in segregated accounts that clearly identify the Trust as owner of the accounts and assets held on those accounts; the segregation will be both from the proprietary property of the Custodian and the assets of any other customer. Such an arrangement is generally deemed to be “bankruptcy remote,” that is, in the event of an

insolvency of the Custodian, assets held in such segregated accounts would not become property of the Custodian’s estate and would not be available to satisfy claims of creditors of the Custodian. In addition, according to the Registration Statement, the Custodian carries fidelity insurance, which covers assets held by the Custodian in custody from risks such as theft of funds. These arrangements provide significant protections to investors and could have mitigated the type of losses incurred by investors in the numerous crypto-related insolvencies, including Celsius, Voyager, BlockFi and FTX.

(ii) Trust’s Transfer Agent Will Instruct Disposition of Trust’s Ether

According to the Registration Statement, except with respect to sale of ether from time to time to cover expenses of the Trust, the only time ether will move into or out from the Trust will be with respect to creations or redemptions of Shares of the Trust. Authorized Participants will deliver ether to the Trust’s account with the Custodian or Subcustodian, as applicable, in exchange for Shares of the Trust, and the Trust, through the Custodian, will deliver ether to Authorized Participants when those Authorized Participants redeem Shares of the Trust. The creation and redemption procedures are administered by the Transfer Agent, the Bank of New York Mellon, an independent third party. In other words, according to the Registration Statement, with very limited exceptions, the Sponsor will not give instructions with respect to the transfer or disposition of the Trust’s ether. Ether owned by the Trust will at all times be held by, and in the control of, the Custodian (or Subcustodian, as applicable), and transfer of such ether to or from the Custodian (or Subcustodian) will occur only in connection with creation and redemptions of Shares. This will provide safeguards against the movement of ether owned by the Trust by or to the Sponsor or affiliates of the Sponsor.

(iii) Trust’s Assets Are Subject to Regular Audit

According to the Registration Statement, audit trails exist for all movement of ether within Custodian-controlled ether wallets and are audited annually for accuracy and completeness by an independent external audit firm. In addition, the Trust will be audited by an independent registered public accounting firm on a regular basis.

(iv) Trust Is Subject to the Exchange’s Obligations of Companies Listed on the Exchange and Applicable Corporate Governance Requirements

The Trust will be subject to the obligations of companies listed on the Exchange set forth in BZX Rule 14.6, which require the listed companies to make public disclosure of material events and any notifications of deficiency by the Exchange, file and distribute period financial reports, engage independent public accountants registered with the Exchange, among other things. Such disclosures serve a key investor protection role. In addition, the Trust will be subject to the corporate governance requirements for companies listed on the Exchange set forth in BZX Rule 14.10.

Background

Ethereum is a decentralized smart contract platform that revolutionized the world of blockchain technology beyond its initial use case of peer-to-peer payments. It introduced the idea of “smart contracts,” self-executing agreements with predefined rules, enabling developers and entrepreneurs worldwide to code and deploy decentralized applications on top of the Ethereum network. Ether (ETH), the native crypto asset of the network, is the fuel that allows Ethereum to operate in the same way that we use oil to propel vehicles, heat buildings, and produce electricity in the physical world. Users must pay a “gas fee” or a transaction tax in ether for every transaction they perform on the network. The term “gas” refers to the unit that measures the computational effort required to execute specific operations on the Ethereum blockchain. Thus, ether is analogous to a digital commodity powering the Ethereum network. For instance, an entire virtual economy has emerged with ether as the unit of account and medium of exchange. This phenomenon is similar to the spontaneous adoption of commodities like coffee and, most notably, precious metals like gold as money by various civilizations throughout history, except this time, in a digital-native realm.

With more than 5,946 monthly active developers as of June 2023, Ethereum is the world’s largest developer ecosystem. Moreover, the platform is explored and experimented with by various private banks and central banks globally. Since its launch in 2015, Ethereum has driven the evolution of the blockchain space with innovations, ranging from decentralized finance (DeFi), non-fungible tokens (NFTs), digital identity solutions, and the tokenizations of off-

⁸ 15 U.S.C. 80a–1.

⁹ According to the Registration Statement, the Trust’s cash will be held at The Bank of New York Mellon pursuant to a cash custody agreement.

chain, or as it's commonly referred to, "real-world" assets. Some of the most important innovations that have come out of DeFi include 'stablecoins,' decentralized exchanges (DEXs), and automated lending protocols. Stablecoins maintain price parity with a target asset, such as the U.S. dollar. Decentralized exchanges (DEXs), such as Uniswap, allow users to trade assets without the need for an intermediary against an "automated market-maker" (AMM), settling trillions of dollars of value since their inception. As a final example, overcollateralized lending protocols like MakerDAO, Aave, or Compound have taken traditional credit risk out of the equation, relying instead on smart contract automation and operators to liquidate loans when the collateralization ratio falls below a predetermined threshold. These and many other DeFi innovations reveal one of the core value propositions of Ethereum—the ability to act as a credibly neutral settlement layer where developers can automate away the need for centralized intermediaries.

Much like bitcoin, access for U.S. retail investors to gain exposure to ether via a transparent and U.S. regulated, U.S. exchange-traded vehicle remains limited. Instead current options include: (i) facing the counter-party risk, legal uncertainty, technical risk, and complexity associated with accessing spot ether; or (ii) over-the-counter ether funds ("OTC Ether Funds") with high management fees and potentially volatile premiums and discounts.¹⁰ Meanwhile, investors in other countries are able to use more traditional exchange listed and traded products (including exchange-traded funds holding physical ETH) to gain exposure

to ether. Similarly, investors across Europe have access to products which trade on regulated exchanges and provide exposure to a broad array of spot crypto assets. U.S. investors, by contrast, are left with fewer and more risky means of getting ether exposure.¹¹

To this point, the lack of an ETP that holds spot ETH (a "Spot Ether ETP") exposes U.S. investor assets to significant risk because investors that would otherwise seek cryptoasset exposure through a Spot Ether ETP are forced to find alternative exposure through fewer and more risky means. For example, investors in OTC Ether Funds are not afforded the benefits and protections of regulated Spot Ether ETPs, resulting in retail investors suffering losses due to drastic movements in the premium/discount of OTC Ether Funds. Many retail investors likely suffered losses due to this premium/discount in OTC Ether Fund trading; all such losses could have been avoided if a Spot Ether ETP had been available. Additionally, many U.S. investors that held their digital assets in accounts at FTX,¹² Celsius Network LLC,¹³ BlockFi Inc.,¹⁴ and Voyager Digital Holdings, Inc.¹⁵ have become unsecured creditors in the insolvencies of those entities. If a Spot Ether ETP was available, it is likely that at least a portion of the billions of dollars tied up in those proceedings would still reside in the brokerage accounts of U.S. investors, having instead been invested in a transparent, regulated, and well-understood structure—a Spot Ether ETP. To this point, approval of a Spot Ether ETP would represent a major win for the protection of U.S. investors in the cryptoasset space. The Trust, like all other series of Commodity-Based Trust Shares, is designed to protect investors against the risk of losses through fraud and insolvency that arise by holding digital assets, including ether, on centralized platforms.

Applicable Standard

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange

has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹⁶ With this in mind, the CME Ether Futures market, which launched in February 2021, is the proper market to consider in determining whether there is a related regulated market of significant size.

The Commission has approved proposals related to the listing and trading of funds that would primarily hold CME Bitcoin Futures that are registered under the Securities Act of 1933 ("Bitcoin Futures ETPs"),¹⁷ finding that the CME Bitcoin Futures market represents a regulated market of significant size. Meanwhile, the Commission has continued to disapprove proposals to list and trade funds that would hold spot bitcoin (these proposed funds are nearly identical to the Trust, but proposed to hold bitcoin instead of ETH) ("Spot Bitcoin ETPs") on the seemingly conflicting basis that the CME Bitcoin Futures market is not a regulated market of significant size. In the recently decided Grayscale Investments, LLC v

¹⁶ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the "Winklevoss Order"). Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission (the "CFTC") regulated futures market. Further to this point, the Commission's prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the approval order issued related to the first spot gold ETP "was based on an assumption that the currency market and the spot gold market were largely unregulated." See Winklevoss Order at 37592. As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission's oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act.

¹⁷ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) and 94853 (May 5, 2022) (collectively, the "Bitcoin Futures Approvals").

¹⁰ The premium and discount for OTC ether Funds is known to move rapidly. For example, over the period of 12/21/20 to 1/21/21, the premium for the largest OTC Ether Fund went from 238.63% to 5.1%. While the price of ether appreciated significantly during this period and NAV per share increased by 101.40%, the price per share decreased by 37.49%. This means that investors are buying shares of a fund that experiences significant volatility in its premium and discount outside of the fluctuations in price of the underlying asset. Even operating within the normal premium and discount range, it's possible for an investor to buy shares of an OTC ether Fund only to have those shares quickly lose 10% or more in dollar value excluding any movement of the price of ether. That is to say—the price of ether could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to ether, the easiest option for a buy and hold strategy for such vehicles is often an OTC ether Fund, meaning that even investors that do not directly buy OTC ether Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

¹¹ The Exchange notes that the list of countries above is not exhaustive and that securities regulators in a number of additional countries have either approved or otherwise allowed the listing and trading of Spot Ether ETPs.

¹² See FTX Trading Ltd., et al., Case No. 22–11068.

¹³ See Celsius Network LLC, et al., Case No. 22–10964.

¹⁴ See BlockFi Inc., Case No. 22–19361.

¹⁵ See Voyager Digital Holdings, Inc., et al., Case No. 22–10943.

Securities and Exchange Commission,¹⁸ however, the court resolved this conflict by finding that the SEC had failed to provide a coherent explanation as to why it had approved the Bitcoin Futures ETPs while disapproving the proposal to list and trade shares of the Grayscale Bitcoin Trust (the “Grayscale Bitcoin Trust Proposal”) and vacating the disapproval order.¹⁹

As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the CME Ether Futures market represents a regulated market of significant size as it relates both to the CME Ether Futures market and to the spot ether market and that this proposal should be approved.

Investment Objective

The investment objective of the Trust will be to seek to track the performance of ether, as measured by the performance of the CME CF Ether-Dollar Reference Rate—New York Variant (the “Index”), adjusted for the Trust’s expenses and other liabilities. In seeking to achieve its investment objective, the Trust will hold ether and will value the Shares daily based on the Index. The Trust will process all creations and redemptions in-kind in transactions with authorized participants. The Trust is not actively managed.

The Index

The Fund will use the Index to calculate the Trust’s NAV. The administrator of the Index is CF Benchmarks Ltd. (the “Index Provider”). The Index currently uses substantially the same methodology as the CME CF Ether Dollar Reference Rate (“ERR”), including utilizing the same six ether exchanges, which is the underlying rate to determine settlement of CME Ether Futures contracts, except that the Index is calculated as of 4:00 p.m. ET, whereas the ERR is calculated as of 4:00 p.m. London time.

The Index, which was introduced on November 14, 2016 is based on materially the same methodology (except calculation time) as the Index Provider’s ERR, which was first introduced on May 14, 2018 and is the rate on which ether futures contracts are cash-settled in U.S. dollars at the CME. The Index is designed based on the IOSCO Principals for Financial Benchmarks. The administrator of the Index is the Index Provider. The Index is calculated daily and aggregates the

notional value of ether trading activity across major ether spot exchanges.

The Sponsor believes that the use of the Index is reflective of a reasonable valuation of the average spot price of ether and that resistance to manipulation is a priority aim of its design methodology. The methodology: (i) takes an observation period and divides it into equal partitions of time; (ii) then calculates the volume-weighted median of all transactions within each partition; and (iii) the value is determined from the arithmetic mean of the volume-weighted medians, equally weighted. By employing the foregoing steps, the Index thereby seeks to ensure that transactions in ether conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level.

In addition, the Sponsor notes that an oversight function is implemented by the Index Provider in seeking to ensure that the Index is administered through codified policies for Index integrity. Index data and the description of the Index are based on information made publicly available by the Index Provider on its website at <https://www.cfbenchmarks.com>. The Trust will determine the value its Shares daily based on the value of ether as reflected by the Index. The Index is calculated daily and aggregates the notional value of ether trading activity across major ether spot exchanges. The Index is designed based on the IOSCO Principals for Financial Benchmarks. The Trust also uses the ether price determined by the Index to calculate its “Ether Holdings,” which is the aggregate U.S. Dollar value of ether in the Trust, based on the ether price determined by the Index, less its liabilities and expenses. “Ether Holdings per Share” is calculated by dividing Ether Holdings by the number of Shares currently outstanding. Ether Holdings and Ether Holdings per Share are not measures calculated in accordance with GAAP. Ether Holdings is not intended to be a substitute for the Trust’s NAV calculated in accordance with GAAP, and Ether Holdings per Share is not intended to be a substitute for the Trust’s NAV per Share calculated in accordance with GAAP.

The Index was created to facilitate financial products based on ether. It serves as a once-a-day benchmark rate of the U.S. dollar price of ether (USD/

ETH), calculated as of 4:00 p.m. ET. The Index, which has been calculated and published since [•], aggregates the trade flow of several ether exchanges, during an observation window between 3:00 p.m. and 4:00 p.m. ET into the U.S. dollar price of one ether at 4:00 p.m. ET. Specifically, the Index is calculated based on the “Relevant Transactions” (as defined below) of all of its constituent ether exchanges, which are currently Coinbase, Bitstamp, Kraken, itBit, LMAX Digital and Gemini (the “Constituent Platforms”), as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.

- The list is partitioned by timestamp into 12 equally-sized time intervals of five minute length.

- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, *i.e.*, across all Constituent Platforms. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.

- The Index is then determined by the equally-weighted average of the volume medians of all partitions.

The Index does not include any futures prices in its methodology. A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. Eastern time on a Constituent Platform in the ETH/USD pair that is reported and disseminated by a Constituent Platform through its publicly available API and observed by the Index Provider. An oversight function is implemented by the Index Provider in seeking to ensure that the Index is administered through the Index Provider’s codified policies for Index integrity.

The Sponsor believes that the use of the Index is reflective of a reasonable valuation of the average spot price of ether and that resistance to manipulation is a priority aim of its design methodology. The methodology: (i) takes an observation period and divides it into equal partitions of time; (ii) then calculates the volume-weighted median of all transactions within each partition; and (iii) the value is determined from the arithmetic mean of the volume-weighted medians, equally weighted. By employing the foregoing steps, the Index thereby seeks to ensure that transactions in ether conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of

¹⁸ Grayscale Investments, LLC v. Securities and Exchange Commission, et al., Case No. 22–1142 (the “Grayscale Order”).

¹⁹ *Id.*

trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level.

Availability of Information

In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ether holdings as well as additional data regarding the Trust. The Trust will provide an Intraday Indicative Value ("IIV") per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's ether holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price²⁰ in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours. Information about the Index, including key elements of how the Index is

calculated, will be publicly available at <https://www.cfbenchmarks.com/>.

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA").

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Index. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the exchanges on which ether are traded. Depth of book information is also available from ether exchanges. The normal trading hours for ether exchanges are 24 hours per day, 365 days per year.

The Ether Custodian

The Custodian carefully considers the design of the physical, operational and cryptographic systems for secure storage of the Trust's private keys in an effort to lower the risk of loss or theft. The Custodian utilizes a variety of security measures to ensure that private keys necessary to transfer digital assets remain uncompromised and that the Trust maintains exclusive ownership of its assets. The operational procedures of the Custodian are reviewed by third-party advisors with specific expertise in physical security. The devices that store the keys will never be connected to the internet or any other public or private distributed network—this is colloquially known as "cold storage." Only specific individuals are authorized to participate in the custody process, and no individual acting alone will be able to access or use any of the private keys. In addition, no combination of the executive officers of the Sponsor or the investment professionals managing the Trust, acting alone or together, will be able to access or use any of the private keys that hold the Trust's ether.

Net Asset Value

NAV means the total assets of the Trust including, but not limited to, all ether and cash, if any, less total liabilities of the Trust, each determined on the basis of generally accepted accounting principles. The Administrator will determine the NAV of the Trust on each day that the Exchange is open for regular trading, as promptly as practical after 4:00 p.m. EST. The NAV of the Trust is the aggregate value of the Trust's assets less

its estimated accrued but unpaid liabilities (which include accrued expenses). In determining the Trust's NAV, the Administrator values the ether held by the Trust based on the price set by the Index as of 4:00 p.m. EST. The Administrator also determines the NAV per Share.

Creation and Redemption of Shares

According to the Registration Statement, on any business day, an authorized participant may place an order to create one or more baskets. Purchase orders must be placed by 4:00 p.m. Eastern Time, or the close of regular trading on the Exchange, whichever is earlier. The day on which an order is received is considered the purchase order date. The total deposit of ether required is an amount of ether that is in the same proportion to the total assets of the Trust, net of accrued expenses and other liabilities, on the date the order to purchase is properly received, as the number of Shares to be created under the purchase order is in proportion to the total number of Shares outstanding on the date the order is received. Each night, the Sponsor will publish the amount of ether that will be required in exchange for each creation order. The Administrator determines the required deposit for a given day by dividing the number of ether held by the Trust as of the opening of business on that business day, adjusted for the amount of ether constituting estimated accrued but unpaid fees and expenses of the Trust as of the opening of business on that business day, by the quotient of the number of Shares outstanding at the opening of business divided by 5,000. The procedures by which an authorized participant can redeem one or more Creation Baskets mirror the procedures for the creation of Creation Baskets.

Commodity-Based Trust Shares—Rule 14.11(e)(4)

The Shares will be subject to BZX Rule 14.11(e)(4), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and that these values and information about the assets of the Trust will be made available to all market participants at the same time. The Exchange notes that, as defined in Rule 14.11(e)(4)(C)(i), the Shares will be: (a) issued by a trust that holds a specified commodity²¹ deposited with

²⁰ As defined in Rule 11.23(a)(3), the term "BZX Official Closing Price" shall mean the price disseminated to the consolidated tape as the market center closing trade.

²¹ For purposes of Rule 14.11(e)(4), the term commodity takes on the definition of the term as provided in the Commodity Exchange Act. The CFTC has stated that: "Certain digital assets,

the trust; (b) issued by such trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder's request by such trust which will deliver to the redeeming holder the quantity of the underlying commodity.

Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Rule 14.11(e)(4)(E)(iv)(a) and that no change will be made to the trustee without prior notice to and approval of the Exchange. The Exchange also notes that, pursuant to Rule 14.11(e)(4)(F), neither the Exchange nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any underlying commodity value, the current value of the underlying commodity required to be deposited to the Trust in connection with issuance of Commodity-Based Trust Shares; resulting from any negligent act or omission by the Exchange, or any agent of the Exchange, or any act, condition or cause beyond the reasonable control of the Exchange, its agent, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in an underlying commodity. Finally, as required in Rule 14.11(e)(4)(G), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange in a manner prescribed by the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker shall trade in an underlying commodity, related

commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by this Rule. In addition to the existing obligations under Exchange rules regarding the production of books and records (see, e.g., Rule 4.2), the registered Market Maker in Commodity-Based Trust Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the underlying physical commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, as may be requested by the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the ether underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(e)(4)(E)(ii), which sets forth circumstances under which trading in the Shares may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BZX will allow trading in the Shares during all trading sessions on the Exchange. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BZX Rule 11.11(a) the minimum price variation for quoting and entry of orders in securities traded on the Exchange is \$0.01 where the price is greater than \$1.00 per share or \$0.0001 where the price is less than \$1.00 per share.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and ether Futures via the Intermarket Surveillance Group ("ISG"), from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.²²

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (i) the procedures for the creation and redemption of Baskets (and that the Shares are not individually redeemable); (ii) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (iii) how information regarding the IIV and the Trust's NAV are disseminated; (iv) the risks involved in trading the Shares outside of Regular Trading Hours²³ when an updated IIV will not be calculated or publicly disseminated; (v) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (vi) trading information.

In addition, the Information Circular will advise members, prior to the

including BTC, ETH, LTC, and at least two fiat-backed stablecoins, tether ("USDT") and the Binance USD ("BUSD"), as well as other virtual currencies as alleged herein, are "commodities," as defined under Section 1a(9) of the [Commodities Exchange] Act, 7 U.S.C. 1a(9). See *Commodity Futures Trading Commission v. Changpeng Zhao, Binance Holdings Limited, Binance Holdings (IE) Limited, Binance (Services) Holdings Limited, and Samuel Lim*, March 27, 2023 at 9.

²² For a list of the current members and affiliate members of ISG, see www.isgportal.com.

²³ Regular Trading Hours is the time between 9:30 a.m. and 4:00 p.m. Eastern Time.

commencement of trading, of the prospectus delivery requirements applicable to the Shares. Members purchasing the Shares for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

CME Ether Futures ²⁴

CME began offering trading in ether futures (“CME Ether Futures”) in February 2021. Each contract represents 50 ether and is based on the CME CF Ether-Dollar Reference Rate.²⁵ The contracts trade and settle like other cash-settled commodity futures contracts. Most measurable metrics related to CME Ether Futures have generally trended up since launch, although some metrics have slowed recently. For example, there were 76,293 CME ETH Futures contracts traded in July 2023 (approximately \$7.3 billion) compared to 70,305 (\$11.1 billion) and 158,409 (\$7.5 billion) contracts traded in July 2021, and July 2022 respectively.²⁶

In addition, according to Sponsor’s research, trading volume for CME Ether Futures amounts to a total volume of \$6,123,830,768.67 for August 2023. This trading volume represents 3,646.26 in open interest for CME Ether Futures, with an average value of \$319,051,613.52. For August 2023, there were a total of 72,223 contracts for CME Ether Futures (equivalent to 3,611,150 ETH).

Sponsor’s analyses further demonstrate that the correlation in pricing between CME Ether Futures and Spot ETH is significantly correlated. Notably, the Sponsor performed a pairwise correlation of Ether daily returns across top centralized spot cryptocurrency exchanges and the CME from March 19, 2021 to September 5, 2023. The Sponsor’s research indicates that daily correlation between the Spot ETH and the CME ETH Futures during this time period was over 99.88%.

Section 6(b)(5) and the Applicable Standards

The Commission has approved numerous series of Trust Issued

Receipts,²⁷ including Commodity-Based Trust Shares,²⁸ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange’s rules are designed to prevent fraudulent and manipulative acts and practices;²⁹ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the

Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place³⁰ with a regulated market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms “significant market” and “market of significant size” include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³¹

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.^{32 33}

²⁷ See Exchange Rule 14.11(f).

²⁸ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

²⁹ Much like bitcoin, the Exchange believes that ether is resistant to price manipulation and that “other means to prevent fraudulent and manipulative acts and practices” exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ether trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ether platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ether prices through continuous trading activity challenging. To the extent that there are ether exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of ether on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ether markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ether price on any single venue would require manipulation of the global ether price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ether exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

³⁰ As previously articulated by the Commission, “The standard requires such surveillance-sharing agreements since ‘they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.’” The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.” The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See *Wilshire Phoenix Disapproval*.

³¹ See *Wilshire Phoenix Disapproval*.

³² See *Winklevoss Order* at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

²⁴ Unless otherwise noted, all data and analysis presented in this section and referenced elsewhere in the filing has been provided by the Sponsor.

²⁵ The CME CF Ether-Dollar Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

²⁶ Source: CME, 7/31/23

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals³⁴ also indicates that this test is satisfied for this proposal. In the Teucrum Approval, the SEC stated:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.³⁵

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Teucrum Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME BTC futures market caused by a person attempting to manipulate the price of CME BTC futures contracts . . . indirectly by trading outside of the CME BTC futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot

markets on the pricing of CME BTC Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated “. . . the Commission in the Teucrum order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one . . .” The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME Ether Futures. This view is also consistent with the Advisor’s research.

Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Index or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the ether spot market, which is led by the ether Futures market. As such, the part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for both Bitcoin Futures ETPs and Spot Bitcoin ETPs.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.³⁶ The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September

1, 2023.³⁷ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the court found in the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, Inc. (“Coinbase”), an operator of a United States-based spot trading platform for ether that represents a substantial portion of US-based and USD denominated ether trading,³⁸ to enter into a surveillance-sharing agreement (“Spot Crypto SSA”) and executed an associated term sheet. Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

The Spot Crypto SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange’s market surveillance program. The Spot Crypto SSA is expected to have the hallmarks of a

³³ According to reports, the Commission is poised to allow the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ether primarily through CME Ether Futures (“ETH Futures ETFs”) as early as October 2023. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ETH. <https://www.bloomberg.com/news/articles/2023-08-17/sec-said-to-be-poised-to-allow-us-debut-of-ether-futures-etfs-eth#xj4y7vzkg>.

³⁴ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrum Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrum Approval, the “Bitcoin Futures Approvals”).

³⁵ See Teucrum Approval at 21679.

³⁶ This logic is reflected by the court in the Grayscale Order at 17–18. Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

³⁷ Source: TokenTerminal.

³⁸ According to a report from The Block, Coinbase represented 45% of USD denominated exchange trading volume in August 2023. <https://www.theblock.co/data/crypto-markets/spot/usd-support-exchange-volume-market-share>.

surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares.³⁹ This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.⁴⁰

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC Ether Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC Ether Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks and costs associated with investing in ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁴¹ in general and Section 6(b)(5) of the Act⁴² in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission has approved numerous series of Trust Issued Receipts,⁴³ including Commodity-Based Trust Shares,⁴⁴ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of Section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;⁴⁵ and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest.

⁴¹ 15 U.S.C. 78f.

⁴² 15 U.S.C. 78f(b)(5).

⁴³ See Exchange Rule 14.11(f).

⁴⁴ Commodity-Based Trust Shares, as described in Exchange Rule 14.11(e)(4), are a type of Trust Issued Receipt.

⁴⁵ Much like bitcoin, the Exchange believes that ether is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of ether trading render it difficult and prohibitively costly to manipulate the price of ETH. The fragmentation across ether platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of ether prices through continuous trading activity challenging. To the extent that there are ether exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of ether on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the ether markets and the presence of arbitrageurs in those markets means that the manipulation of the price of ether price on any single venue would require manipulation of the global ether price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular ether exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

The Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place⁴⁶ with a regulated market of significant size. Both the Exchange and CME are members of ISG. The only remaining issue to be addressed is whether the ether Futures market constitutes a market of significant size, which both the Exchange and the Sponsor believe that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.⁴⁷

⁴⁶ As previously articulated by the Commission, "The standard requires such surveillance-sharing agreements since 'they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'" The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party." The Commission has historically held that joint membership in the ISG constitutes such a surveillance sharing agreement. See Wilshire Phoenix Disapproval.

⁴⁷ See Wilshire Phoenix Disapproval.

³⁹ For additional information regarding ISG and the hallmarks of surveillance-sharing between ISG members, see <https://isgportal.org/overview>.

⁴⁰ The Exchange also notes that it already has in place ISG-like surveillance sharing agreement with Cboe Digital Exchange, LLC and Cboe Clear Digital, LLC.

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying Section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.^{48 49}

(a) Manipulation of the ETP

The significant market test requires that there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct. In light of the similarly high correlation between spot ETH/CME Ether Futures and spot bitcoin/CME Bitcoin Futures, applying the same rationale that the Commission applied to a Bitcoin Futures ETF in the Bitcoin Futures Approvals⁵⁰ also indicates that this test is satisfied for this proposal. In the Teucrium Approval, the SEC stated:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME futures contracts, whether that attempt is made by directly trading on the CME futures market or indirectly by trading outside of the CME futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and

detering fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.⁵¹

The assumptions from this statement are also true for CME Ether Futures. CME Ether Futures pricing is based on pricing from spot ether markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME BTC futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME BTC futures contracts . . . indirectly by trading outside of the CME BTC futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of CME BTC Futures. This same logic would extend to CME Ether Futures markets where CME’s surveillance would be able to capture the effects of trading on the relevant spot markets on the pricing of CME Ether Futures. This was further acknowledged in the Grayscale lawsuit when Judge Rao stated “. . . the Commission in the Teucrium order recognizes that the futures prices are influenced by the spot prices, and the Commission concludes in approving futures ETPs that any fraud on the spot market can be adequately addressed by the fact that the futures market is a regulated one. . . .” The Exchange agrees with the Commission on this point and notes that the pricing mechanism applicable to the Shares is similar to that of the CME Ether Futures. This view is also consistent with the Advisor’s research.

Further, the Trust only allows for in-kind creation and redemption, which, as further described below, reduces the potential for manipulation of the Shares through manipulation of the Index or any of its individual constituents, again emphasizing that a potential manipulator of the Shares would have to manipulate the entirety of the ether spot market, which is led by the ether Futures market. As such, the part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares in the same way that it would be for both Bitcoin Futures ETPs and Spot Bitcoin ETPs.

(b) Predominant Influence on Prices in Spot and Ether Futures

The Exchange and Sponsor also believe that trading in the Shares would

not be the predominant force on prices in the CME Ether Futures market for a number of reasons. First, because the Trust would not hold CME Ether Futures contracts, the only way that it could be the predominant force on prices in that market is through the spot markets that CME Ether Futures contracts use for pricing.⁵² The Sponsor notes that ether total 24-hour spot trading volume has averaged \$9.4 billion over the year ending September 1, 2023.⁵³ The Sponsor expects that the Trust would represent a very small percentage of this daily trading volume in the spot ether market even in its most aggressive projections for the Trust’s assets and, thus, the Trust would not have an impact on the spot market and therefore could not be the predominant force on prices in the CME Ether Futures market. Second, much like the CME Bitcoin Futures market, the CME Ether Futures market has progressed and matured significantly. As the court found in the Grayscale Order, “Because the spot market is deeper and more liquid than the futures market, manipulation should be more difficult, not less.” The Exchange and sponsor agree with this sentiment and believe it applies equally to the spot ether and CME Ether Futures markets.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices

As noted above, the Commission also permits a listing exchange to demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present.

The Exchange is proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares. On June 21, 2023, the Exchange reached an agreement on terms with Coinbase, an operator of a United States-based spot trading platform for ether that represents a substantial portion of US-based and USD denominated ether trading, to enter into a Spot Crypto SSA and executed an associated term sheet.

⁴⁸ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a ‘cannot be manipulated’ standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met.” *Id.* at 37582.

⁴⁹ According to reports, the Commission is poised to allow the launch of ETFs registered under the Investment Company Act of 1940, as amended (the “1940 Act”), that provide exposure to ether primarily through CME Ether Futures (“ETH Futures ETFs”) as early as October 2023. Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on ETH. <https://www.bloomberg.com/news/articles/2023-08-17/sec-said-to-be-poised-to-allow-us-debut-of-ether-futures-etfs-eth#xj4yvzkg>.

⁵⁰ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).

⁵¹ See Teucrium Approval at 21679.

⁵² This logic is reflected by the court in the Grayscale Order at 17–18. Specifically, the court found that “Because Grayscale owns no futures contracts, trading in Grayscale can affect the futures market only through the spot market. . . . But Grayscale holds just 3.4 percent of outstanding bitcoin, and the Commission did not suggest Grayscale can dominate the price of bitcoin.”

⁵³ Source: TokenTerminal.

Based on this agreement on terms, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares.

The Spot Crypto SSA is expected to be a bilateral surveillance-sharing agreement between the Exchange and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot Crypto SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot ether trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot ether trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

(ii) Designed To Protect Investors and the Public Interest

The Exchange believes that the proposal is designed to protect investors and the public interest. Over the past several years, U.S. investor exposure to ether through OTC Ether Funds is greater than \$5 billion. With that growth, so too has grown the quantifiable investor protection issues to U.S. investors through premium/discount volatility and management fees for OTC Ether Funds. The Exchange believes that, as described above, the concerns related to the prevention of fraudulent and manipulative acts and practices have been sufficiently addressed to be consistent with the Act and, to the extent that the Commission disagrees with that assertion, such concerns are now at the very least outweighed by investor protection concerns. As such, the Exchange believes that approving this proposal (and comparable proposals) provides the Commission with the opportunity to allow U.S. investors with access to ether in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing

risks and costs associated with investing in ether Futures ETFs and operating companies that are imperfect proxies for ether exposure; and (iv) providing an alternative to custodial spot ether.

Commodity-Based Trust Shares—Rule 14.11(e)(4)

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 14.11(e)(4). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. The Exchange may obtain information regarding trading in the Shares and listed ether derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

Availability of Information

The Exchange also believes that the proposal promotes market transparency in that a large amount of information is currently available about ether and will be available regarding the Trust and the Shares. In addition to the price transparency of the Index, the Trust will provide information regarding the Trust's ether holdings as well as additional data regarding the Trust. The Trust will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the

value of the Trust's ether holdings during the trading day.

The IIV disseminated during Regular Trading Hours should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Trading Hours by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The website for the Trust, which will be publicly accessible at no charge, will contain the following information: (a) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the BZX Official Closing Price in relation to the NAV as of the time the NAV is calculated and a calculation of the premium or discount of such price against such NAV; (c) data in chart form displaying the frequency distribution of discounts and premiums of the Official Closing Price against the NAV, within appropriate ranges for each of the four previous calendar quarters (or for the life of the Trust, if shorter); (d) the prospectus; and (e) other applicable quantitative information. The Trust will also disseminate the Trust's holdings on a daily basis on the Trust's website. The price of ether will be made available by one or more major market data vendors, updated at least every 15 seconds during Regular Trading Hours.

Information about the Index, including key elements of how the Index is calculated, will be publicly available at

The NAV for the Trust will be calculated by the Administrator once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Quotation and last sale information for ether is widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters, as well as the Index. Information relating to trading, including price and volume information, in ether is available from major market data vendors and from the exchanges on which ether are traded. Depth of book information is also available from ether exchanges. The normal trading hours for ether exchanges are 24 hours per day, 365 days per year.

In sum, the Exchange believes that this proposal is consistent with the requirements of Section 6(b)(5) of the Act, that this filing sufficiently demonstrates that the CME Ether Futures market represents a regulated

market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for ether Futures ETFs and premium/discount volatility and management fees for OTC Ether Funds. As discussed throughout, this growth investor protection concerns need to be re-evaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establish the CME Ether Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Ether Futures market is a significant market as it relates to the CME Ether Futures market, but not a significant market as it relates to the ether spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

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 Exchange 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-070 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CboeBZX-2023-070. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-070 and should be submitted on or before October 18, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98474; File No. SR-CBOE-2023-048]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rules 5.87 and 8.21

September 21, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 14, 2023, Cboe Exchange, Inc. ("Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the "Exchange" or "Cboe Options") proposes to amend Rules 5.87 and 8.21. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for

⁵⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend certain open outcry trading procedures, set forth in the Exchange Rulebook.

Rule 8.21 (Multiple Representation Prohibited) generally prohibits multiple representation in open outcry trading crowds by a Trading Permit Holder ("TPH") for any account in which a TPH has an interest or on behalf of a customer. The rule provides in relevant part that, except in accordance with procedures established by the Exchange or with the Exchange's permission in individual cases, no individual Market-Maker shall enter or be present in a trading crowd while a Floor Broker present in the trading crowd is holding an order on behalf of the Market-Maker's individual account or an order initiated by the Market-Maker for an account in which the Market-Maker has an interest.³ Further, the rule provides that no TPH, for any account in which the TPH has an interest or on behalf of a customer, shall maintain with more than one broker orders for the purchase or sale of the same option contract or other security, or the same combination of option contracts or other securities, with the knowledge that such orders are for the account of the same principal.⁴

Interpretations and Policies .01 and .02 to Rule 8.21 set forth exception procedures that would permit multiple representation for individual Market-Makers in certain circumstances, with Interpretation .01 including exception procedures related to an individual Market-Maker placing orders with a Floor Broker and Interpretation .02 including exception procedures related to the simultaneous representation of Market-Maker joint accounts.

Specifically, Interpretation and Policy .02 to Rule 8.21 sets out various procedures that, if followed, would permit the simultaneous presence in a trading crowd of participants in and orders for the same Market-Maker joint account. These procedures are intended

to ensure that Market-Makers who choose to employ a joint account for their Exchange trading are not disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts.⁵ These exception procedures apply only to individual Market-Makers. Currently, the Exchange has interpreted the term "individual Market-Maker" to mean a person who is registered with the Exchange as an individual TPH and holds a Market-Maker Floor Permit, which entitles the holder to act as a Market-Maker on the floor of the Exchange.⁶ The current exception procedures and requirements are as follows:

- Joint accounts may be simultaneously represented in a trading crowd by participants trading in-person for the joint account. (See Rule 8.21.02(a).)
- Joint account participants who are not trading in-person in a trading crowd may enter orders for the joint account with Floor Brokers even if other participants are trading the same joint account in-person. (See Rule 8.21.02(b).)
- When series are simultaneously opened during rotation, joint account participants trading the joint account in-person may enter orders for the joint account with Floor Brokers in series where they are unable to trade the joint account in-person. (See Rule 8.21.02(c).)
- There is no restriction on the number of joint account participants that may participate on behalf of the joint account on the same trade. (See Rule 8.21.02(d).)
- When joint account participants are trading in-person in a trading crowd for their individual account or as a Floor Broker, another participant of the joint account may trade for the joint account in-person or enter orders for the joint account with Floor Brokers. (See Rule 8.21.02(e).)
- Except as otherwise permitted under this Rule 8.21, TPHs are prohibited from entering orders for their individual or joint accounts while they are trading in-person in a trading crowd even if the orders are for an account they are not then actively trading. (See Rule 8.21.02(f).)
- TPHs must ensure that they do not trade in-person or by orders such that (1) a trade occurs between a joint account participant's individual market-maker account and the joint account of which he or she is a participant, or (2) a trade occurs in which the buyer and seller are representing the same joint account and are on opposite sides of a transaction. It is the responsibility of a joint account participant to ascertain whether joint account orders have been entered in a crowd prior to trading the joint account in-person. (See Rule 8.21.02(g).)
- Joint account participants may not act as a Floor Broker for the joint account of which they are a participant. (See Rule 8.21.02(h).)

⁵ See Securities Exchange Act Release No. 34-61715 (May 16, 2010), 75 FR 13626 (March 22, 2010) (SR-CBOE-2010-028).

⁶ See Cboe Regulatory Circular 23-006, dated July 21, 2023.

• TPHs may alternate trading in-person for their individual account and their joint account while in a trading crowd. (See Rule 8.21.02(i).⁷)

• When completing a trade ticket for Market-Maker joint account transactions, it must contain such information as may be required by the Exchange under Rule 6.1(e).

All procedures and requirements contained in Interpretation and Policy .02 must be satisfied, and each individual Market-Maker must also separately satisfy the procedures and requirements of Interpretation and Policy .01. These joint account requirements also remain subject to other applicable open outcry trading procedures, such as open outcry priority and facilitation/solicitation requirements, including Rule 5.86 (Facilitated and Solicited Transactions) and Rule 5.87 (Crossing Orders), as applicable.

Since the enactment of these rules, changes have occurred in the trading environment. First, the Exchange migrated from a floor-based market, where individuals traded in-person as a Floor Broker or a Market-Maker, to a hybrid environment, whereby individuals can trade in-person on the floor, or remotely. Further, the capacity in which individual Market-Makers trade has shifted. Historically, Trading Permits were most commonly held by individuals. While current Exchange rules still allow for an individual to be an individual Trading Permit Holder, it has become far more common for a Trading Permit Holder organization to become a Trading Permit Holder, purchase Trading Permits, and, under Rule 3.9(b), designate individual nominees to represent the organization with respect to each Floor Broker Trading Permit or Market-Maker Floor Trading Permit or, under Rule 3.9(a), designate at least one individual as the Responsible Person for that TPH organization, with respect to the TPH organization's electronic Trading Permit(s). Thus, it is common practice that a TPH organization has, at any given time, designated numerous individuals to be nominees and perform trading functions on behalf of the TPH organization, either on the floor or electronically, with respect to any Trading Permit which the organization holds. As a result, instead of participating in joint accounts, Market-Makers often trade for the accounts of those TPH organizations.

Under the current exception procedures in Interpretation and Policy

⁷ Current Rule 8.21.02(j) erroneously refers to Rule 6.1(d); as part of the proposed rule change, the Exchange proposes to update the rule to refer to Rule 6.1(e).

³ See Rule 8.21(b).

⁴ See Rule 8.21(a).

.02, because an individual Market-Maker only contemplates an individual with a Market-Maker Floor Permit, an individual Market-Maker trading in-person on the trading floor may participate on the same trade as a Floor Broker who holds a solicited order from the same TPH organization only if initiated by someone who also meets the definition of an individual Market-Maker (*i.e.*, an individual with a Market-Maker Floor Permit). As noted above, Market-Makers are currently nominees of TPH organizations as opposed to individual TPHs and trade for the accounts of their TPH organizations as opposed to joint accounts. Therefore, few Market-Makers may take advantage of the current exception procedures intended to not disadvantage Market-Makers from participating in trades versus those Market-Makers that choose to employ individual accounts, because many individuals trading off the floor (who may solicited) likely no longer have floor permits. Currently, there are no exceptions to the multiple representation prohibition for TPH organizations' associated persons who are not registered as individual Market-Makers (and thus do not have a Market-Maker Floor Trading Permit) and place solicited orders on behalf of their associated TPH organizations with Floor Brokers. Therefore, an individual Market-Maker trading in-person on the trading floor currently may not participate on the same trade as a Floor Broker who holds a solicited order initiated by an associated person of the same TPH organization (that is not also an individual Market-Maker) as the individual Market-Maker.

The Exchange now proposes changes to Rules 8.21 and 5.87.

First, the Exchange proposes to amend Rule 8.21(b) to the definition of "individual Market-Maker" and update this definition in the Rules. The Exchange proposes to add a parenthetical to the rule to define explicitly an individual Market-Maker as an individual nominee⁸ of a TPH organization or an individual Trading Permit Holder, either of which holds a Market-Maker Floor Trading Permit.⁹

⁸ The term "nominee" means an individual who is authorized by a TPH organization, in accordance with Rule 3.9, to represent such TPH organization in all matters relating to the Exchange with respect to a Floor Broker or Market-Maker Floor Trading Permit. See Rule 1.1 (definition of "nominee"). Pursuant to Rule 3.9, each TPH organization must designate an individual nominee to represent the organization with respect to each Market-Maker Floor Trading Permit in all matters relating to the Exchange.

⁹ The Exchange currently maintains five types of Trading Permits: a Market-Maker Electronic Access Permit, an Electronic Access Permit, a Clearing TPH

This change merely updates this definition to reflect current rule terminology and industry changes, pursuant to which most (if not all) individual Market-Makers are part of larger TPH organizations.

Similarly, the Exchange proposes to amend Rule 8.21, Interpretation and Policy .02 to clarify the applicability of the exception procedures. As noted above, Rule 8.21.02 provides exception procedures related to the simultaneous representation of Market-Maker joint accounts. The Exchange proposes to delete reference to "participants" from the introduction in Interpretation .02, as well as Interpretation .02(a), (b), (c), and (d), and proposes to instead refer to an "individual Market-Maker." Likewise, the Exchange proposes to delete references to "joint account participants" from Interpretation .02(b), (e), and (h), and proposes to instead refer to an "individual Market-Maker." Finally, the Exchange proposes to delete "Trading Permit Holders" from Interpretation Rule .02(i) and (f) and replace with "Individual Market-Makers."¹⁰ The Exchange notes that the application of the rule is not changing per these proposed replacements, but rather the Exchange seeks to simplify the multiple representation rule using clearer and more unified terminology. These terminology changes are consistent with who may participate in joint accounts (and thus who may take advantage of the exception procedures in this rule).

The Exchange also proposes to add a new Interpretation .03 to Rule 8.21 to provide an additional exception to the prohibition on multiple representation to incorporate the market changes described above to, similar to the exception in Interpretation and Policy .02, ensure that Market-Makers on the floor who choose to be part of a larger TPH organization and trade for the account of that TPH organization (similar to the concept of trading for a joint account) are not disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts. Under the current exception, as noted above, while a Floor Broker may represent an order initiated by a nominee of a TPH organization who is not an individual Market-Maker (and thus has a Trading Permit other than a Market-Maker Floor Permit), the in-crowd Market-Makers from the same TPH organization are unable to

Permit, a Market-Maker Floor Trading Permit and a Floor Broker Trading Permit.

¹⁰ There are no changes to Rule 8.21(g) as part of the proposed rule change, as the provision, and responsibilities described therein, continue to apply to Trading Permit Holders.

participate on the trade.¹¹ The Exchange proposes to add Interpretation .03 to provide that, subject to the requirements of Rule 5.87(f), as applicable, an individual Market-Maker trading in-person in a trading crowd and not through orders placed with a Floor Broker may participate on the same trade as a Floor Broker who holds a solicited order on behalf of the same TPH Organization, provided the individual Market-Maker did not initiate the solicited order. As individual Market-Makers are generally part of larger TPH organizations and trade for the accounts of those organizations, which have multiple individuals functioning as Market-Makers on the trading floor (*i.e.*, with Market-Maker Floor Permits) or through electronic trading from off the trading floor (*i.e.*, with Electronic Access Permits), the Exchange believes this proposed exception is appropriate to reflect current organizational structures within the industry. This proposed exception aligns in purpose with the current exception in Interpretation and Policy .02 and will further ensure that Market-Makers trading on the Exchange's floor are not prevented from participating in trades that include solicited interest merely because the solicited party happens to be trading for the same account (TPH organization account instead of joint account).

The proposed Rule 8.21.03 also provides that the last sentence of Interpretation .02(g) to this Rule 8.21, which states that it is the responsibility of a joint account participant to ascertain whether joint account orders have been entered in a crowd prior to trading the joint account in-person, does not apply to this new Interpretation .03.¹² Under the proposed changes, as further detailed below, there would be no obligation on behalf of the individual Market-Maker to ascertain whether someone from his or her firm initiated the solicited order or had knowledge of the solicited order, prior to trading in-person in a trading crowd.¹³

¹¹ As noted above, the current exception procedures would permit in-crowd Market-Makers to participate on a trade only if the Floor Broker was representing an order initiated by another individual Market-Maker from the same TPH organization.

¹² For the avoidance of doubt, all other procedures and requirements contained in Interpretation and Policy .02, including all provisions in Interpretation .02(g) except the last sentence, must be satisfied and each individual Market-Maker must also separately satisfy the procedures and requirements of Interpretation and Policy .01.

¹³ If a TPH organization were to enter an order with a Floor Broker, in addition to the solicited order, then the TPH organization (not the Floor

The Exchange proposes to amend Rule 5.87(f), which contains procedures and requirements related to open outcry crossing entitlement for solicitations and facilitations.¹⁴ Under current rules, in the event a Floor Broker represents an order that is of the eligible order size or greater (“original order”) and is also holding a facilitation order or a solicited order, the Floor Broker may proceed under the provisions of Rule 5.87(f) to obtain a crossing participation entitlement.¹⁵ The crossing participation entitlement permits the Floor Broker to transact either 20% or 40% (currently 40% for all classes), of the remainder of the original order against the facilitation or solicited order. Further, if an On-Floor DPM or On-Floor LMM is granted participation rights under Rule 5.85, Rule 5.87(f)(5) provides that the On-Floor DPM or On-Floor LMM participation entitlement is applied if the trade occurs at the On-Floor DPM’s/LMM’s principal bid or offer, provided that the On-Floor DPM/LMM participation entitlement will be limited to a percentage of contracts that, when combined with the percentage the originating firm crossed, may not exceed 40% of the original order size. After the applicable public customer orders and participation entitlements have been satisfied, Rule 5.87(f)(6) provides that the remaining balance of the order will be allocated among the In-Crowd Market Participants (“ICMPs”) ¹⁶ who established the market.¹⁷ Rule 5.87(f)(6)(B) further provides that priority to trade the remaining portion of the order shall be afforded to bids (offers) made by ICMPs in the sequence in which they are made. If bids (offers) were made at the same time, or in the event that the sequence cannot be reasonably determined, priority shall be apportioned equally among the ICMPs who established the market.

In light of the proposed changes to Rule 8.21, the Exchange proposes to

update Rule 5.87(f) to modify the priority of members in the trading crowd after the crossing participation entitlement and other applicable participation entitlements have been satisfied. Specifically, the Exchange proposes to update Rule 5.87(f)(6) ¹⁸ to state that priority to trade the remaining portion of the order shall be apportioned equally among ICMPs who established the market, as is the case currently if bid (offers) were made at the same time, or in the event that the sequence cannot be reasonably determined. As under the current rule, in the event an ICMP declines to accept any portion of the available contracts, any remaining contracts shall be apportioned equally among the other ICMPs who established the market until all contracts have been apportioned. The Exchange also proposes to amend Rule 5.87(f)(7). Current Rule 5.87(f)(7) states nothing in that paragraph is intended to prohibit a Floor Broker, an On-Floor DPM, or an On-Floor LMM from trading more than his or her percentage entitlement if the other ICMPs do not choose to trade the remaining portion of the order. The Exchange proposes to add that it is also not intended to prohibit these parties from trading more than his or her percentage entitlement if such trades are permissible under the proposed Interpretation .03 of Rule 8.21. This is consistent with the proposed rule change above, which would make it possible for the TPH organization of which the applicable party is a part to, as a whole, trade more than 40% participation entitlement).

Finally, the Exchange proposes to amend Interpretation .06 to Rule 5.87, which currently provides that Rule 5.87(f) supersedes the priority provision of Rule 5.86(d) in those situations where the Floor Broker representing an eligible order determines to take advantage of the crossing provisions of paragraph (f) of this Rule. The Exchange proposes adding language regarding an order being represented by the Floor Broker using the crossing provision, to clarify that paragraph (f) of Rule 5.87 provides the solicited person or order being represented by the Floor Broker using the crossing provision with priority over all other parties (other than certain Public Customer orders) for either 20% or 40% of the contracts remaining in the order, as determined by the Exchange, after those certain Public Customer orders have been satisfied. This is

merely a clarifying change and has no impact on what orders may be eligible for the entitlement pursuant to Rule 5.87(f).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹⁹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) ²⁰ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) ²¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to add an exception to the multiple representation prohibition will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. The purpose of this proposed change, similar to the purpose of the current exception to the multiple representation prohibition in Rule 8.21, Interpretation and Policy .02, is to ensure that an individual Market-Maker trading in-person on behalf of the TPH organization is not disadvantaged in participating in a solicited trade solely because the trade was initiated off the floor by an individual trading for the same account. This proposed exception expands the current exception to permit Market-Makers to participate in trades if they are for TPH organization accounts (as is current common practice) instead of joint accounts and if the solicited party is from his or her same TPH organization, regardless of the type of trading permit the solicited party is using (as opposed to the current exception that permits this only if the

Broker) would be in violation of the multiple representation rule.

¹⁴ As part of this proposed rule change, the Exchange proposes to make a non-substantive change to correct the cross-reference in Rule 5.87(f)(4), to refer to paragraph (f) of the Rule rather than paragraph (d).

¹⁵ Pursuant to Rule 5.87(f)(2), the Floor Broker crossing entitlement takes effect after all public customer orders that were on the limit order book and then represented in the trading crowd at the time the market was established have been satisfied.

¹⁶ See Rule 1.1 for definition of In-Crowd Market Participant.

¹⁷ Rule 5.87(f)(6) currently provides in relevant part that the “the ICMPs who established the market will have priority over all other orders that were not represented in the trading crowd at the time the market was established (but not over Priority Customer orders on the Book) and will maintain priority over such orders except for orders that improve upon the market.”

¹⁸ The proposed rule change deletes Rule 5.87(f)(6)(A) and (B), as they are no longer applicable, and moves language from current 5.87(f)(6)(C) to be included in 5.87(f)(6).

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

²¹ *Id.*

solicited party has a Market-Maker Floor Trading Permit, which is uncommon in current practice).

Specifically, under the current rules, an individual Market-Maker trading in-person on the trading floor may participate on the same trade as a Floor Broker who holds a solicited order from the same TPH organization, but only if initiated by another individual Market-Maker. However, currently, there are no exceptions to the multiple representation prohibition for TPH organizations' associated persons who are not registered as individual Market-Makers (and thus do not have a Market-Maker Floor Trading Permit) and place solicited orders for joint accounts with Floor Brokers. Therefore, an individual Market-Maker trading in-person on the trading floor currently may not participate on the same trade as a Floor Broker who holds a solicited order initiated by an associated person of the same TPH organization as the individual Market-Maker.

As discussed above, since the enactment of these rules, changes have occurred in the trading environment. As a result of those changes, it is common practice that a TPH organization has, at any given time, designated numerous individuals to perform trading functions on behalf of the TPH organization, either on the floor or electronically, with respect to any Trading Permit which the organization holds. As a result, instead of participating in joint accounts, Market-Makers trade for the accounts of those TPH organizations.

The proposed rule changes incorporate these advancements in the modern trading environment into the current exceptions to Rule 8.21 by expanding on the current exception procedures in current Interpretation and Policy .02 to permit an individual Market-Maker trading in-person may participate on a solicited trade that is initiated by an individual from the same TPH organization, regardless of whether the individual initiating the solicited trade is an individual Market-Maker. The proposed exception essentially permits Market-Makers trading in person on the floor on behalf of a TPH organization (as opposed to for a joint account) to participate on a trade if solicited interest was initiated by another Market-Maker from that TPH organization (for the same account). Like the current exception in Interpretation and Policy .02, the purpose of this exception is to ensure that Market-Makers on the floor who choose to be part of a larger TPH organization and trade for an account of that TPH organization (similar to the concept of a joint account) are not

disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts. It is common practice for off-floor liquidity providers, including Market-Makers with Electronic Access Permits, to be solicited to provide liquidity to trade against customer orders that are ultimately crossed on the Exchange's trading floor. Therefore, given the changes to the market as described above, the Exchange believes the proposed rule change further removes impediments to and perfects the mechanism of a free and open market and a national market system, as the proposed changes ensure that an individual Market-Maker that trading in-person that chooses to be part of a larger TPH organization and trade for an account of that TPH organization (similar to the concept of a joint account) is not disadvantaged in participating in a solicited trade versus a Market-Maker that chooses to employ an individual account.

The Exchange further believes the proposed rule change will not permit unfair discrimination between customers, issuers, brokers, or dealers, because it will eliminate a disparity that exists under current Rules. As noted above, because it is common for Market-Makers to trade on behalf of TPH organizations as opposed to trade as individual TPHs, and thus trade for TPH organization accounts as opposed to for joint accounts, there are few Market-Makers on the trading floor that can take advantage of the current exception to the multiple representation prohibition in current Rule 8.21, Interpretation and Policy .02. The Exchange believes this may disadvantage Market-Makers from participating in trades versus those that choose to employ individual accounts, because Market-Makers trading on behalf of TPH organizations (as most do) are not permitted to take advantage of the current exception if the solicited interested was initiated off the floor by an individual who does not hold a Market-Maker Floor Trading Permit, but rather another eligible trading permit offered by the Exchange (for example, acting as a Market-Maker with an Electronic Access Permit), thus removing a potential disparity that exists under current Rules. Therefore, these Market-Makers are losing trading opportunities because of the type of permit held by the solicited party.

Additionally, the Exchange believes the proposed rule change is consistent with the requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as the Exchange believes the proposed

rule change may reduce any inadvertent unfair discrimination to which current individual Market-Makers are subject. As discussed above, the Exchange believes many individual Market-Makers on the trading floor that trade for the account of the TPH organizations on behalf of which they trade may be at a disadvantage compared to individual Market-Makers that trade for an individual account. This is due to the fact that currently Market-Makers act as nominees of TPH organizations, trading for the accounts of those TPH organizations, and trade upstairs with EAPs rather than Market-Maker Floor Permits, as opposed to being and individual TPH as was the case historically. Under the proposed rule change, a Market-Maker acting as nominee of a TPH organization would have the opportunity to participate in trades for which members of their TPH organizations provide solicited liquidity, regardless of the type of trading permit those members have. Currently, individual Market-Makers have this opportunity only if that other member of the same TPH organization happens to have a Market-Maker Floor Trading Permit. As proposed, no ICMP would be prohibited from participating on a trade solely because he or she is from the same TPH organization as the individual that initiated the solicited order. The Exchange believes that the changes will create an opportunity for increased participation on such open outcry trades, which could potentially lead to increased execution opportunities. The Exchange believes that this in turn may lead to greater competition and price improvement for orders, thus creating a more robust open outcry market, which may ultimately benefit investors who choose to send orders to the Exchange.

Further, the Exchange believes the proposed rule changes promote just and equitable principles of trade, as the amended rule preserves the intended prohibitions around multiple representation,²² while ensuring that Market-Makers who are employed by TPH organizations represented by multiple individuals (as is generally the case in today's trading environment) trading on and off the floor under a variety of eligible trading permits are not unfairly disadvantaged from participating in trades. As noted above, there is a current exception to the multiple representation prohibition that permits a Market-Maker on the trading floor to participate on a trade for which

²² Rule 8.21 is designed to ensure that a Market-Maker present in the trading crowd is not disproportionately represented.

another Market-Maker with a Market-Maker Floor Trading Permit from the same TPH organization was solicited. The proposed exception essentially just expands this exception to permit Market-Makers on the trading floor to participate in trades for which any other individual trading on behalf of the same TPH organization provided liquidity in the form of a solicited order, regardless of the type of permit such individual holds. Like the current exceptions, the proposed Rule 8.21, Interpretation .03 requires an individual Market-Maker participating on a trade for which the solicited order was initiated by another individual from the same TPH organization to be trading in-person in a trading crowd and not through orders placed with a Floor Broker. Additionally, the proposed exception would not apply if the individual Market-Maker trading in-person initiated the solicited order. Finally, all requirements set forth in Rule 8.21 and its Interpretations and Policies, with the exception of the last sentence of Interpretation .02(g) (as discussed below), continue to apply with respect to multiple representation prohibitions and solicited orders. Thus, the proposed changes continue to preserve the intent of the multiple representation rule to ensure that a Market-Maker present in the trading crowd is not disproportionately represented, and just expands exceptions under the current rule to permit Market-Makers on the trading floor to participate in trades for which any other individual trading on behalf of the same TPH organization provided liquidity in the form of a solicited order, regardless of the type of permit such individual holds.

Similarly, the Exchange believes the proposed changes to exclude the last sentence of Rule 8.21.02(g) from the proposed exception and to Rule 5.87(f) to revise the priority afforded to in-crowd participants with respect to facilitated and solicited orders in open outcry trading, after the crossing participation entitlement and other applicable participation entitlements have been satisfied, are consistent with the Act and promote just and equitable principles of trade. In today's hybrid trading environment, it may be difficult and unduly onerous for individuals on the trading floor to ascertain (at all or in a timely manner) which TPH organization has been solicited on an initiating trade, and thus, difficult, under current rules, to determine which ICMP(s) would have priority. Further, the Exchange believes the current rules may discourage a TPH organization from submitting solicited orders to trade

against customer orders in open outcry, as the TPH that submitted a solicited order may ultimately end up trading against a lesser portion of the initiating order if there are a small number of ICMPs who want to trade against the order, as such ICMPs would have priority over any ICMP from the same TPH organization that submitted the solicited order. This may reduce execution opportunities or competition for customer orders. Under the proposed changes, priority to trade the remaining portion of the solicited order shall be apportioned equally among ICMPs who established the market; this would include ICMPs from all TPH organizations, including the one on behalf of which the solicited order was submitted. The Exchange notes that the proposed changes align with current floor behavior, since, as stated above, in today's trading environment it is difficult to reasonably determine which ICMP(s) have priority. The Exchange further notes that priority is not always time determinative (*e.g.*, *pro rata*),²³ and believes the proposed rules will streamline the open outcry execution process for crossing transactions, while continuing to provide such solicited orders with meaningful execution and price improvement opportunities.

Further, under the proposed rules, an individual Market-Maker would not be required to ascertain whether the solicited order was initiated on behalf of the same TPH organization, nor would the TPH organization firm be required to inform their Market-Makers trading in person if a solicited order had been initiated. The Exchange believes the proposed changes will reduce unnecessary complexity and confusion in its open outcry procedures, and simplify handling of solicited orders on the Exchange's trading floor, to the benefit and protection of investors.

Finally, the Exchange believes the proposed changes to clarify certain Rules will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, will protect investors and the public interest. Specifically, by amending Rule 8.21(b) and Interpretation and Policies .02 to clarify the definition of "individual Market-Maker" and the applicability of the current exception procedures, the proposed rule change may mitigate any potential confusion for TPHs. Further, the Exchange believes the proposed change to Interpretation .06 to Rule 5.87 to add language to clarify that paragraph (f) of Rule 5.87 provides the solicited person or order being represented by the

Floor Broker using the crossing provision with priority over all other parties (other than certain Public Customer orders) for either 20% or 40% of the contracts remaining in the order, as determined by the Exchange, after those certain Public Customer orders have been satisfied may mitigate any potential confusion as a result of the proposed rule changes, which protects investors and perfects the mechanism of a free and open market. Such changes are not unfairly discriminatory as they are not instituting a new policy, but rather providing clarification as to a current rule, which provides for participation entitlement consistent with other exchanges.²⁴

Additionally, the Exchange believes the proposed change to Rule 5.87(f) to state that nothing in the rule paragraph is intended to prohibit an Floor Broker, an On-Floor DPM, or an On-Floor LMM from trading more than his or her percentage entitlement if such trades are permissible under proposed Interpretation .03 of Rule 8.21 (as under proposed rule a TPH organization as a whole may trade more than 40% participation entitlement) provides further transparency into the potential allocations as related to solicited orders, which protects investors and perfects the mechanism of a free and open market by eliminating any potential confusion as a result of the proposed rule changes.

The Exchange also believes the proposed changes to clarify certain Rules is consistent with Section 6(b)(1) of the Act,²⁵ which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange. As noted above, the Exchange believes the proposed changes to Rule 8.21(b) and Interpretation and Policies .02 to clarify the definition of "individual Market-Maker" and the applicability of the current exception procedures, as well as the proposed change to Interpretation .06 to Rule 5.87, may mitigate any potential confusion for TPHs and thus facilitate compliance with Exchange rules. Similarly, the proposed change to Rule 5.87(f) provides further transparency into the potential allocations as related to solicited orders. The Exchange believes these changes and transparency

²⁴ See, *e.g.*, NYSE American Rule 934.1NY (Facilitation Cross Transactions).

²⁵ 15 U.S.C. 78f(b)(1).

²³ See, *e.g.*, Rule 5.32(a)(1)(B).

will protect investors and assist TPHs in complying with Exchange rules, as they provide more clarity and reduce complexity within the rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it will apply in the same manner to all TPH organizations. The proposed exception to the multiple representation prohibition is similar to exceptions currently in place today. The Exchange believes the proposed rule change will put all individual Market-Makers on equal footing with respect to the ability to participate on crossing transactions. As discussed, above, the Exchange believes the proposed exception removes a potential disparity under current Rules that may disadvantage an individual Market-Maker trading in-person from participating in trades solely because the trade was initiated off the floor by an individual from his or her same TPH organization who holds a permit other than a Market-Maker Floor Trading Permit. Further, the proposed changes to the priority afforded to ICMPs with respect to facilitated and solicited orders in open outcry trading, after the crossing participation entitlement and other applicable participation entitlements have been satisfied, will apply equally to all ICMPs.

The Exchange does not believe that the proposed change will impose an unnecessary or inappropriate burden on intermarket competition because it only applies to the execution of orders on the Exchange's trading floor. As discussed above, the proposed rule change is intended to modernize and streamline the Exchange's open outcry procedures regarding crossing transactions, which changes the Exchange believes may lead to greater competition and price improvement for orders, thus creating a more robust open outcry market.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather add transparency to the Rules and eliminate potential confusion of investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁶ and Rule 19b-4(f)(6) thereunder.²⁷

A proposed rule change filed under Rule 19b-4(f)(6)²⁸ normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)²⁹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange may implement the proposed change as soon as possible. The Exchange states that waiver of the operative delay will protect investors by ensuring that an individual Market-Maker trading in-person is not disadvantaged in participating in a solicited trade solely because the trade was initiated off the floor by an individual from his or her same TPH organization who does not hold a Market-Maker Floor Trading Permit, thus removing a potential disparity that exists under current Rules. With respect to the proposed changes to exclude the last sentence of Rule 8.21.02(g) from the proposed exception and to revise the priority described in Rule 5.87(f), the Exchange states that waiver of the operative delay will promptly reduce unnecessary complexity and confusion regarding open outcry procedures, and simplify handling of solicited orders on the trading floor. Additionally, the

²⁶ 15 U.S.C. 78s(b)(3)(A).

²⁷ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁸ 17 CFR 240.19b-4(f)(6).

²⁹ 17 CFR 240.19b-4(f)(6)(iii).

Exchange states that, with respect to proposed changes to clarify definitions and the applicability of current exception procedures, waiver of the operative delay will allow the Exchange to provide further transparency as soon as possible. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.³⁰

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2023-048 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CBOE-2023-048. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

³⁰ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2023-048 and should be submitted on or before October 18, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98472; File No. SR-PEARL-2023-45]

Self-Regulatory Organizations; MIAx PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAx Pearl Equities Fee Schedule To Adopt the NBBO Setter Plus Program and Eliminate Certain Other Rebates

September 21, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 11, 2023, MIAx PEARL, LLC ("MIAx Pearl" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this

notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule (the "Fee Schedule") applicable to MIAx Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-equities/pearl-equities/rule-filings>, at MIAx Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to: (i) adopt a new incentive program called the "NBBO Setter Plus Program" (referred to in this filing as the "NBBO Program") that, in general, provides enhanced rebates for Equity Members' ³ added displayed liquidity ("Added Displayed Volume") in securities priced at or above \$1.00 per share in all Tapes based on increasing volume thresholds and increasing market quality levels (described below), as well as an additive rebate applied to orders that set the NBBO ⁴ upon entry; (ii) reduce the standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume in all Tapes and make the corresponding changes to the Liquidity Indicator Codes and

Associated Fees table ⁵; (iii) eliminate the Add Volume Tiers table ⁶ and associated rebates and make corresponding changes to rename Section 1)c) to now be titled "NBBO Setter Plus Program"; (iv) eliminate the Market Quality Tiers table ⁷ and associated rebates; (v) renumber Section 1)g), Step-Up Added Liquidity Rebate, to now be Section 1)f), Step-Up Added Liquidity Rebate; and (vi) amend the Definitions section to include a definition for the term "NBBO Set Volume" (described below). All of the proposed changes relate to the adoption of the proposed NBBO Program, which incorporates certain concepts from the current Add Volume Tiers and Market Quality Tiers programs.

The Exchange originally filed this proposal on August 31, 2023 (SR-PEARL-2023-42). On September 11, 2023, the Exchange withdrew SR-PEARL-2023-42 and refiled this proposal.

Background of Current Rebate Programs Impacted by This Proposal

Section 1)a) of the Fee Schedule sets forth the Exchange's standard rebates and fees for adding, removing or routing orders (displayed and non-displayed) in all Tapes. The Exchange provides different rebates and fees depending on whether (i) the execution is for an order where the securities are priced at or above \$1.00 per share, or (ii) the execution is for an order where the securities are priced below \$1.00 per share. Relevant for the purposes of this proposal, the Exchange currently provides a standard rebate of (\$0.0027) ⁸ per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes.⁹

Section 1)b) of the Fee Schedules provides a list of the liquidity indicator codes and associated rebates or fees that are applied to a transaction so that each Equity Member that enters an order is able to understand the fee or rebate that is applied to the execution. Each side of a trade is assigned a liquidity indicator code in order to identify the scenario under which the trade occurred.

Section 1)c) of the Fee Schedule provides a volume-based tier structure, referred to as the Add Volume Tiers, in

⁵ See Fee Schedule, Section 1)b), Liquidity Indicator Codes AA, AB and AC.

⁶ See Fee Schedule, Section 1)c).

⁷ See Fee Schedule, Section 1)f).

⁸ The Exchange indicates rebates in parentheses in the Fee Schedule. See the General Notes Section of the Fee Schedule.

⁹ See Fee Schedule, Section 1)a). See also Fee Schedule, Section 1)b), Liquidity Indicator Codes AA, AB, and AC.

³¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term "Equity Member" is a Member authorized by the Exchange to transact business on MIAx Pearl Equities. See Exchange Rule 1901.

⁴ With respect to the trading of equity securities, the term "NBB" shall mean the national best bid, the term "NBO" shall mean the national best offer, and the term "NBBO" shall mean the national best bid and offer. See Exchange Rule 1901.

which the Exchange provides enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume for Equity Members that meet specified volume thresholds on the Exchange. In particular, an Equity Member that qualifies for Add Volume Tier 1 will receive an enhanced rebate of (\$0.0032) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV ¹⁰ of at least 0.07% of TCV. ¹¹ An Equity Member that qualifies for Add Volume Tier 2 will receive an enhanced rebate of (\$0.0035) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.10% of TCV. An Equity Member that qualifies for Add Volume Tier 3 will receive an enhanced rebate of (\$0.0036) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.30% of TCV. The enhanced rebates provided by the Add Volume Tiers are provided instead of the standard rebate of (\$0.0027) per share applicable to executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes.

Section 1)f) of the Fee Schedule sets forth a separate tiered pricing incentive structure, referred to as the Market Quality Tiers, which provides enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume for Equity Members that meet certain minimum quoting requirements across a

specified number of securities. In particular, the Exchange provides an enhanced rebate of (\$0.0032) per share in Market Quality Tier 1 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume if the Equity Member's Percent Time at NBBO ¹² is at least 25% in an average of at least 250 securities, at least 50 of which must be Market Quality Securities, ¹³ per trading day during the month. The Exchange also provides an enhanced rebate of (\$0.0035) per share in Market Quality Tier 2 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume if the Equity Member's Percent Time at NBBO is at least 25% in an average of at least 1,000 securities, at least 100 of which must be MQ Securities, per trading day during the month. The list of MQ Securities is published on the Exchange's website. ¹⁴

Proposal To Adopt the NBBO Setter Plus Program

The Exchange proposes to adopt a new incentive program called the "NBBO Setter Plus Program" (referred to in this filing as the "NBBO Program"), which is designed to incentivize market quality and quoting on the Exchange. Certain elements of the NBBO Program will be similar to the incentives and volume calculations for the current Add Volume Tiers and Market Quality Tiers programs. In connection with the establishment of the NBBO Program, the Exchange proposes to remove the Add Volume Tiers and Market Quality Tiers sections from the Fee Schedule (described further below), with Section 1)c) being re-titled "NBBO Setter Plus Program."

The Exchange proposes to add a new table in Section 1)c) of the Fee Schedule titled "NBBO Setter Plus Table." The NBBO Setter Plus Table will provide

enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes (applicable to Liquidity Indicator Codes AA, AB and AC). Conceptually, the NBBO Program provides four volume tiers enhanced by three market quality levels to provide increasing rebates in this segment. The four volume tiers are achievable by greater volume from the best of three alternative methods. The three market quality levels are achievable by greater NBBO participation in a minimum number of specific securities. Additionally, there is an additive rebate for trades the set the NBBO, described further below.

First, MIAx Pearl Equities will determine the applicable tier based on three different volume calculation methods. The three volume-based methods to determine the Equity Member's tier for purposes of the NBBO Program will be calculated in parallel in each month, and each Equity Member will receive the highest tier achieved from any of the three methods each month. All three volume calculation methods will be based on an Equity Member's respective ADAV or NBBO Set Volume or ADV as a percent of industry TCV as the denominator.

Under volume calculation Method 1, the Exchange proposes to provide tiered rebates based on an Equity Member's ADAV as a percentage of TCV. In particular, an Equity Member will qualify for the base rebates in Tier 1 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.00% and less than 0.08% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 2 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.08% and less than 0.25% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 3 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.25% and less than 0.40% of TCV. Finally, an Equity Member will qualify for the enhanced rebates in Tier 4 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADAV of at least 0.40% of TCV.

Under volume calculation Method 2, the Exchange proposes to provide tiered rebates based on an Equity Member's NBBO Set Volume as a percentage of TCV. In connection with this proposed

¹⁰ The term "ADAV" means average daily added volume calculated as the number of shares added per day and "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day. ADAV and ADV are calculated on a monthly basis. The Exchange excludes from its calculation of ADAV and ADV shares added or removed on any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours ("Exchange System Disruption"), on any day with a scheduled early market close, and on the "Russell Reconstitution Day" (typically the last Friday in June). Routed shares are not included in the ADAV or ADV calculation. See the Definitions Section of the Fee Schedule.

¹¹ The term "TCV" means total consolidated volume calculated as the volume in shares reported by all exchanges and reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply. The Exchange excludes from its calculation of TCV volume on any given day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours. On any day with a scheduled early market close, and on the "Russell Reconstitution Day" (typically the last Friday in June). See the Definitions Section of the Fee Schedule.

¹² The term "Percent Time at NBBO" means the aggregate of the percentage of time during regular trading hours where a Member has a displayed order of at least one round lot at the national best bid ("NBB") or the national best offer ("NBO"). See the Definitions Section of the Fee Schedule.

¹³ Pursuant to this proposal, and as described further below, the Exchange proposes to slightly amend the term "Market Quality Securities" or "MQ Securities" as currently defined in the Fee Schedule in order to account for the changes to the Market Quality Tiers program and newly proposed NBBO Setter Plus Program. Currently, the term "Market Quality Securities" or "MQ Securities" means a list of securities designated as such, that are used for the purposes of qualifying for the Market Quality Tiers. The universe of these securities will be determined by the Exchange and published on the Exchange's website. See the Definitions Section of the Fee Schedule. The proposed changes are described below.

¹⁴ See <https://www.miaxglobal.com/markets/us-equities/pearl-equities/fees> (last visited August 21, 2023).

volume calculation method, the Exchange proposes to adopt a definition for the term “NBBO Set Volume,” which will be included in the Definitions section of the Fee Schedule. The Exchange proposes that the term NBBO Set Volume means the ADAV in all securities of an Equity Member that sets the NBB or NBO on MIAIX Pearl Equities. Pursuant to proposed Method 2, an Equity Member will qualify for the base rebates in Tier 1 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an NBBO Set Volume of at least 0.00% and less than 0.02% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 2 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an NBBO Set Volume of at least 0.02% and less than 0.03% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 3 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an NBBO Set Volume of at least 0.03% and less than 0.08% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 4 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an NBBO Set Volume of at least 0.08% of TCV.

Under volume calculation Method 3, the Exchange proposes to provide tiered rebates based on an Equity Member's ADV as a percentage of TCV. In particular, an Equity Member will qualify for the base rebates in Tier 1 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADV of at least 0.00% and less than 0.20% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 2 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADV of at least 0.20% and less than 0.60% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 3 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADV of at least 0.60% and less than 1.00% of TCV. An Equity Member will qualify for the enhanced rebates in Tier 4 for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes by achieving an ADV of at least 1.00% of TCV.

After the volume calculation is performed to determine highest tier

achieved by the Equity Member, the applicable rebate will be calculated based on two different measurements based on the Equity Member's participation at the NBBO on the Exchange in certain securities (referenced below).

The Exchange proposes to provide one column of base rebates (referred to in the NBBO Program table as “Level A”) and two columns of enhanced rebates (referred to in the NBBO Program table as “Level B” and “Level C”), depending on the Equity Member's Percent Time at NBBO on MIAIX Pearl Equities in a certain amount of specified securities (“Market Quality Securities” or “MQ Securities,” defined below). The Fee Schedule will specify the percentage of time that the Equity Member must be at the NBBO on MIAIX Pearl Equities in at least 200 symbols out of the full list of 1,000 MQ Securities (which may vary from time to time based on market conditions). The list of MQ Securities will be generally based on the top multi-listed 1,000 symbols by ADV across all U.S. securities exchanges. The list of MQ Securities will be updated monthly by the Exchange and published on the Exchange's website. The Exchange notes that at least one other competing exchange provides enhanced rebates for executions of orders in certain securities priced at or above \$1.00 per share submitted by members that set or join the NBBO on that exchange.¹⁵

The Exchange proposes that, for the purpose of determining qualification for the rebates described in Level B and Level C of Market Quality Tier columns in the NBBO Setter Plus Program, the Exchange will exclude from its calculation: (1) any trading day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours; (2) any day with a scheduled early market close; and (3) the “Russell Reconstitution Day” (typically the last Friday in June). The Exchange proposes

¹⁵ See Cboe BZX Equities Fee Schedule, NBBO Setter section and Add/Remove Volume Tiers section, available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/ (providing an additional rebate of (\$0.0007) per share to the top displayed liquidity tier rebate of (\$0.0031) per share for executions of added displayed volume in securities priced at or above \$1.00 per share that establish a new Setter NBBO in NBBO Setter Securities on Cboe BZX). For purposes of the Cboe BZX Fee Schedule, the term “Setter NBBO” means a quotation of at least 100 shares that is better than the NBBO or a quotation of a notional size of at least \$10,000.00 that is better than the NBBO. Further, the term “NBBO Setter Securities” means a list of securities included in the Cboe BZX NBBO Setter Program, the universe of which will be determined by Cboe BZX and published in a notice distributed to Cboe BZX members and on the Cboe BZX website. See *id.*

to describe this exclusion in the General Notes section of the Fee Schedule. The Exchange believes that these types of Exchange system disruptions could preclude Equity Members from participating on the Exchange to the extent that they might have otherwise participated on such days, and thus, the Exchange believes it is appropriate to exclude such days when determining whether an Equity Member meets the applicable Percent Time at NBBO during a month to avoid penalizing Equity Members that might otherwise have met such requirements.

Additionally, the Exchange believes that scheduled early market closures, which typically are the day before, or the day after, a holiday, may preclude some Equity Members from participating on the Exchange at the same level that they might otherwise. For similar reasons, the Exchange believes it is appropriate to exclude the Russell Reconstitution Day in the same manner, as the Exchange believes that the Russell Reconstitution Day typically has extraordinarily high, and abnormally distributed, trading volumes and the Exchange believes this change to normal activity may affect an Equity Member's ability to meet the quoting requirement across various MQ Securities on that day. The Exchange notes that the exclusion of any day during which the Exchange's system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours, any day with a scheduled early market close, and the Russell Reconstitution Day is consistent with the methodologies used by other exchanges when calculating certain member trading and other volume metrics for purposes of determining whether those members qualify for certain pricing incentives, and the Exchange believes application of this methodology is similarly appropriate for the proposed Percent Time at NBBO requirements under the proposed NBBO Program.¹⁶

The Exchange proposes that the base rebates (“Level A”) will be as follows: (\$0.00240) per share in Tier 1; (\$0.00310) per share in Tier 2; (\$0.00345) per share in Tier 3; and (\$0.00350) per share in Tier 4.¹⁷

¹⁶ See e.g., Cboe BZX Equities Fee Schedule, available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/; Cboe EDGX Exchange, Inc. (“Cboe EDGX”) Equities Fee Schedule, available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/; and MEMX, LLC (“MEMX”) Fee Schedule, available at <https://info.memxtrading.com/fee-schedule/>.

¹⁷ The Exchange notes that the proposed (\$0.00240) per share will be the base standard rebate for executions of orders in securities priced

Under Level B, the Exchange proposes to provide enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes if the Equity Member's Percent Time at NBBO is at least 25% and less than 50% in at least 200 MQ Securities per trading day during the month. The Exchange proposes that the Level B rebates will be as follows: (\$0.00250) per share in Tier 1; (\$0.00315) per share in Tier 2; (\$0.00350) per share in Tier 3; and (\$0.00355) per share in Tier 4.

Under Level C, the Exchange proposes to provide enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes if the Equity Member's Percent Time at NBBO is at least 50% in at least 200 MQ Securities per trading day during the month. The Exchange proposes that the Level C rebates will be as follows: (\$0.00260) per share in Tier 1; (\$0.00320) per share in Tier 2; (\$0.00355) per share in Tier 3; and (\$0.00360) per share in Tier 4.

The Exchange notes that the introduction of the NBBO Setter Plus Program will be available to all Equity Members and will provide Equity Members several different opportunities to receive enhanced rebates utilizing three different volume calculation methodologies and different participation levels at the NBBO. The proposed changes are designed to encourage Equity Members that provide Added Displayed Volume in securities priced at or above \$1.00 per share across all Tapes to the Exchange to increase such order flow, which would benefit all Equity Members by providing greater execution opportunities on the Exchange and contribute to a deeper, more liquid market, to the benefit of all investors and market participants.

NBBO Setter Additive Rebate

The Exchange proposes to provide an additional rebate as part of the NBBO Program, which will be included as a line item at the bottom of the NBBO Setter Plus table. In particular, the Exchange proposes to provide an "NBBO Setter Additive Rebate" of (\$0.0003) per share, which will be applicable only to executions of orders in securities priced at or above \$1.00 per

at or above \$1.00 per share for Added Displayed Volume across all Tapes, which is a decrease from the current standard rebate of (\$0.0027) per share, listed in Section 1)a) of the Fee Schedule and attributable to Liquidity Indicator Codes AA, AB and AC. The purpose and rationale for the proposed decrease in the standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes is discussed below.

share for Added Displayed Volume (other than Retail Orders¹⁸) that set the NBB or NBO on MIAAX Pearl Equities with a minimum size of a round lot. The purpose of the proposed NBBO Setter Additive Rebate is to provide an additional incentive for Equity Members to contribute Added Displayed Volume in securities priced at or above \$1.00 per share that sets the NBBO on MIAAX Pearl Equities, which should benefit all Equity Members by providing greater execution opportunities on the Exchange and contribute to a deeper, more liquid market, to the benefit of all investors and market participants. Additionally, other U.S. equity exchanges have adopted similar pricing incentives applicable to executions of orders that establish the NBBO, with the Exchange's proposed top tier rebate, coupled with the NBBO Setter Additive Rebate, being higher than competing exchanges' top rebates for similar executions (providing additive rebate of (\$0.0003) per share to the top displayed liquidity tier rebate of (\$0.0036) per share for executions of added displayed volume (other than retail orders) in securities priced at or above \$1.00 per share that establish the NBBO on the Exchange, for a total "enhanced" rebate of (\$0.0039) per share).¹⁹

Corresponding Changes to the Fee Schedule

Proposal To Reduce the Standard Rebate for Executions of Orders in Securities Priced at or Above \$1.00 per Share for Added Displayed Volume (All Tapes) and Corresponding Changes to Liquidity Indicator Codes

In connection with the proposed NBBO Setter Plus Program, the Exchange proposes to reduce the standard rebate for executions of orders

¹⁸ A "Retail Order" is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Exchange Rule 2626(a)(2).

¹⁹ See MEMX Fee Schedule, NBBO Setter/Joiner Tiers Section (providing additional rebate of (\$0.0004) per share to the top displayed liquidity tier rebate of (\$0.0033) per share for executions of added displayed volume (other than retail orders) in securities priced at or above \$1.00 per share that establish the NBBO or establish a new BBO on MEMX that matches the NBBO first established on an away market, for a total "enhanced" rebate of (\$0.0037) per share); and Cboe BZX Fee Schedule, NBBO Setter section and Add/Remove Volume Tiers section (providing additional rebate of (\$0.0007) per share to the top displayed liquidity tier rebate of (\$0.0031) per share for executions of added displayed volume in securities priced at or above \$1.00 per share that establish a new Setter NBBO in NBBO Setter Securities on Cboe BZX, for a total "enhanced" rebate of (\$0.0038) per share).

in securities priced at or above \$1.00 per share that add displayed liquidity to the Exchange across all Tapes (as mentioned above). Currently, the Exchange provides a standard rebate of (\$0.0027) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume in all Tapes. The Exchange now proposes to reduce the standard rebate from (\$0.0027) to (\$0.0024) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes. Accordingly, the Exchange proposes to amend Section 1)a), Standard Rates, to reflect this proposed change and amend Section 1)b), Liquidity Indicator Codes and Associated Fees, to reflect the corresponding changes to the applicable Liquidity Indicator Codes, AA, AB and AC.

The purpose of reducing the standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes is due to the Exchange's proposal to adopt the NBBO Program, which provides multiple volume calculation methods for Equity Members to receive enhanced rebates compared to the standard rate. The Exchange notes that despite the modest reduction proposed herein, the proposed standard rebate of (\$0.0024) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes remains competitive with, and higher than, the standard rebates provided by other exchanges for similar executions.²⁰

Proposal To Eliminate the Add Volume Tiers Table and Associated Rebates

In connection with the NBBO Setter Plus Program, the Exchange proposes to eliminate the Add Volume Tiers table and associated rebates in Section 1)c) of the Fee Schedule and rename Section 1)c) as the NBBO Setter Plus Program. As mentioned above, the Add Volume Tiers provided enhanced rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume so long as the Equity Member met specified ADAV thresholds on the Exchange. The Exchange adopted

²⁰ See e.g., NYSE Arca Equities Fee Schedule, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf (providing standard rebates of \$0.0020 per share (Tapes A and C) and \$0.0016 per share (Tape B) for adding displayed liquidity in securities priced at or above \$1.00 per share); see also Cboe BZX Equities Fee Schedule, available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/ (providing a standard rebate of \$0.0016 per share for adding displayed liquidity in securities priced at or above \$1.00 per share).

the Add Volume Tiers rebates for the purpose of encouraging Equity Members to increase their orders that add liquidity on the Exchange, thereby improving its market quality with respect to such securities and contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Equity Members.²¹ The Exchange now proposes to eliminate the Add Volume Tiers table and associated rebates as the NBBO Program incorporates similar aspects and rebate amounts, including, under volume calculation Method 1, tiered rebates based on an Equity Member's ADAV as a percentage of TCV. The Exchange notes that the NBBO Program does have slightly lower rebates for the corresponding Add Volume Tier thresholds; however, the Exchange believes that the benefits of the NBBO Program—three volume calculation methods and two market quality levels based on participation at the NBBO in order to obtain enhanced rebates—provides more opportunities for Equity Members to achieve higher rebates and will encourage the submission of increased order flow. The Exchange believes this will, in turn benefit all Equity Members by providing greater execution opportunities on the Exchange and contribute to a deeper, more liquid market, to the benefit of all investors and market participants.

Proposal To Eliminate the Market Quality Tiers Table and Associated Rebates

In connection with the NBBO Setter Plus Program, the Exchange proposes to eliminate the Market Quality Tiers table and associated rebate in Section 1(f) of the Fee Schedule. As mentioned above, the Market Quality Tiers provided enhanced rebates for Equity Members that met certain minimum quoting requirements across a specified number of securities. The Exchange adopted the Market Quality Tiers for the purpose of encouraging executions of Added Displayed Volume for qualifying Equity Members as a means of recognizing the value of market participants that consistently quote at the NBBO in a large number of securities generally, and in the specified MQ Securities, in particular.²² The Exchange now proposes to eliminate the Market Quality Tiers table and associated rebates as the NBBO Program incorporates similar aspects, rebate

amounts, and calculation methodologies based on an Equity Member's Percent Time at NBBO in certain MQ Securities under Level B and Level C.

Proposal To Renumber Fee Schedule Section 1(g), Step-Up Added Liquidity Rebate, as Section 1(f)

As described above, the Exchange proposes to eliminate the Market Quality Tiers table and associated rebates currently described in Section 1(f) of the Fee Schedule. Accordingly, the Exchange proposes to renumber Section 1(g), Step-Up Added Liquidity Rebate, as Section 1(f). The purpose of this change is to provide consistency and clarity in the Fee Schedule.

Proposed Changes to the Definitions and General Notes Sections of the Fee Schedule

As mentioned above, with the adoption of the NBBO Program, the Exchange proposes to make several corresponding changes to the Definitions and General Notes sections of the Fee Schedule. First, the Exchange proposes to amend the paragraphs describing “ADAV” in the Definition section to include the definition of “NBBO Set Volume.” In particular, the term “NBBO Set Volume” will mean the ADAV in all securities of an Equity Member that sets the NBB or NBO on MIAAX Pearl Equities. Further, the Exchange proposes that an Equity Member's NBBO Set Volume will be excluded from the calculation of the NBBO Program in certain instances. The Exchange proposes to amend the second paragraph related to ADAV in the Definitions section to include NBBO Set Volume as excluded volume. With the proposed changes, the paragraphs describing ADAV in the Definitions section will read as follows:

“ADAV” means average daily added volume calculated as the number of shares added per day and “ADV” means average daily volume calculated as the number of shares added or removed, combined, per day. ADAV and ADV are calculated on a monthly basis. NBBO Set Volume means the ADAV in all securities of an Equity Member that sets the NBB or NBO on MIAAX Pearl Equities.

The Exchange excludes from its calculation of ADAV, ADV, and NBBO Set Volume shares added or removed on any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours, on any day with a scheduled early market close, and on the “Russell Reconstitution Day” (typically the last Friday in June).

Next, the Exchange proposes to amend the definition for “Market Quality Securities” or “MQ Securities.” Since the Exchange proposes to eliminate the Market Quality Tiers and

associated rebates, which are based on an Equity Member's participation at the NBBO in the currently-defined MQ Securities, the Exchange will amend this definition to fit within the NBBO Program. As described above, Level B and Level C enhanced rebates in the NBBO Program will be partly based on an Equity Member's Percent Time at NBBO on MIAAX Pearl Equities in a certain amount of MQ Securities. The Exchange proposes to amend the definition of MQ Securities to reflect the elimination of the Market Quality Tiers and adoption of the NBBO Program. Accordingly, with the proposed changes, the definition for Market Quality Securities will be as follows:

“Market Quality Securities” or “MQ Securities” shall mean a list of securities designated as such, that are used for the purposes of qualifying for the rebates described in Level B and Level C of the Market Quality Tier columns in the NBBO Setter Plus Program. The universe of these securities will be determined by the Exchange and published on the Exchange's website.

In connection with the proposed revised definition for MQ Securities, the Exchange also proposes to amend the corresponding paragraph in the General Notes section regarding when the Exchange excludes certain Market Quality security volume. With the proposed changes, the exclusion paragraph will read as follows:

For the purpose of determining qualification for the rebates described in Level B and Level C of Market Quality Tier columns in the NBBO Setter Plus Program, the Exchange will exclude from its calculation: (1) any trading day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours; (2) any day with a scheduled early market close; and (3) the “Russell Reconstitution Day” (typically the last Friday in June).

The purpose of all these changes is to provide consistency and clarity in the Fee Schedule in light of the proposed adoption of the NBBO Program and corresponding elimination of other rebate programs.

Implementation

The proposed changes are immediately effective.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act²³ in general, and furthers the objectives of Section 6(b)(4) of the Act²⁴ in

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(4).

²¹ See Securities Exchange Act Release No. 93979 (January 14, 2022), 87 FR 3151 (January 20, 2022) (SR-PEARL-2022-01).

²² See Securities Exchange Act Release No. 94929 (May 17, 2022), 87 FR 31269 (May 23, 2022) (SR-PEARL-2022-21).

particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Equity Members and issuers and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁵ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange operates in a highly fragmented and competitive market in which market participants can readily direct their order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of sixteen registered equities exchanges, and there are a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. As of August 23, 2023, based on publicly available information, no single registered equities exchange currently has more than approximately 13–14% of the total market share of executed volume of equities trading for the month of August 2023.²⁶ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 1.86% of the overall market share. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²⁷

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces

constrain the Exchange’s transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance liquidity and market quality in both a broad manner and in a targeted manner with respect to the MQ Securities and the NBBO Program.

NBBO Setter Plus Program

The Exchange believes that the proposed NBBO Setter Plus Program, in general, is a reasonable means to encourage Equity Members to not only increase their order flow to the Exchange but also to contribute to price discovery and market quality on the Exchange by submitting aggressively priced displayed liquidity in securities priced at or above \$1.00 per share. As noted above, aspects of the proposed NBBO Program are comparable to other volume-based incentives currently in place at the Exchange and competing exchanges, which have been widely adopted.²⁸ The Exchange believes the proposed NBBO Program is equitable and not unfairly discriminatory because it is open to all Equity Members on an equal basis and provides enhanced rebates that are reasonably related to the value to the Exchange’s market quality associated with greater order flow by Equity Members that set the NBBO, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes the proposed NBBO Program is equitable and not unfairly discriminatory because it is designed to incentivize the entry of aggressively priced displayed liquidity that will create tighter spreads, thereby promoting price discovery and market quality on the Exchange to the benefit of all Equity Members and public investors.

The Exchange believes the proposal to have three different volume calculation methods to determine the Equity Member’s tier for purposes of the NBBO Program is reasonable, equitably allocated, and not unfairly discriminatory because the three methods will be calculated in parallel in each month, and each Equity Member will receive the tier associated with the

highest tier achieved each month. This allows market participants with various trading strategies to participate in the NBBO Program, including, among others, Equity Members with liquidity providing strategies, aggressive order adding strategies that attempt to set the NBBO, as well as Equity Members acting as an agency for customers.

The Exchange believes the proposed Market Quality Tiers applicable to the enhanced rebates in the NBBO Program, which are dependent upon the Equity Member’s Percent Time at NBBO in MQ Securities, are reasonable, equitably allocated and not unfairly discriminatory. This is because the Market Quality Tiers of the NBBO Program are intended to encourage Equity Members to promote price discovery and market quality by quoting at the NBBO for a significant portion of each day in a large number of securities generally, and in MQ Securities in particular, thereby benefiting the Exchange and other investors by providing improved trading conditions for all market participants through narrower bid-ask spreads and increasing the depth of liquidity available at the NBBO in a broad base of highly liquid securities. As noted above, Cboe BZX provides an enhanced rebate based on increased member participation in a defined list of securities (called the NBBO Setter Securities on Cboe BZX) that set the NBBO on that exchange.²⁹

The Exchange believes the proposed enhanced rebates in Level B³⁰ and Level C³¹ of the Market Quality Tiers of the NBBO Program are reasonable in that they do not reflect disproportionate increases above the standard rebates of (\$0.00250) per share for Level B and (\$0.00260) per share for Level C, but reflect the value added value to the Exchange’s market quality from Equity Members that meet the required Percent Time at NBBO in the minimum number of MQ Securities, which should incentivize the entry of aggressively priced displayed liquidity that will create tighter spreads, promote price discovery and market quality on the Exchange to the benefit of all Equity Members and public investors.

The Exchange further believes that the proposed criteria to achieve the enhanced rebates provided in Level B and Level C of the Market Quality Tiers of the NBBO Program is reasonable and not unfairly discriminatory because the proposed criteria for Level C rebates is

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ See the “Market Share” section of the Exchange’s website, available at <https://www.miaxglobal.com/> (last visited August 23, 2023).

²⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37499 (June 29, 2005).

²⁸ See, generally, Fee Schedule, Section 1(c) and Section 1(f); see also Cboe BZX Equities Fee Schedule, NBBO Setter Section and Add/Remove Volume Tiers Section and MEMX Fee Schedule, NBBO Setter/Joiner Tiers Section.

²⁹ See *supra* note 15.

³⁰ Proposed tiered rebates ranging from (\$0.00250) in Tier 1 to (\$0.00355) in Tier 4.

³¹ Proposed tiered rebates ranging from (\$0.00260) in Tier 1 to (\$0.00360) in Tier 4.

incrementally more difficult to achieve than that of Level B, and thus Level C appropriately offers higher rebates commensurate with the corresponding higher Percent Time at NBBO by Equity Members in the minimum number of MQ Securities. Therefore, the Exchange believes that the Market Quality Tiers of the NBBO Program, as proposed, are consistent with an equitable allocation of fees and rebates, as the more stringent criteria correlates with the corresponding higher tiers' enhanced rebates.

In addition, the Exchange believes that it is reasonable and consistent with an equitable allocation of fees to pay higher rebates for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume to Equity Members that qualify for one of the Market Quality Tiers of the NBBO Program because of the additional commitment to market quality reflected in the associated Percent Time at NBBO requirements. Such Equity Members benefit all investors by promoting price discovery and increasing the depth of liquidity available at the NBBO and benefit the Exchange itself by enhancing its competitiveness as a market center that attracts actionable orders. Further, the Exchange notes that the proposed Market Quality Tiers of the NBBO Program offer incentives on the Exchange that would apply uniformly to all Equity Members, and any Equity Member may choose to qualify for one of those tiers by meeting the associated requirements in any month. The Exchange believes that the requirements are attainable for many market participants who do actively quote on the Exchange and are reasonably related to the enhanced market quality that the NBBO Program is designed to promote.

The Exchange also believes that including in the proposed Market Quality Tiers of the NBBO Program a quoting requirement for certain specified securities (*i.e.*, the MQ Securities), is equitable and not unfairly discriminatory because the Exchange has identified the MQ Securities as securities in which it would like to inject additional quoting competition, which the Exchange believes will generally act to narrow spreads, increase size at the NBBO, and increase liquidity depth in such securities, thereby increasing the attractiveness of the Exchange as a destination venue with respect to such securities. Accordingly, the Exchange believes that this aspect of the proposal is reasonable, equitably allocated, and not unfairly discriminatory because it is consistent with the overall goals of enhancing market quality.

As noted above, the proposed Market Quality Tiers of the NBBO Program are similar in structure and purpose to pricing programs in place on at least one other exchange that is designed to enhance market quality.³² Specifically, this program provides a higher rebate for executions of liquidity-adding displayed orders for members that achieve minimum quoting standards, including minimum quoting at the NBBO in a large number of securities generally, or certain designated securities in particular.³³ The Exchange also notes that the proposed Market Quality Tiers of the NBBO Program are not dissimilar from volume-based rebates and fees which have been widely adopted by exchanges³⁴ and are equitable and not unfairly discriminatory because they are generally open to all Equity Members on an equal basis and provide higher rebates that are reasonably related to the value of an exchange's market quality. Much like volume-based tiers are designed to incentivize higher levels of liquidity provision, the proposed Market Quality Tiers portion of the NBBO Program is designed to incentivize enhanced market quality on the Exchange through tighter spreads, greater size at the NBBO, and greater quoting depth in a large number of securities generally, and in MQ Securities specifically, through the provision of an enhanced rebate, where such rebate will in turn incentivize higher levels of displayed liquidity provision in a general manner. Accordingly, the Exchange believes that the proposed NBBO Program, in general, promotes the principles discussed in Sections 6(b)(4) and 6(b)(5) of the Act.³⁵

NBBO Setter Additive Rebate

The Exchange believes the proposed NBBO Setter Additive Rebate is reasonable, equitably allocated and not unfairly discriminatory because is available to all Equity Members and is designed to incentivize the entry of aggressively priced displayed liquidity that will create tighter spreads, thereby promoting price discovery and market quality on the Exchange to the benefit of all Equity Members and public investors. As such, the Exchange believes the NBBO Setter Additive Rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume (other than Retail Orders) that sets the NBB or NBO on the Exchange is

reasonably related to the market quality benefits that such additional enhanced rebate is designed to promote. Additionally, other U.S. equity exchanges have adopted similar pricing incentives applicable to executions of orders that establish the NBBO, with the Exchange's proposed top tier rebate, coupled with the NBBO Setter Additive Rebate, being higher than competing exchanges' top rebates for similar executions.³⁶

Reduce Standard Rebate for Executions of Orders in Securities Priced at or Above \$1.00 per Share for Added Displayed Volume (All Tapes) and Corresponding Changes to Liquidity Indicator Codes

The Exchange believes that the proposal to reduce the standard rebate from (\$0.0027) to (\$0.0024) per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume is reasonable, equitably allocated and not unfairly discriminatory because it represents a modest decrease from the current standard rebate and competitive with, and higher than, the standard rebates provided by other exchanges for similar executions.³⁷ The Exchange further believes that the proposed reduced standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume is equitably allocated and not unfairly discriminatory because the standard rebate will apply equally to all Equity Members. The Exchange also believes its proposal to amend Section 1(b), Liquidity Indicator Codes and Associated Fees, to reflect the proposed decreased rebate for Added Displayed Volume in the corresponding Liquidity Indicator Codes AA, AB and AC is reasonable because it provides uniformity and clarity in the Fee Schedule.

³⁶ See MEMX Fee Schedule, NBBO Setter/Joiner Tiers Section (providing additional rebate of (\$0.0004) per share to the top displayed liquidity tier rebate of (\$0.0033) per share for executions of added displayed volume (other than retail orders) in securities priced at or above \$1.00 per share that establish the NBBO or establish a new BBO on MEMX that matches the NBBO first established on an away market, for a total "enhanced" rebate of (\$0.0037) per share); and Cboe BZX Equities Fee Schedule, NBBO Setter section and Add/Remove Volume Tiers section (providing additional rebate of (\$0.0007) per share to the top displayed liquidity tier rebate of (\$0.0031) per share for executions of added displayed volume in securities priced at or above \$1.00 per share that establish a new Setter NBBO in NBBO Setter Securities on Cboe BZX, for a total "enhanced" rebate of (\$0.0038) per share).

³⁷ See *supra* note 20.

³² See *supra* note 15.

³³ *Id.*

³⁴ *Id.*

³⁵ 15 U.S.C. 78f(b)(4) and (5).

Proposal To Eliminate the Add Volume Tiers Table and Associated Rebates and the Market Quality Tiers Table and Associated Rebates

The Exchange believes its proposal to eliminate the Add Volume Tiers table and associated rebates in Section 1(c) of the Fee Schedule and rename Section 1(c) as the NBBO Setter Plus Program in connection with the NBBO Program, is reasonable, equitably allocated and not unfairly discriminatory. The Exchange adopted the Add Volume Tiers rebates for the purpose of encouraging Equity Members to increase their orders that add liquidity on the Exchange, thereby improving its market quality with respect to such securities and contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Equity Members. The Exchange's proposal to eliminate the Add Volume Tiers table and associated rebates is reasonable because the NBBO Program incorporates similar aspects and rebate amounts, including, under volume calculation Method 1, tiered rebates based on an Equity Member's ADAV as a percentage of TCV. The Exchange notes that the NBBO Program does have slightly lower rebates for the corresponding Add Volume Tier thresholds; however, the Exchange believes that the benefits of the NBBO Program, *i.e.*, several volume calculation methods to obtain enhanced rebates, provides more opportunities for Equity Members to achieve higher rebates and will encourage the submission of increased order flow, which would benefit all Equity Members by providing greater execution opportunities on the Exchange and contribute to a deeper, more liquid market, to the benefit of all investors and market participants.

Similarly, the Exchange believes its proposal to eliminate the Market Quality Tiers table and associated rebate in Section 1(f) of the Fee Schedule is reasonable, equitably allocated and not unfairly discriminatory. The Exchange adopted the Market Quality Tiers for the purpose of encouraging executions of Added Displayed Volume for qualifying Equity Members as a means of recognizing the value of market participants that consistently quote at the NBBO in a large number of securities generally, and in the specified MQ Securities, in particular. The Exchange's proposal to eliminate the Market Quality Tiers table and associated rebates is reasonable as the NBBO Program incorporates similar aspects, rebate amounts calculation methodologies based on an Equity Member's Percent Time at NBBO in

certain MQ Securities under Level B and Level C, which should provide more opportunities for Equity Members to achieve higher rebates and will encourage the submission of increased order flow to the benefit of all Equity Members. This should provide greater execution opportunities on the Exchange and contribute to a more liquid market, to the benefit of all investors and market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed NBBO Program will be eligible to all Equity Members equally in that all Equity Members have the opportunity to participate and therefore qualify for the proposed enhanced rebates. Furthermore, the Exchange believes that the proposed NBBO Program will incentivize Equity Members to submit additional aggressively priced displayed liquidity to the Exchange, and to increase their order flow on the Exchange generally, thereby contributing to a deeper and more liquid market and promoting price discovery and market quality on the Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue. The Exchange believes that this, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Equity Members by providing more trading opportunities and encourages Equity Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

The proposed decrease to the standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume does not impose a burden on intramarket competition that is not in furtherance of the Act in that the proposed change applies to all Equity Members equally and the proposed reduced rate is still competitive with, or higher than, rebates offered by competing exchanges for similar executions.³⁸

³⁸ See *supra* note 20.

The proposed non-substantive changes to the Definitions section of the Fee Schedule are similarly non-burdensome as they are intended to provide clear descriptions of the terms applicable to the proposed NBBO Program.

In general, the Exchange believes all of the proposed changes are intended to enhance market quality on the Exchange in a large number of securities generally, and in the MQ Securities specifically, and to encourage Equity Members to maintain or increase their order flow on the Exchange, thereby promoting price discovery and contributing to a deeper and more liquid market to the benefit of all market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."³⁹

Intermarket Competition

The Exchange believes its proposal will benefit competition, and the Exchange notes that it operates in a highly competitive market. Equity Members have numerous alternative venues they may participate on and direct their order flow to, including fifteen other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than 13–14% of the total market share of executed volume of equities trading.⁴⁰ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow in response to new or different pricing structures being introduced to the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates generally, including with respect to executions of Added Displayed Volume, and market participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem fee levels

³⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 47396 (June 29, 2005).

⁴⁰ See *supra* note 26.

at those other venues to be more favorable.

As described above, the proposal is designed to enhance market quality on the Exchange and to encourage additional order flow and quoting activity on the Exchange and to promote market quality through pricing incentives that are comparable to, and competitive with, pricing programs in place at other exchanges with respect to executions of Added Displayed Volume.⁴¹ Accordingly, the Exchange believes the proposal would not be a burden on, but rather promote, intermarket competition by enabling the Exchange to better compete with other exchanges that offer similar incentives to market participants that enhance market quality and/or achieve certain volume criteria and thresholds.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁴² The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the DC circuit stated: “[n]o one disputes that competition for order flow is ‘fierce’ As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possess a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”⁴³ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁴⁴ and Rule 19b-4(f)(2)⁴⁵ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PEARL-2023-45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-PEARL-2023-45. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-PEARL-2023-45 and should be submitted on or before October 18, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁶

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-20960 Filed 9-26-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98475; File No. SR-NASDAQ-2023-037]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NOM Options 7, Section 2

September 21, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 13, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

⁴⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁴¹ See *supra* note 19.

⁴² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

⁴³ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

⁴⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴⁵ 17 CFR 240.19b-4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market LLC ("NOM") Pricing Schedule at Options 7, Section 2.³

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NOM's Pricing Schedule at Options 7, Section 2, Nasdaq Options Market—Fees and Rebates. Today, NOM Options 7, Section 2(1) provides for various fees and rebates applicable to NOM Participants.

Today, Customer,⁴ Professional,⁵ and NOM Market Maker⁶ Rebates to Add Liquidity in Penny Symbols are paid per

the highest tier achieved among the available tiers. The tiers for Customer and Professional Rebates to Add Liquidity in Penny Symbols are below.

Monthly Volume

Tier 1: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume ("ADV") contracts per day in a month.

Tier 2: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 3: Participant: (a) adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% of total industry customer equity and ETF option ADV contracts per day in a month; or (b) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols above 0.05% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for MARS.

Tier 4: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.30% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 5: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 6#: Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Symbols and/or Non-Penny Symbols above 0.70% or more of total industry customer equity and ETF option ADV contracts per day in a month, or Participant: (1) adds Customer and/or Professional liquidity in Penny Symbols and/or Non-Penny Symbols of 0.10% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS (defined below).

To determine the applicable percentage of total industry customer

equity and ETF option average daily volume for a Customer and Professional Rebate to Add Liquidity in Penny Symbols, unless otherwise stated, the Participant's Penny Symbol and Non-Penny Symbol Customer and/or Professional volume that adds liquidity will be included.⁷

With respect to the NOM Market Maker Rebates to Add Liquidity in Penny Symbols, today, rebates are paid on the below tier qualifications.

Monthly Volume

Tier 1: Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume ("ADV") contracts per day in a month.

Tier 2: Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 3: Participant: (a) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% of total industry customer equity and ETF option ADV contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.07% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent (i) 0.70% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market or (ii) 70 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market, (3) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.10% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (4) executes greater than 0.01% of CV via Market-on-Close/Limit-on-Close ("MOC/LOC") volume within The Nasdaq Stock Market Closing Cross in the same month.

Tier 4: Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.60% of total industry customer equity and ETF option ADV contracts per day in a month.

Tier 5: Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a

³ On September 13, 2023, the Exchange withdrew SR-NASDAQ-2023-033 and replaced it with the instant rule change.

⁴ The term "Customer" or ("C") applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(a)(47)). See Options 7, Section 1(a).

⁵ The term "Professional" or ("P") means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(47). All Professional orders shall be appropriately marked by Participants. See Options 7, Section 1(a).

⁶ The term "NOM Market Maker" or ("M") is a Participant that has registered as a Market Maker on NOM pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security. See Options 7, Section 1(a).

⁷ See note 1 in Options 7, Section 2.

month and transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market.

Tier 6: Participant: (a)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.95% of total industry customer equity and ETF option ADV contracts per day in a month, (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity, and (3) adds Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Symbols of 10,000 or more contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity.

Total Volume is defined as Customer, Professional, Firm, Broker-Dealer, Non-NOM Market Maker and NOM Market Maker volume in Penny Symbols and/or Non-Penny Symbols which either adds or removes liquidity on NOM. Finally, today, Broker-Dealers,⁸ Firms⁹ and Non-NOM Market Makers¹⁰ are paid a \$0.10 per contract Rebate to Add Liquidity in Penny Symbols regardless of the tier.

Proposal

NOM Market Maker—Note 4

At this time, the Exchange proposes to amend note 4 of Options 7, Section 2 which currently applies to Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity in Penny Symbols. Note 4 of Options 7, Section 2 currently states, "Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity will receive \$0.40 per contract to add liquidity in the following symbols: AAPL, SPY, QQQ, IWM, and VXX." The Exchange proposes to amend this rebate

in note 4 of Options 7, Section 2 and also offer a second additional rebate.

First, the Exchange proposes to amend the existing rebate of \$0.40 per contract in note 4 of Options 7, Section 2, which is paid to Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity in Penny Symbols to \$0.39 per contract. Second, the Exchange proposes to remove the symbols "AAPL" and "VXX" as eligible for the existing rebate. Third, the Exchange proposes to offer an additional rebate, in note 4 of Options 7, Section 2, of \$0.33 per contract to add liquidity in SPY, QQQ, and IWM to Participants who achieve the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols and execute 1 million shares or more ADV in the same month utilizing the M-ELO order type¹¹ on The Nasdaq Stock Market, provided the Participant also transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent (i) 0.45% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market or (ii) 45 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market.

Therefore, in order to qualify for the new \$0.33 per contract rebate to add liquidity in SPY, QQQ, and IWM, in note 4 of Options 7, Section 2, a Participant must first qualify for the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols and execute 1 million shares or more ADV in the same month utilizing the M-ELO order type on The Nasdaq Stock Market. Further, a Participant must transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent either (i) 0.45% or more of CV which adds liquidity in the same month¹² on The Nasdaq Stock Market; or (ii) 45 million shares or more ADV

which adds liquidity in the same month on The Nasdaq Stock Market to receive a \$0.33 per contract to add liquidity in SPY, QQQ, and IWM.

The Exchange believes the amendment to the current rebate in note 4 of Options 7, Section 2 will continue to incentivize Participants to add liquidity to NOM to qualify for the \$0.39 per contract rebate to add liquidity in SPY, QQQ, and IWM despite the lower rebate (\$0.40 to \$0.39 per contract) and removal of AAPL and VXX. Additionally, the Exchange believes that introducing a new \$0.33 rebate for Participants who achieve the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols, in addition to other qualifications, will create an additional opportunity for Market Makers to increase their liquidity adding activity on the Exchange's equity market. The Exchange believes that the new note 4 rebate qualifying criteria will incentivize participation in greater volume from cross asset activity, which would improve the overall quality of the Exchange's marketplace to the benefit of all market participants, both on NOM and The Nasdaq Stock Market.

NOM Market Maker—Tier 3 Qualifier

The Exchange also proposes to amend the qualifications in the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbol that currently state,

Participant: (a) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% of total industry customer equity and ETF option ADV contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.07% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent (i) 0.70% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market or (ii) 70 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market, (3) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.10% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (4) executes greater than 0.01% of CV via Market-on-Close/Limit-on-Close ("MOC/LOC") volume within The Nasdaq Stock Market Closing Cross in the same month.

The Exchange proposes to amend the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbol qualifications in several ways. First, the Exchange proposes to amend the (b)(1) qualifier to require NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.15% of total industry customer equity and ETF

⁸ The term "Broker-Dealer" or ("B") applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(a).

⁹ The term "Firm" or ("F") applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC. See Options 7, Section 1(a).

¹⁰ The term "Non-NOM Market Maker" or ("O") is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM. See Options 7, Section 1(a).

¹¹ The M-ELO order type, also known as the "Midpoint Extended Life Order," is a Non-Displayed Order priced at the midpoint between the National Best Bid and Offer ("NBBO") and is eligible for execution only against other eligible M-ELOs and only after a minimum period of 10 milliseconds ("Holding Period") has passed after acceptance of the Order by the System. All market participants on The Nasdaq Stock Market LLC may utilize this order type. See Nasdaq Equities 4, Rule 4702(b)(14). Of note, the Commission recently approved a rule proposal amending the Holding Period of the M-ELO order type so that it may adjust dynamically between .025 and 2.5 milliseconds upon real-time assessments of market conditions. See Securities and Exchange Act Release No. 98321 (September 7, 2023), 88 FR 62850 (September 13, 2023) (SR-NASDAQ-2022-079). This rule change has not yet been implemented.

¹² The Exchange notes that 0.45% or more of Consolidated Volume ("CV") is approximately \$44 million.

option ADV contracts per day in a month (a change from 0.07% to 0.15%). Second, the Exchange proposes to amend the (b)(2)(i) qualifier to require 0.50% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market (a change from 0.70% to 0.50%). Third, the Exchange proposes to amend the (b)(2)(ii) qualifier to require 50 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market (a change from 70 million to 50 million shares). Fourth, the Exchange proposes to remove the current (b)(3) and (4) qualifiers and replace those qualifiers with a new (b)(3) qualifier that requires a Participant to execute 1.5 million shares or more ADV in the same month utilizing the M-ELO order type on The Nasdaq Stock Market. In order to qualify for the Tier 3 NOM Market Maker Rebate to Add Liquidity a Participant must meet either the Tier 3 (a) or (b) requirements. To the extent a Participant desires to qualify for the Tier 3 (b) requirements, all 3 parts of the requirement must be met. The proposed new language of the Tier 3 NOM Market Maker Rebate to Add Liquidity would provide,

Participant: (a) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% of total industry customer equity and ETF option ADV contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent (i) 0.50% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market or (ii) 50 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market, and (3) executes 1.5 million shares or more ADV in the same month utilizing the M-ELO order type on The Nasdaq Stock Market.

The Exchange believes that the proposed Tier 3 NOM Market Maker Rebate to Add Liquidity will continue to provide NOM Participants an opportunity to qualify for the NOM Market Maker Tier 3 Rebate to Add Liquidity in more than one way. The proposed new Tier 3 NOM Market Maker Rebate to Add Liquidity (b) qualifiers will incentivize greater options participation with the amendment to (b)(1) increasing the percentage of total industry customer equity and ETF option ADV contracts per day in a month from 0.07% to 0.15%; decreasing the (b)(2)(i) percentage of CV required to add liquidity on The Nasdaq Stock Market from 0.70% to 0.50%; lowering the

current share requirement for participation in The Nasdaq Stock Market as part of (b)(2)(ii) from 70 to 50 million shares; and adding a new (b)(3) requirement to utilize M-ELO to execute 1.5 million shares or more ADV on The Nasdaq Stock Market. The amended qualifiers for (b) within Tier 3 will incentivize participation in greater volume from cross asset activity, which would improve the overall quality of the Exchange's marketplace to the benefit of all market participants, both on NOM and The Nasdaq Stock Market.

2. Statutory Basis

The proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*¹³ ("NetCoalition"), the D.C. Circuit stated, "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ." ¹⁴

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

¹³ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

¹⁴ *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca-2006–21)).

NOM Market Maker—Note 4

Amending note 4 of Options 7, Section 2, which currently applies to Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity in Penny Symbols is reasonable in several ways. The Exchange believes the amendment to the current rebate in note 4 of Options 7, Section 2 will continue to incentivize Participants to add liquidity to NOM to qualify for the \$0.39 per contract rebate to add liquidity in SPY, QQQ, and IWM despite the lower rebate (\$0.40 to \$0.39 per contract) and removal of AAPL and VXX. The Exchange notes that it proposes to limit the rebate to adding liquidity in SPY, QQQ, and IWM, and not AAPL and VXX, because options on these broad-based Exchange-Traded Funds collectively have large volumes. The amended \$0.39 per contract rebate remains higher than the NOM Market Maker Tier 3 or Tier 4 Rebates to Add Liquidity of \$0.30 and \$0.32 per contract, respectively. Additionally, amending note 4 of Options 7, Section 2 to introduce an additional rebate for Participants who achieve the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols is reasonable because it will create an additional opportunity for Market Makers to increase their liquidity adding activity on the Exchange's equity market. The Exchange believes that the new note 4 rebate qualifying criteria will incentivize participation in greater volume from cross asset activity, which would improve the overall quality of the Exchange's marketplace to the benefit of all market participants, both on NOM and The Nasdaq Stock Market. The proposed new Tier 2 NOM Market Maker Rebate to Add Liquidity in Penny Symbols of \$0.33 per contract is higher than the Tier 2 NOM Market Maker Rebate to Add Liquidity of \$0.25 per contract. Finally, the Exchange notes that all NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules. Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market. All members of The Nasdaq Stock Market LLC may utilize the M-ELO order type.

Amending note 4 of Options 7, Section 2, which currently applies to Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity in Penny Symbols is equitable and not unfairly discriminatory because the Exchange

will pay the Tier 3 and 4 NOM Market Maker rebates uniformly to any qualifying Participants. Additionally, amending note 4 of Options 7, Section 2 to introduce an additional rebate for Participants who achieve the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols is equitable and not unfairly discriminatory because the Exchange will pay the new Tier 2 NOM Market Maker rebate uniformly to any qualifying Participants. The Exchange notes that all NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules. Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market. All members of The Nasdaq Stock Market LLC may utilize the M-ELO order type. Additionally, Market Makers add value through continuous quoting and the commitment of capital.¹⁵ Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering these rebates to Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging Market Makers to add greater liquidity benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

NOM Market Maker—Tier 3 Qualifier

Amending the Tier 3 NOM Market Maker Rebate to Add Liquidity qualifications in several ways¹⁶ is reasonable because Participants will continue to have more than one way to qualify for the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny

Symbols.¹⁷ The proposed new Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbols part (b) qualifier will incentivize greater options participation with the amendment to (b)(1) as it increases the percentage of total industry customer equity and ETF option ADV contracts per day in a month from 0.07% to 0.15%. Further part (b)(2)(i) decreases the percentage of CV required to add liquidity on The Nasdaq Stock Market from 0.70% to 0.50%, lowers the current share requirement for participation in The Nasdaq Stock Market as part of (b)(2)(ii) from 70 to 50 million shares, and adds a new (b)(3) requirement to utilize M-ELO to execute 1.5 million shares or more ADV on The Nasdaq Stock Market. The amended qualifiers for (b) within Tier 3 will incentivize participation in greater volume from cross asset activity, which would improve the overall quality of the Exchange's marketplace to the benefit of all market participants, both on NOM and The Nasdaq Stock Market. All NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules. Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market.

Amending the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbols qualifications in several ways¹⁸ is equitable and not unfairly discriminatory because the Exchange will pay the Tier 3 NOM Market Maker Rebate to Add Liquidity uniformly to all Participants that qualify for this tier. All NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules. Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market. Additionally, Market Makers add value through continuous quoting and the commitment of capital.¹⁹ Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering the rebate to only Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging Market

Makers to add greater liquidity on both NOM and The Nasdaq Stock Market benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to pay a rebate to add liquidity in SPY, QQQ, and IWM, as compared to other options, because pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in the most actively traded options classes, in this case actively traded Penny Symbols. SPY, QQQ, and IWM are among the most actively traded options in the U.S. The Exchange believes that this pricing will incentivize members to transact options in SPY, QQQ, and IWM on NOM in order to obtain higher NOM Market Maker rebates in Penny Symbols.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its pricing to remain competitive with other exchanges. Because competitors are free to modify their pricing in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which pricing changes in this market may impose any burden on competition is extremely limited because other options exchanges offer similar pricing.

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and rebate changes. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

¹⁵ See Options 2, Sections 4 and 5.

¹⁶ First, the Exchange proposes to amend the (b)(1) qualifier to require NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month (a change from 0.07% to 0.15%). Second, the Exchange proposes to amend the (b)(2)(i) qualifier to require 0.50% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market (a change from 0.70% to 0.50%). Third, the Exchange proposes to amend the (b)(2)(ii) qualifier to require 50 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market (a change from 70 million to 50 million shares). Fourth, the Exchange proposes to remove the current (b)(3) and (4) qualifiers and replace those qualifiers with a new (b)(3) qualifier that requires a Participant to execute 1.5 million shares or more ADV in the same month utilizing the M-ELO order type on The Nasdaq Stock Market.

¹⁷ In order to qualify for the Tier 3 NOM Market Maker Rebate to Add Liquidity a Participant must meet the (a) or (b) requirements within the tier.

¹⁸ See *supra* note 14.

¹⁹ See Options 2, Sections 4 and 5.

Intramarket Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Amending note 4 of Options 7, Section 2, which currently applies to Participants who achieve the NOM Market Maker Tier 3 or Tier 4 Rebate to Add Liquidity in Penny Symbols does not impose an undue burden on competition because the Exchange will pay the Tier 3 and 4 NOM Market Maker rebates uniformly to any qualifying Participants. Additionally, amending note 4 of Options 7, Section 2 to introduce an additional rebate for Participants who achieve the NOM Market Maker Tier 2 Rebate to Add Liquidity in Penny Symbols does not impose an undue burden on competition because the Exchange will pay the new Tier 2 NOM Market Maker rebate uniformly to any qualifying Participants. The Exchange notes that all NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules. Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market. All members of The Nasdaq Stock Market LLC may utilize the M-ELO order type. Additionally, Market Makers add value through continuous quoting and the commitment of capital.²⁰ Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering these rebates to Market Makers does not impose an undue burden on competition in light of their obligations. Finally, encouraging Market Makers to add greater liquidity benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

Amending the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbols qualifications in several ways²¹ does not impose an undue burden on competition because the Exchange will pay the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbols uniformly to all Participants that qualify for this tier. All NOM Participants are required to become members of The Nasdaq Stock Market pursuant to General 3 Membership and Access rules.

Therefore, a NOM Participant is able to transact the requisite volume on NOM as an Options Participant and also utilize the M-ELO order type as a member of The Nasdaq Stock Market. Additionally, Market Makers add value through continuous quoting and the commitment of capital.²² Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering the rebate to only Market Makers does not impose an undue burden on competition in light of their obligations. Finally, encouraging Market Makers to add greater liquidity on both NOM and The Nasdaq Stock Market benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

The Exchange believes that paying a rebate to add liquidity in SPY, QQQ, and IWM, as compared to other options, does not impose an undue burden on competition because pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in the most actively traded options classes, in this case actively traded Penny Symbols. SPY, QQQ, and IWM are among the most actively traded options in the U.S. The Exchange believes that this pricing will incentivize members to transact options in SPY, QQQ, and IWM on NOM in order to obtain higher NOM Market Maker rebates in Penny Symbols.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²³

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings

to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2023-037 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NASDAQ-2023-037. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2023-037 and should be submitted on or before October 18, 2023.

²⁰ See Options 2, Sections 4 and 5.

²¹ See *supra* note 14.

²² See Options 2, Sections 4 and 5.

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 200.30-3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–20962 Filed 9–26–23; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 12195]

30-Day Notice of Proposed Information Collection: Welcome Corps Application

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to October 27, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents to Cassie Le, who may be reached on 202–805–9291 or at LeCR@state.gov.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Welcome Corps Application.
- *OMB Control Number:* 1405–0256.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* PRM/A.
- *Form Number:* No form.
- *Respondents:* Respondents: Private Sponsor Groups (PSGs), groups of at least five or more individual American citizens or permanent residents who will be able to apply to sponsor the resettlement of refugees, and Private Sponsor Organizations (PSOs), established and/or incorporated

organizations who will be able to apply to mobilize, organize, oversee, and/or offer support to Private Sponsor Groups.

- *Estimated Number of Respondents:* 2,020.

- *Estimated Number of Responses:* 2,020.

- *Average Time per Response:* 5.5 hours.

- *Total Estimated Burden Time:* 8,908 hours total.

- *Frequency:* Once per respondent.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

- Enhance the quality, utility, and clarity of the information to be collected.

- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are a public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

In Executive Order 14013 on “Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration” issued in February 2021, President Biden directed the Department of State and Department of Health and Human Services to “capitalize on . . . private sponsorship of refugees” as part of efforts to “meet the challenges of restoring and expanding the [U.S. Refugee Admissions Program].” To fulfill this directive, the Department of State is rolling out a program for private sponsorship of refugees approved for admission to the United States through the U.S. Refugee Admissions Program (USRAP), named “the Welcome Corps.”

Through the Welcome Corps application process, private sponsors accept primary responsibility to welcome arriving refugees and to provide core services/assistance to support their initial resettlement equivalent to what is provided by nonprofit resettlement agency partners through the U.S. Government-funded Reception and Placement (R&P) program. When private sponsors apply

through the program, sponsors have the option to be matched with a refugee case already being processed through the USRAP or to refer specific individuals to access the USRAP through the P–4 Privately Sponsored Refugees category. The P–4 category, along with the other categories of cases that have access to the USRAP, is outlined in the annual Proposed Refugee Admissions—Report to Congress, which is submitted on behalf of the President in fulfillment of the requirements of section 207(d) of the Immigration and Nationality Act (8 U.S.C. 1157) and authorized by the annual Presidential Determination for Refugee Admissions.

Private sponsor entities include Private Sponsor Groups (groups of at least five or more individual American citizens or permanent residents who can apply to sponsor the resettlement of refugees) and Private Sponsor Organizations (established and/or incorporated organizations who can apply to mobilize, organize, oversee, and/or offer support to Private Sponsor Groups).

As part of the Welcome Corps application process for private sponsors, biographic information is collected from Private Sponsor Groups (PSGs) and Private Sponsor Organizations (PSOs) to facilitate the placement of approved refugee applicants with private sponsors and to plan for refugee applicants to travel to the appropriate location of private sponsors within the United States. In instances where private sponsors are seeking to refer specific individuals to access the USRAP through the P–4 category, additional information is collected on refugee applicants, including biographic information, to assess whether refugee applicants meet the eligibility criteria to access the USRAP through the P–4 category. The information collected on refugee applicants will also assist Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS) officials in conducting adjudications of applicants’ refugee status.

Methodology

The Department of State’s Bureau of Population, Refugees, and Migration (PRM) has entered into a cooperative agreement with the Community Sponsorship Hub (CSH), which is managing a consortium of non-governmental organizations (NGOs) to establish and oversee an online application process to intake applications from PSGs and PSOs and screen their applications for approval for participation in the Welcome Corps.

CSH and the NGO consortium it is managing will also screen referrals submitted by PSGs and PSOs of refugee applicants before sharing referrals with PRM for consideration of whether referred refugee applicants meet the eligibility criteria to be granted access to the USRAP through the P-4 category.

As part of the online application process for PSGs, the NGO consortium will collect information on PSGs as part of completed applications submitted electronically by prospective private sponsors through the program website that is being built and managed by the consortium (www.welcomecorps.org). This will include biographic information on each member of the PSG, evidence that each member of the PSG has completed the required background checks through a third-party identified by the consortium, evidence that at least one member of the PSG has completed required online training developed by the consortium, and details on how PSGs will plan to provide initial resettlement support to the refugees who are matched to them through the Welcome Corps.

In addition, the NGO consortium will also oversee a separate application process for PSOs and collect information from PSOs accordingly. This will include biographic information for a key point of contact at the PSO, background information on the organizational structure of the PSO, and information on the PSO's organizational resources and staffing capacity to mobilize, support, and oversee PSGs.

The NGO consortium will also collect information on refugee applicants referred by PSGs and PSOs for access to the USRAP through the P-4 category that will be submitted electronically by PSGs and PSOs through the program website. This will include biographic information on each refugee applicant being referred, claimed relationships of the principal refugee applicant to all derivatives on the referral, their immigration status in the country of asylum, a narrative of the principal applicant's refugee claim, and supporting documentation.

To support PRM's operational requirements to facilitate placements of refugee cases with PSGs (including those supported by specific PSOs), the consortium will share key biographic information of PSGs and PSOs with PRM. This will include points of contact of PSGs and PSOs, such as the name of the designated point of contact along with that private sponsor group member's address, phone number, email address, and other relevant contact information. Information collected by the NGO consortium on referred refugee

applicants will also be shared with PRM to enable PRM to determine whether applicants meet the eligibility criteria for access to the USRAP through the P-4 category.

The consortium will electronically transmit biographic information on PSGs and PSOs, along with information on refugee applicants, to PRM's Refugee Processing Center (RPC) through secure means. Biographic information on PSGs and PSOs will enable PRM to facilitate the matching of approved refugee applicants with approved PSGs or PSOs and to track the placement of refugee applicants, similarly to how PRM facilitates and tracks placement of refugee applicants supported by PRM's funded resettlement agency partners through the R&P Program. This will enable PRM to have a record of the relevant point of contact for each resettled refugee case supported by a PSG or PSO through the Welcome Corps.

The information on refugee applicants will enable PRM to assess the eligibility of referred applicants to access the USRAP through the P-4 category. Those meeting the eligibility criteria will be granted access to the USRAP for further processing. Referred refugee applicants approved for resettlement in the United States will be served by the private sponsors who referred them.

Kevin E. Bryant,

Deputy Director, Office of Directives Management, U.S. Department of State.

[FR Doc. 2023-21042 Filed 9-26-23; 8:45 am]

BILLING CODE 4710-33-P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36717]

OmniTRAX SBVR, LLC d/b/a South Branch Valley Railroad—Operation Exemption—Railroad Line of West Virginia State Rail Authority in Hampshire, Hardy, and Grant Counties, W. Va.

OmniTRAX SBVR, LLC d/b/a South Branch Valley Railroad (OSL), a noncarrier controlled by short line holding company OmniTRAX Holdings Combined, Inc. (OmniTRAX), has filed a verified notice of exemption under 49 CFR 1150.31 to assume operations over approximately 52.4 miles of rail line, extending from milepost 0.0 at Green Spring, W. Va., to milepost 52.4 at Petersburg, W. Va., located in Hampshire, Hardy, and Grant Counties, W. Va. (the Line).¹

¹ OSL initially filed its verified notice on August 14, 2023. By order served September 8, 2023, the

The Line is owned and currently operated by the West Virginia State Rail Authority (Rail Authority). OSL states that it has reached an agreement with the Rail Authority (Agreement) under which OSL will replace the Rail Authority as the operator on the Line. OSL states that the Rail Authority will retain ownership of, and a residual common carrier obligation over, the Line post-transaction.

This transaction is related to the verified notice of exemption filed in *OmniTRAX Holdings Combined, Inc.—Continuance in Control Exemption—OmniTRAX SBVR, LLC*, Docket No. FD 36716, in which OmniTRAX and HGS Railway Holdings, Inc., seek to continue in control of OSL upon OSL's becoming a Class III rail carrier.

OSL certifies that its projected annual revenues will not exceed \$5 million and will not result in OSL's becoming a Class I or Class II rail carrier. OSL further certifies that it is not contractually limited in its ability to interchange traffic with any third-party connecting carrier.

The effective date of this exemption is October 11, 2023. If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 4, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36717, must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423-0001. In addition, a copy of each pleading must be served on OSL's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606-3208.

According to OSL, this action is categorically excluded from environmental review under 49 CFR 1105.6(c)(2), and from historic preservation reporting requirements under 49 CFR 1105.8(b)(1).

Board decisions and notices are available at www.stb.gov.

Decided: September 21, 2023.

effective dates of the exemptions in this docket and in the related Docket No. FD 36716 were postponed pending further Board order to allow for further briefing and consideration of certain issues. On September 13, 2023, OSL filed an amended verified notice of exemption in Docket No. FD 36717 addressing the issues raised in the September 8 order.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Raina White,
Clearance Clerk.

[FR Doc. 2023–21076 Filed 9–26–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36716]

OmniTRAX Holdings Combined, Inc., and HGS Railway Holdings, Inc.—Continuance in Control Exemption—OmniTRAX SBVR, LLC d/b/a South Branch Valley Railroad

OmniTRAX Holdings Combined, Inc. (OmniTRAX), and HGS Railway Holdings, Inc. (HGS) (collectively, Omni-HGS), both noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of OmniTRAX SBVR, LLC d/b/a South Branch Valley Railroad (OSL), a non-carrier entity controlled by OmniTRAX, upon OSL's becoming a Class III rail carrier.

This transaction is related to a verified notice of exemption filed in *OmniTRAX SBVR, LLC—Operation Exemption—Railroad Line of West Virginia State Rail Authority in Hampshire, Hardy, & Grant Counties, W. Va.*, Docket No. FD 36717, in which OSL seeks to operate an approximately 52.4-mile rail line (the Line) extending from milepost 0.0 at Green Spring, W. Va., to milepost 52.4 at Petersburg, W. Va., owned by the West Virginia Rail Authority.

Omni-HGS states that it will continue in control of OSL upon OSL's becoming a railroad common carrier. According to the verified notice, OmniTRAX and HGS are under joint managerial and operational control. OmniTRAX currently controls 22 Class III rail carriers: Alabama & Tennessee River Railway, LLC; Brownsville & Rio Grande International Railway, LLC; Central Texas & Colorado River Railway, LLC; Chicago Rail Link, L.L.C.; Cleveland & Cuyahoga Railway, LLC; Fulton County Railway, LLC; Georgia & Florida Railway, LLC; Georgia Woodlands Railroad, L.L.C.; Great Western Railway of Colorado, L.L.C.; Illinois Railway, LLC; Kettle Falls International Railway, LLC; Manufacturers' Junction Railway, L.L.C.; Nebraska, Kansas and Colorado Railway, LLC; The Newburgh & South Shore Railroad, LLC; Northern Ohio & Western Railway, L.L.C.; Omni River Ridge, LLC d/b/a River Ridge Railroad; Panhandle Northern Railroad, L.L.C.; Peru Industrial Railroad, LLC; Sand Springs Railway Company; Savannah

Industrial Transportation, LLC (SIT);¹ Stockton Terminal and Eastern Railroad; and The Winchester and Western Railroad Company. HGS controls two Class III railroads: HGS-ATN, LLC; and HGS-FCR, LLC.

Omni-HGS represents that: (1) the rail line to be operated by OSL does not connect with the rail lines of any of the rail carriers controlled by Omni-HGS; (2) the transaction is not part of a series of anticipated transactions that would result in such a connection; and (3) the transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Accordingly, because this transaction involves Class III rail carriers only, the Board may not impose labor protective conditions here.

The effective date of this exemption is October 11, 2023.² If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than October 4, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36716, must be filed with the Surface Transportation Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Omni-HGS's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to Omni-HGS, this action is categorically excluded from

¹ Omni-HGS notes that SIT has limited and provisional authority to operate pursuant to *Savannah Industrial Transportation, LLC—Operation Exemption—in Effingham County, Ga.*, FD 36489, slip op. at 6–7 (STB served Aug. 1, 2023).

² By order served September 8, 2023, the effective dates of the exemptions in this docket and in the related Docket No. FD 36717 were postponed pending further Board order to allow for further briefing and consideration of certain issues. On September 13, 2023, OSL filed an amended verified notice of exemption in Docket No. FD 36717 addressing the issues raised in the September 8 order.

environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at www.stb.gov.

Decided: September 21, 2023.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Raina White,
Clearance Clerk.

[FR Doc. 2023–21077 Filed 9–26–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–1555; Summary Notice No. 2023–37]

Petition for Exemption; Summary of Petition Received; Billings Flying Service

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before October 17, 2023.

ADDRESSES: Send comments identified by docket number FAA–2023–1555 using any of the following methods:

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

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

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

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

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

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

FOR FURTHER INFORMATION CONTACT:

Valerie Smith, AIR-646, Federal Aviation Administration, phone 404-474-5380, email valerie.l.smith@faa.gov.

This notice is published pursuant to 14 CFR 11.85.

Issued in Los Angeles, California on September 22, 2023.

Thuan Nguyen,

Manager, Technical Writing Section.

Petition for Exemption

Docket No.: FAA-2023-1555

Petitioner: Billings Flying Service

Section(s) of 14 CFR Affected:
§ 21.185(b)

Description of Relief Sought: The petitioner is seeking relief from 14 CFR 21.185(b), which allows an applicant for a restricted category airworthiness certificate for an aircraft type certificated in the restricted category, that was either a surplus aircraft of the Armed Forces or previously type certificated in another category, to be entitled to an airworthiness certificate if the aircraft has been inspected by the FAA and found to be in a good state of preservation and repair and in a condition for safe operation. Specifically, the petitioner is requesting relief so that it can apply for and receive restricted category airworthiness certificates for six CH-47D helicopters that were received from the Royal Netherlands Air Force.

[FR Doc. 2023-21061 Filed 9-26-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on a Land Release Request for Change in Use from Aeronautical to Non-Aeronautical at Salisbury-Ocean City: Wicomico Regional Airport, Salisbury, MD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request for a change in use of on-airport property.

SUMMARY: The FAA proposes to rule and invites public comment on Wicomico County's request to change 0.15 acres of federally obligated airport property at Salisbury-Ocean City: Wicomico Regional Airport, Salisbury, MD from aeronautical to non-aeronautical use. This acreage was originally purchased with federal financial assistance through the Airport Development Aid Program (ADAP). The proposed use of land will be compatible with the airport and will not interfere with the airport or its operation.

DATES: Comments must be received on or before October 27, 2023.

FOR FURTHER INFORMATION CONTACT:

Comments on this application may be mailed or delivered to the following address:

Anthony Rudy, Airport Manager,
Salisbury-Ocean City: Wicomico
Regional Airport, 5485 Airport
Terminal Road, Unit A, Salisbury, MD
2804, (410) 548-4827

and at the FAA Washington Airports
District Office:

Matthew J. Thys, Manager, Washington
Airports District Office, 13873 Park
Center Road, Suite 490S, Herndon,
VA 20171, (703) 487-3980

SUPPLEMENTARY INFORMATION: In accordance with the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Public Law 106-181 (Apr. 5, 2000; 114 Stat. 61), this notice must be published in the **Federal Register** 30 days before the Secretary may waive any condition imposed on a federally obligated airport by grant agreements. The following is a brief overview of the request.

Wicomico County has submitted a land release request seeking FAA approval for the change in use of approximately 0.15 acres of federally obligated airport property from aeronautical to non-aeronautical use. The subject property is proposed to be improved with a cell tower and associated parking area.

Parcel 6 was originally purchased with federal financial assistance through

the ADAP program. The FAA has determined the proposed project would have no material impact on aircraft operations, at, to or from the airport; would not affect the safety of people and property on the ground adjacent to the airport as a result of aircraft operations; and would not have an adverse effect on the value of prior Federal investments to a significant extent. Subsequent to the implementation of the proposed change in use, rents received by the airport from this property is considered airport revenue, and will be used in accordance with 49 U.S.C. 47107(b) and the FAA's Policy and Procedures Concerning the Use of Airport Revenue published in the **Federal Register** on February 16, 1999. The proposed use of the property will not interfere with the airport or its operation.

Issued in Herndon, Virginia.

Matthew J. Thys,

Manager, Washington Airports District Office.

[FR Doc. 2023-21035 Filed 9-26-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Rescinding a Notice of Intent To Prepare an Environmental Impact Statement: Delaware County, NY

AGENCY: Federal Highway Administration (FHWA), United States Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The FHWA, in cooperation with the New York State Department of Transportation (NYSDOT), is issuing this notice to advise the public that we are rescinding the 2001 Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) for a previous proposal to improve NYS Route 17 in Delaware County, New York (the Project, NYSDOT Project Identification Number [PIN] 9066.91). FHWA is rescinding the NOI because a substantial amount of time has passed since its original publication, and previously identified funding and design resources were reprioritized and reallocated to other needs, preventing the progression of the Project.

FOR FURTHER INFORMATION CONTACT:

Richard J. Marquis, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 11A Clinton Avenue, Suite 719, Albany, New York 12207, Telephone: (518) 431-4127; or James Rusak, P.E., Regional Director, New York State Department of

Transportation, Region 9, Binghamton State Office Building, 44 Hawley Street, Binghamton, New York 13901, Telephone: (607) 721-8116.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the NYSDOT, previously intended to prepare an EIS to improve a section of the NYS Route 17 corridor within the Towns of Deposit and Hancock in Delaware County, New York. The NOI was published in the **Federal Register** on July 9, 2001, at 66 FR 35824.

The NOI indicated that the Project objectives were to eliminate all at-grade intersections and driveways on NYS Route 17 between Hale Eddy and Hancock and to upgrade NYS Route 17 to Interstate standards for the designation of NYS Route 17 to Interstate 86.

As stated in the 2001 NOI, alternatives under consideration included (1) Do Nothing and (2) Controlled access freeway, built to Interstate standards, with at least one full interchange serving the community of Hale Eddy. Several alignment alternatives were under consideration for further study under the controlled access freeway alternative, which generally included new interchanges and reconstruction of the freeway. Within all of the alternatives, various options for maintaining access to existing properties incorporating service roads were under study. Incorporated into and studied with the various alternatives were design variations of grade and alignment.

Development of the EIS and advancement of the Project was delayed primarily due to increased Project costs and reprioritization of funding. Funding constraints and a subsequent shift in overall NYSDOT priorities led to reprioritization of budget allocations and design resources. Since the Project has not progressed, and because a substantial amount of time has passed since the original NOI was published, the 2001 NOI is being rescinded. The FHWA and NYSDOT will reassess the transportation needs for the NYS Route 17 corridor at this location. If a new action is proposed warranting preparation of an EIS, a new NOI will be published in the future.

Comments and questions concerning this rescission should be directed to the FHWA or NYSDOT at the addresses provided above.

Richard J. Marquis,
Division Administrator, HDA-NY, Federal Highway Administration.

[FR Doc. 2023-21056 Filed 9-26-23; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0023]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from nine individuals for an exemption from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions would enable these hard of hearing and deaf individuals to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 27, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA-2023-0023 using any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov/, insert the docket number (FMCSA-2023-0023) in the keyword box and click "Search." Next, choose the only notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.

- **Mail:** Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590-0001.

- **Hand Delivery:** West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.

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

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64-224, Washington, DC 20590-0001, (202) 366-4001, fmcsamedical@dot.gov. Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket,

contact Dockets Operations, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2023-0023), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0023>. Next, choose the only notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA-2023-0023) in the keyword box and click "Search." Next, choose the only notice listed, and click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. 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 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notice>, the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The nine individuals listed in this notice have requested an exemption from the hearing requirement in 49 CFR 391.41(b)(11). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

On February 1, 2013, FMCSA announced in a Notice of Final Disposition titled, "Qualification of Drivers; Application for Exemptions; National Association of the Deaf," (78 FR 7479), its decision to grant requests from 40 individuals for exemptions from the Agency's physical qualification standard concerning hearing for interstate CMV drivers. Since that time the Agency has published additional notices granting requests from hard of hearing and deaf individuals for exemptions from the Agency's physical

qualification standard concerning hearing for interstate CMV drivers.

III. Qualifications of Applicants

Fred Dudley

Fred Dudley, 53, holds a class C driver's license in Texas.

Jonathan Garcia

Jonathan Garcia, 28, holds a class D driver's license in Arizona.

Juan Hernandez

Juan Hernandez, 23, holds a class C driver's license in Texas.

Francisco Luna

Francisco Luna, 53, holds a class C driver's license in Texas.

Dylan Luttrell

Dylan Luttrell, 36, holds a class F driver's license in Missouri.

Wanda Mack

Wanda Mack, 34, holds a class E driver's license in Florida.

Kevin Nadrowski

Kevin Nadrowski, 42, holds a class D driver's license in Connecticut.

Kevin Prior

Kevin Prior, 38, holds a class D driver's license in New Hampshire.

William Schoemig

William Schoemig, 57, holds a class D driver's license in Utah.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–20957 Filed 9–26–23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0141]

Qualification of Drivers; Exemption Applications; Narcolepsy

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces receipt of an application from one individual for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against operation of a commercial motor vehicle (CMV) in interstate commerce by persons with either a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a CMV. If granted, the exemption would enable this individual who has been diagnosed with narcolepsy and is receiving medical treatment to operate CMVs in interstate commerce.

DATES: Comments must be received on or before October 27, 2023.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2023–0141 using any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov/, insert the docket number (FMCSA–2023–0141) in the keyword box, and click "Search." Next, choose the only notice listed, and click on the "Comment" button. Follow the online instructions for submitting comments.

- **Mail:** Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.

- **Hand Delivery:** West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.

- Fax: (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the "Public Participation" portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, fmcsamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2023–0141), indicate the specific section of this

document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0141>. Next, sort the results by "Posted (Newer-Older)," choose the first notice listed, click the "Comment" button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2023–0141) in the keyword box and click "Search." Next, choose the only notice listed, and click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. 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 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from

the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The individual listed in this notice has requested an exemption from 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of the applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist Medical Examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. The criteria also state that a variety of functional disorders can cause drowsiness, dizziness, confusion, weakness, or paralysis that may lead to incoordination, inattention, loss of functional control, and susceptibility to accidents while driving.

In those individual cases where a driver had an epileptic medical event or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has fully

¹ These criteria may be found in Appendix A to part 391—Medical Advisory Criteria, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

recovered from that condition, has no existing residual complications, and is not taking anti-seizure medication.

III. Qualifications of Applicant

Kevin Cunningham

Kevin Cunningham is a commercial driver's license holder in Tennessee. In a statement dated July 25, 2023, Kevin Cunningham's sleep medicine provider reported that they were diagnosed with obstructive sleep apnea and narcolepsy without cataplexy. Their sleep medicine provider also reported they are treated with a stimulant, compliant with continuous positive airway pressure treatment, and have no concern for risk of sleepiness while driving.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petition described in this notice. We will consider all comments received before the close of business on the closing date indicated in the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–20965 Filed 9–26–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments relating to Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

DATES: Written comments should be received on or before November 27, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or

by email to pra.comments@irs.gov. Include “OMB Number 1545–1349” in the subject line of the message.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of this collection should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at Martha.R.Brinson@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

OMB Number: 1545–1349.

Abstract: The proposed research will improve the quality of data collection by examining the psychological and cognitive aspects of methods and procedures such as: Interviewing processes, forms redesign, survey and tax collection technology and operating procedures (internal and external in nature).

Current Actions: We will be conducting different opinion surveys, focus group sessions, think-aloud interviews, and usability studies regarding cognitive research surrounding forms submission or IRS system/product development.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals and businesses or other for-profit organizations.

Estimated Number of Respondents: 6,000.

Estimated Time per Respondent: 1 hour, 30 minutes.

Estimated Total Annual Burden Hours: 9,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance

of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 18, 2023.

Martha Brinson,

Tax Analyst.

[FR Doc. 2023–21052 Filed 9–26–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0768]

Agency Information Collection Activity: Program of Comprehensive Assistance for Family Caregivers (PCAFC)

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before November 27, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at www.Regulations.gov or to Grant Bennett, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to Grant.Bennett@va.gov. Please refer to “OMB Control No. 2900–0768” in any correspondence. During

the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266–4688 or email maribel.aponte@va.gov. Please refer to “OMB Control No. 2900–0768” in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Program of Comprehensive Assistance for Family Caregivers (PCAFC) (VA Form 10–10CG).

OMB Control Number: 2900–0768.

Type of Review: Revision of a currently approved collection.

Abstract: Authority for this information collection is found in Public Law (Pub. L.) 111–163, Caregivers and Veterans Omnibus Health Services Act of 2010, as amended in title 38 United States Code Chapter 17 by adding a new section, 1720G, “Assistance and Support Services for Caregivers.” Section 1720G required the Department of Veterans Affairs (VA) to develop a Program of Comprehensive Assistance for Family Caregivers and Support Services. Under the law, Primary Family Caregivers may be eligible to receive a stipend, access to health care coverage, mental health counseling, comprehensive caregiver education and training, and expanded respite services. Caregivers also may be eligible for travel benefits when they accompany the Veteran for care or attending training.

In order to administer these benefits to caregivers, it is necessary that the VA

receive information about the nature of benefit being sought and the persons who will be serving as caregivers and receiving benefits. This information is collected with VA Form 10–10CG, which is currently approved under Office of Management and Budget (OMB) Control Number 2900–0768. VA requests a three-year renewal of the PRA clearance for 10–10CG from OMB to continue with the collection of this

information, which is necessary to administer VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC).

Affected Public: Individuals or households.

Estimated Annual Burden: 27,668 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 110,671.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–21116 Filed 9–26–23; 8:45 am]

BILLING CODE 8320–01–P



FEDERAL REGISTER

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September 27, 2023

Part II

Environmental Protection Agency

40 CFR Parts 121, 122, and 124

Clean Water Act Section 401 Water Quality Certification Improvement Rule;
Final Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 121, 122, and 124**

[EPA-HQ-OW-2022-0128; FRL-6976.1-03-OW]

RIN 2040-AG12

Clean Water Act Section 401 Water Quality Certification Improvement Rule**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: Following careful reconsideration of the water quality certification rule the U.S. Environmental Protection Agency (EPA or the Agency) promulgated in 2020, the Agency is finalizing a rule revising and replacing the 2020 regulatory requirements for water quality certification under Clean Water Act (CWA) section 401. This final rule updates the existing regulations to better align with the statutory text and purpose of the CWA; to clarify, reinforce, and provide a measure of consistency with elements of section 401 certification practice that have evolved over the more than 50 years since EPA first promulgated water quality certification regulations; and to support an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles central to CWA section 401. An Executive order signed on January 20, 2021, entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” directed the Agency to review the water quality certification rule EPA promulgated in 2020, and this final rule culminates that review. The Agency is also finalizing conforming amendments to the water quality certification regulations for EPA-issued National Pollutant Discharge Elimination System (NPDES) permits.

DATES: This action is effective on November 27, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2022-0128. All documents in the docket are listed on the <https://www.regulations.gov/> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available in hard copy form. Publicly

available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Lauren Kasperek, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202-564-3351; email address: cwa401@epa.gov.

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I. Executive Summary

Clean Water Act (CWA) section 401 provides states¹ and authorized Tribes² with a powerful tool to protect the quality of their waters from adverse impacts resulting from the construction and/or operation of federally licensed or permitted projects. Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into “waters of the United States”³ unless the state or authorized Tribe where the discharge would originate either issues a CWA section 401 water quality certification “that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307” of the CWA, or waives certification. 33 U.S.C. 1341(a)(1). When granting a CWA section 401 certification, CWA section 401(d) directs states and authorized Tribes to include conditions, including “effluent limitations and other limitations, and monitoring requirements,” necessary to assure that the applicant for a Federal license or permit will comply with CWA sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.” *Id.* at 1341(d).

Congress originally created the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970, which amended the Federal Water Pollution Control Act (FWPCA).⁴ Congress granted states this certification authority in response to Federal agencies’ failure to achieve Congress’s previously stated goal of assuring that federally licensed or permitted activities comply with water quality standards.⁵ Two years

¹ The CWA defines “state” as “a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.” 33 U.S.C. 1362(3).

² The term “authorized Tribes” refers to Tribes that have been approved for “treatment in a manner similar to a State” status for CWA section 401. See 33 U.S.C. 1377(e).

³ The CWA, including section 401, uses the term “navigable waters,” which the statute defines as “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). This final rule uses the term “waters of the United States” interchangeably with “navigable waters”.

⁴ Water Quality Improvement Act of 1970, Public Law 91-224, 84 Stat. 91 (April 3, 1970).

⁵ S. Rep. 91-351, at 26 (1969) (“Existing law declares it to be the intent of Congress that all Federal departments, agencies, and instrumentalities shall comply with water quality standards. This declaration of intent has proved unsatisfactory. One basic thrust of S. 7 is to require that all activity over which the Federal Government has direct control— . . . federally licensed or permitted activity—be carried out in a manner to assure compliance with applicable water quality standards.”)

later, Congress revised the Federal water quality protection framework⁶ when it enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or CWA).⁷ In those Amendments, Congress placed the water quality certification requirement in section 401, using “substantially section 21(b) of existing law,” with relevant conforming amendments “to assure consistency with the [] changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” S. Rep. No. 92–414 at 69 (1971); *see also* H.R. Rep. No. 92–911 at 121 (1972) (“Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.”). Consistent with the overall cooperative federalism framework of the CWA, section 401 authorizes states and authorized Tribes to play a significant role in the Federal licensing or permitting process.

EPA promulgated implementing regulations for water quality certification in 1971 (1971 Rule)⁸ prior to enactment of the 1972 amendments to the CWA. In 1979, the Agency recognized the need to update its water quality certification regulations, in part to be consistent with the 1972 amendments. *See* 44 FR 32854, 32856 (June 7, 1979) (noting the 40 CFR part 121 regulations predated the 1972 amendments). However, the Agency declined to update the regulations at the time because it had not consulted with other Federal agencies impacted by the water quality certification process, and instead developed regulations applicable to water quality certifications on EPA-issued National Pollutant Discharge Elimination System (NPDES) permits. *Id.*; *see, e.g.*, 40 CFR 124.53 through 124.55. As a result, for a number of years, the 1971 Rule did not fully reflect the amended statutory language. Following the promulgation of the 1971 Rule, several seminal court cases have addressed fundamental aspects of the water quality certification process, including the scope of certification review and the appropriate timeframe for certification decisions. States have also developed and

implemented their own water quality certification programs and practices aimed at protecting waters within their borders. During this time, the Agency supported state and Tribal water quality certification practices and the critical role states and Tribes play in protecting their waters under section 401.⁹ But the 1971 Rule did not reflect or account for water quality certification practices or judicial interpretations of section 401 that evolved over the 50 years since 1971.

EPA revised the 1971 Rule in 2020.¹⁰ The 2020 Rule did not update the regulations applicable to water quality certifications on EPA-issued NPDES permits but noted that the Agency would “make any necessary conforming regulatory changes in a subsequent rulemaking.” 85 FR 42219 (July 13, 2020). The 2020 Rule represented a substantive departure from some of the Agency’s and certifying authorities’ core prior interpretations and practices with respect to water quality certification. The 2020 Rule also deviated sharply from the cooperative federalism framework central to section 401 and the CWA. While the 2020 Rule reaffirmed some of the Agency’s and the courts’ prior interpretations, *e.g.*, the need for a potential point source discharge into waters of the United States to trigger the section 401 water quality certification requirement, it rejected nearly 50 years of Agency practice and over 25 years of Supreme Court precedent regarding the appropriate scope of certification review, *i.e.*, rejecting “activity as a whole” for the narrower “discharge-only” approach. Additionally, the 2020 Rule introduced new procedural requirements that disrupted state and Tribal certification programs that evolved over the last half century. In this final rule, the Agency is returning to those important core interpretations and practices, such as an “activity” approach to the scope of certification review and greater deference to the role of states and Tribes in the certification process, while retaining (and adding) elements that provide transparency and predictability for all stakeholders.

On January 20, 2021, President Biden signed Executive Order 13990 directing

Federal agencies to review actions taken in the prior four years that are, or may be, inconsistent with the policies stated in the order (including, but not limited to, bolstering resilience to climate change impacts and prioritizing environmental justice).¹¹ Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (published January 25, 2021, signed January 20, 2021). Pursuant to this Executive order, EPA reviewed the 2020 Rule. EPA identified substantial concerns with several of its provisions that were in tension with section 401’s cooperative federalism approach to ensuring that states and Tribes are empowered to protect their water quality. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541, 29542 (June 2, 2021) (identifying the Agency’s concerns with the 2020 Rule). As a result, the Agency announced its intention to revise the 2020 Rule so that it is (1) well-informed by stakeholder input, (2) better aligned with the cooperative federalism principles that have been central to the effective implementation of the CWA, and (3) responsive to the environmental protection and other objectives outlined in Executive Order 13990. *Id.*

Five months after EPA’s announcement of its intent to reconsider and revise the 2020 Rule, on October 21, 2021, in a legal challenge to the 2020 Rule, a Federal district court remanded and vacated the 2020 Rule. *In Re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021). While EPA had not asked the court to vacate the 2020 Rule,¹² the court found that vacatur was appropriate “in light of the lack of reasoned decision-making and apparent errors in the rule’s scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand.” *Id.* at 1026–27. The effect of the court’s vacatur was to reinstate the 1971 Rule, effective October 21, 2021. Defendant-intervenors appealed the vacatur order to the U.S. Court of Appeals for the Ninth Circuit. On April 6, 2022, the U.S. Supreme Court granted the defendant-

⁶ *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 317 (1981).

⁷ Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.*

⁸ 36 FR 5863 (May 8, 1971), redesignated at 36 FR 22369, 22487 (November 25, 1971), further redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979).

⁹ *See* Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (hereinafter, 1989 Guidance); Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) (hereinafter, 2010 Handbook) (rescinded in 2019, *see infra*).

¹⁰ Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (hereinafter, 2020 Rule). For further discussion on the 2020 Rule, including legal challenges, please see section III of this preamble.

¹¹ EPA has defined environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” *See* <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

¹² *See* EPA’s Motion for Remand Without Vacatur, No. 3:20-cv-04636-WHA (N.D. Cal. July 1, 2021).

intervenor's application for a stay of the vacatur pending the Ninth Circuit appeal. *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022).¹³ As a result of the Supreme Court's stay, the 2020 Rule once again applied to section 401 certifications. On February 21, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's remand with vacatur order and remanded the case back to the U.S. District Court for the Northern District of California for further proceedings.¹⁴ As a result of the Ninth Circuit's decision, the 2020 Rule applies until this final rule goes into effect.

The Agency is finalizing revisions to the 2020 Rule to better reflect the cooperative federalism framework and text of the 1972 and 1977 statutory amendments. The final rule also clarifies issues such as scope of certification and the reasonable period of time for a certifying authority to act. The final rule modifies the regulatory text implementing section 401 to support a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of CWA section 401 and Executive Order 13990. The Agency is also finalizing conforming amendments to the water quality certification regulations for EPA-issued NPDES permits.

II. General Information

A. What action is the Agency taking?

In this action, the Agency is publishing a final rule to replace its

¹³ The Court's stay order does not alter EPA's legal conclusions discussed in this final rule. The request for a stay concerned only the appropriateness of the district court's vacatur of a rule before a decision on the merits. The stay request did not raise any issues related to the substance of CWA section 401 certification or the merits of the 2020 Rule. See Application for Stay Pending Appeal in *Louisiana v. Am. Rivers*, No. 21A539, pp. 1, 4, 16 (March 21, 2022) (identifying "the core issue in this case" to be the appropriateness of the district court's vacatur order) (identifying the Administrative Procedure Act (APA)—not the CWA or section 401—as the statutory provision involved in the application for stay) (starting the application for stay with the question: "Can a single district court vacate a rule that an agency adopted through notice-and-comment rulemaking without first finding that the rule is unlawful?"). Neither the Court's majority—which did not issue an opinion explaining its stay order—nor the dissent discussed any aspect of section 401 certification or the 2020 Rule.

¹⁴ The court found that "the district court lacked the authority to vacate the 2020 Rule without first holding it unlawful." *In Re Clean Water Act Rulemaking*, 60 F.4th 583, 596 (9th Cir. 2023). The court did not address the merits of the 2020 Rule, noting that it could not "engage in the factfinding that might be needed to identify any harms that keeping the 2020 Rule in place during a remand might cause. . . ." *Id.*

currently effective water quality certification regulations at 40 CFR part 121 and to make conforming edits in 40 CFR parts 122 and 124.

B. What is the Agency's authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including but not limited to sections 101(d), 304(h), 401, 402, and 501(a).

C. What are the incremental costs and benefits of this action?

The Agency prepared the Economic Analysis for the Final "Clean Water Act Section 401 Water Quality Certification Improvement Rule" ("Economic Analysis for the Final Rule"), which evaluates the potential costs and benefits and is available in the rulemaking docket. The analysis is summarized in section V in this preamble. The Economic Analysis for the Final Rule is qualitative due to significant limitations and uncertainties associated with estimating the incremental costs and benefits of the final rule. See section V of this preamble for further discussion.

III. Background

A. Development of Section 401

In 1965, Congress amended the Federal Water Pollution Control Act (FWPCA) to require states, or, where a state failed to act, the newly created Federal Water Pollution Control Administration, to promulgate water quality standards for interstate waters within each state. Water Quality Act of 1965, Public Law 89-234, 79 Stat. 903 (October 2, 1965). These standards were meant "to protect the public health or welfare, enhance the quality of water and serve the purposes of [the] Act," which included "enhanc[ing] the quality and value of our water resources and [] establish[ing] a national policy for the prevention, control, and abatement of water pollution." *Id.* Yet, only a few years later, while debating potential amendments to the FWPCA, Congress observed that, despite that laudable national policy, states faced obstacles to achieving these newly developed water quality standards because of an unexpected source: Federal agencies. Instead of helping states cooperatively achieve these Federal policy objectives, Federal agencies were "sometimes . . . a culprit with considerable responsibility for the pollution problem which is present." 115 Cong. Rec. 9011, 9030 (April 15, 1969). Federal agencies were issuing licenses and permits "without any assurance that [water

quality] standards [would] be met or even considered." S. Rep. No. 91-351, at 3 (August 7, 1969). As a result, states, industry groups, conservation groups, and the public alike "questioned the justification for requiring compliance with water quality standards" if Federal agencies themselves would not comply with those standards. *Id.* at 7.

In response to such concerns, Congress introduced language that would bolster state authority to protect their waters and ensure federally licensed or permitted projects would not "in fact become a source of pollution" either through "inadequate planning or otherwise." 115 Cong. Rec. 9011, 9030 (April 15, 1969). Under this new provision, instead of relying on the Federal Government to ensure compliance with water quality standards, states would be granted the power to certify that there was reasonable assurance that federally licensed or permitted activities would meet water quality standards before such a Federal license or permit could be issued. Ultimately, Congress added this new provision as section 21(b) of the Water Quality Improvement Act of 1970, Public Law 91-224, 84 Stat. 91 (April 3, 1970).

Under section 21(b)(1), applicants for Federal licenses or permits were required to obtain state certification that there was reasonable assurance that any federally licensed or permitted activity that may result in any discharge into navigable waters would not violate applicable water quality standards. *Id.* Additionally, section 21(b) also provided a role for other potentially affected states, discussed scenarios under which state certification for both Federal construction and operation licenses or permits may be necessary, and provided an opportunity for a Federal license or permit to be suspended for violating applicable water quality standards. Section 21(b) embodied the cooperative federalism principles from the 1965 amendments by providing states with the opportunity to influence, yet not "frustrate," the Federal licensing or permitting process. See 115 Cong. Rec. 28875, 28971 (October 7, 1969) (noting the idea of state certification "[arose] out of policy of the 1965 Act that the primary responsibility for controlling water pollution rests with the States"); see also H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Rep.) (adding a timeline for state certification "[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application").

In 1972, with the enactment of the Clean Water Act, Congress significantly

revised the statutory water quality protection framework.¹⁵ Clean Water Act, Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* While doing so, Congress reaffirmed “the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.”¹⁶ To this end, the 1972 amendments included section 401, which Congress considered to be “substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.” H.R. Rep. No. 92–911, at 121 (1972). These “new requirements” of the 1972 Act reflected a “changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” S. Rep. No. 92–414, at 69 (1971). As a result, unlike section 21(b), which focused only on compliance with water quality standards, section 401 required applicants for Federal licenses and permits to obtain state certification of compliance with the newly enacted provisions focused on achieving effluent limitations. 33 U.S.C. 1341(a)(1). A few years later, Congress amended section 401 to correct an omission from the 1972 statute and clarify that it still intended for states to also certify compliance with water quality standards. *See* H.R. Rep. No. 95–830, at 96 (1977) (inserting section 303 in the list of applicable provisions throughout section 401).¹⁷

Section 401 of the 1972 Act also introduced a new subsection, subsection (d), that explicitly provided states with the ability to include “effluent limitations and other limitations, and monitoring requirements” in their certification to assure that the applicant will comply not only with sections 301, 302, 306, and 307, but also with “any other appropriate requirement of State

law.” *Id.* at 1341(d). In subsection (d), Congress also provided that any certification “shall become a condition on any Federal license or permit.” *Id.*; *see also* S. Rep. No. 92–414, at 69 (1971) (“The certification provided by a State in connection with any Federal license or permit must set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law and such a certification becomes an enforceable condition on the Federal license or permit.”). Consistent with Congress’s intent to empower states to protect their waters from the effects of federally licensed or permitted projects, this provision “assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.” S. Rep. No. 92–414, at 69 (1971).

B. Overview of Section 401 Requirements

Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the certifying authority where the discharge would originate either issues a CWA section 401 water quality certification or waives certification. 33 U.S.C. 1341(a)(1). The applicant for the Federal license or permit that requires section 401 certification is responsible for obtaining certification or a waiver from the certifying authority, which could be a state, territory, authorized Tribe, or EPA, depending on where the discharge originates. To initiate the certification process, Federal license or permit applicants must submit a “request for certification” to the appropriate certifying authority. The certifying authority must act upon the request within a “reasonable period of time (which shall not exceed one year).” *Id.* Additionally, during the reasonable period of time, certifying authorities must comply with public notice procedures established for certification requests, and where appropriate, procedures for public hearings. *Id.*

If a certifying authority determines that the activity will comply with the listed provisions in section 401(a)(1), it may grant or waive certification. *See* section IV.E in this preamble for further discussion on the scope of certification. When granting a CWA section 401 certification, certifying authorities must include conditions (*e.g.*, “effluent limitations and other limitations, and monitoring requirements”) pursuant to CWA section 401(d) necessary to assure that the applicant for a Federal license or permit will comply with applicable

provisions of CWA sections 301, 302, 306, and 307, and with “any other appropriate requirement of State law.” 33 U.S.C. 1341(d). If a certifying authority grants certification with conditions, those conditions are incorporated into the Federal license or permit. *Id.* Once an applicant provides a Federal agency with a certification, the Federal agency may issue the license or permit. *Id.* at 1341(a)(1).

If a certifying authority is unable to provide such certification, the certifying authority may deny or waive certification. If certification is denied, the Federal agency cannot issue the Federal license or permit. If certification is waived, the Federal agency may issue the Federal license or permit. Certifying authorities may waive certification expressly, or they may waive certification by “fail[ing] or refus[ing] to act on a request for certification within a reasonable period of time.” *Id.* Either way, the Federal licensing or permitting agency may issue the Federal license or permit.

Although Congress provided section 401 certification authority to the jurisdiction in which the discharge originates, Congress also recognized that another state or authorized Tribe’s water quality may be affected by the discharge, and it created an opportunity for such a state or authorized Tribe to raise objections to, and request a hearing on, the Federal license or permit. *See id.* at 1341(a)(2). Section 401(a)(2) requires the Federal agency to “immediately notify” EPA “upon receipt” of a “[license or permit] application and certification.” *Id.* EPA in turn has 30 days from that notification to determine whether the discharge “may affect” the water quality of any other state or authorized Tribe. *Id.* If the Agency makes a “may affect” determination, it must notify the other state or authorized Tribe, the Federal agency, and the applicant. The other state or authorized Tribe then has 60 days to determine whether the discharge will violate its water quality requirements. If the other state or authorized Tribe makes such a determination within those 60 days, it must notify EPA and the Federal agency, in writing, of its objection(s) to the issuance of the Federal license or permit and request a public hearing. *Id.* The Federal licensing or permitting agency is responsible for holding the public hearing. At the hearing, EPA is required to submit its evaluation and recommendations regarding the objection. Based on the recommendations from the objecting state or authorized Tribe and EPA’s own evaluation and recommendation, as well as any evidence presented at the

¹⁵ *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 317 (1981).

¹⁶ 33 U.S.C. 1251(b).

¹⁷ The conference report noted that “[t]he inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306, and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402, and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed.” *Id.*

hearing, the Federal agency is required to condition the license or permit “in such manner as may be necessary to ensure compliance with applicable water quality requirements.” *Id.* The Federal license or permit may not be issued “if the imposition of conditions cannot ensure such compliance.” *Id.*

Section 401 also addresses when an applicant must provide separate certifications for a facility’s Federal construction license or permit and any necessary Federal operating license or permit. Under section 401(a)(3), an applicant may rely on the same certification obtained for the construction of a facility for any Federal operating license or permit for the facility if (1) the Federal agency issuing the operating license or permit notifies the certifying authority, and (2) the certifying authority does not within 60 days thereafter notify the Federal agency that “there is no longer reasonable assurance that there will be compliance with applicable provisions of sections [301, 302, 303, 306, and 307 of the CWA].” *Id.*¹⁸

Sections 401(a)(4) and (a)(5) describe circumstances where the certified Federal license or permit may be suspended by the Federal agency. First, a Federal agency may suspend a license or permit where a certifying authority determines during a pre-operation inspection of the facility or activity that it will violate applicable water quality requirements. *Id.* at 1341(a)(4). This pre-operation inspection and possible suspension apply only where a facility or activity does not require a separate operating Federal license or permit. Under section 401, the Federal agency may not suspend the license or permit unless it holds a public hearing.¹⁹ *Id.* Once a Federal license or permit is suspended, it must remain suspended until the certifying authority notifies the Federal agency that there is reasonable assurance that the facility or activity will not violate applicable water quality requirements. *Id.* Second, a Federal agency may suspend or revoke a certified license or permit upon the entering of a judgment under the CWA that the facility or activity violated applicable provisions of section 301,

302, 303, 306, or 307 of the CWA. *Id.* at 1341(a)(5).

Section 401 not only identifies the roles and obligations of Federal license or permit applicants, certifying authorities, and Federal agencies, it also provides specific roles for EPA. First, EPA may act as a certifying authority where a state or authorized Tribe “has no authority to give such certification.” *Id.* at 1341(a)(1). Second, as discussed above, EPA is responsible for notifying other states or authorized Tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such other state or authorized Tribe’s objections. *Id.* at 1341(a)(2). Lastly, EPA is responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id.* at 1341(b).

C. Prior Rulemaking Efforts Addressing Section 401

In the last 50 plus years, EPA has undertaken two rulemaking efforts focused solely on addressing water quality certification, one of which preceded the 1972 amendments to the CWA. The Agency has also developed several guidance documents on the section 401 process. This section of the preamble discusses EPA’s major rulemaking and guidance efforts over the last 50 plus years, including most recently the 2020 Rule and EPA’s review of it pursuant to Executive Order 13990.

1. 1971 Rule

In February 1971, EPA proposed regulations implementing section 401’s predecessor provision, section 21(b) of the FWPCA. 36 FR 2516 (February 5, 1971). Those proposed regulations were divided into four subparts, one of which provided “definitions of general applicability for the regulations and . . . provide[d] for the uniform content and form of certification.” *Id.* The other three subparts focused on EPA’s roles. *Id.* In May 1971, after receiving public comments, EPA finalized the water quality certification regulations with the proposed four-part structure at 18 CFR part 615. 36 FR 8563 (May 8, 1971) (“1971 Rule”).

The first subpart of the 1971 Rule (subpart A) established requirements that applied generally to all stakeholders in the certification process, including an identification of information that all certifying authorities must include in a certification. According to the 1971 Rule, a certifying authority was required

to include several components in a certification, including the name and address of the project applicant; a statement that the certifying authority either examined the Federal license or permit application or examined other information from the project applicant and, based upon that evaluation, concluded that “there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;” any conditions that the certifying authority deemed “necessary or desirable for the discharge of the activity;” and any other information the certifying authority deemed appropriate. 40 CFR 121.2(a) (2019). Additionally, the 1971 Rule allowed for modifications to certifications upon agreement by the certifying authority, the Federal licensing or permitting agency, and EPA. *Id.* at § 121.2(b) (2019).

The second subpart of the 1971 Rule (subpart B) established a process for EPA to provide notification of potential water quality effects to other potentially affected jurisdictions. Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit application, the certification or waiver, and, where requested by EPA, any supplemental information provided by the Federal licensing or permitting agency.²⁰ If the Regional Administrator determined that there was “reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates,” the Regional Administrator would notify each affected state within 30 days of receipt of the application materials and certification. *Id.* at §§ 121.13, 121.16 (2019). In cases where the Federal licensing or permitting agency held a public hearing on the objection raised by an affected jurisdiction, the Federal agency was required to forward notice of such objection to the Regional Administrator no later than 30 days prior to the hearing. *Id.* at § 121.15 (2019). At the hearing, the Regional Administrator was required to submit an evaluation and “recommendations as to whether and under what conditions the license or permit should be issued.” *Id.*

Subpart B also provided that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on

¹⁸ Section 401(a)(3) identifies the bases a certifying authority may rely upon for finding that there is no longer reasonable assurance. These are changes after certification was granted in: construction or operation of the facility, characteristics of the water where the discharge occurs, or the applicable water quality criteria or effluent limits or other requirements. *Id.* at 1341(a)(3).

¹⁹ Each Federal licensing or permitting agency may have its own regulations regarding additional processes for suspending a license or permit.

²⁰ If the documents provided are insufficient to make the determination, the Regional Administrator can request any supplemental information “as may be required to make the determination.” 40 CFR 121.12 (2019).

a request for certification; and second, when the Federal licensing or permitting agency sends written notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id.* at § 121.16 (2019). The 1971 Rule provided that the Federal licensing or permitting agency determined what constitutes a “reasonable period of time,” and that the period shall generally be six months, but in any event no more than one year. *Id.* at § 121.16(b) (2019).

The third subpart of the 1971 Rule (subpart C) established requirements that only applied when EPA acted as the certifying authority, including identifying specific information that must be included in a certification request. The project applicant was required to submit to the EPA Regional Administrator a signed request for certification that included a “complete description of the discharge involved in the activity for which certification is sought,” which included five items: the name and address of the project applicant, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge would begin and end, and a description of the methods to be used to monitor the quality and characteristics of the discharge. *Id.* at § 121.22 (2019). Once the request was submitted to EPA, the Regional Administrator was required to provide public notice of the request and an opportunity to comment. The 1971 Rule specifically stated that “[a]ll interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determined that such a hearing is necessary or appropriate.” *Id.* at § 121.23 (2019). If, after consideration of relevant information, the Regional Administrator determined that there was “reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards,” the Regional Administrator would issue the certification. *Id.* at § 121.24 (2019).

The fourth and final subpart of the 1971 Rule (subpart D) provided that the Regional Administrator “may, and upon request shall” provide Federal licensing and permitting agencies with information regarding water quality standards and advise them as to the

status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id.* at § 121.30 (2019).

In November 1971, EPA reorganized and transferred several regulations, including the water quality certification regulations, into title 40 of the Code of Federal Regulations. EPA subsequently redesignated the water quality certification regulations twice in the 1970s. *See* 36 FR 22369, 22487 (November 25, 1971), redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979). The last redesignation effort was part of a rulemaking that extensively revised the Agency’s NPDES regulations. In the revised NPDES regulations, EPA addressed water quality certifications on EPA-issued NPDES permits separately from the 1971 Rule. EPA acknowledged that the 1971 Rule was “in need of revision” because the “substance of these regulations predates the 1972 amendments to the Clean Water Act.” 44 FR 32880 (June 7, 1979). However, EPA declined to revise the 1971 Rule because it had not consulted the other Federal agencies impacted by the water quality certification process. *Id.* at 32856. Instead, the Agency finalized regulations applicable only to certification on EPA-issued NPDES permits. *Id.* at 32880. EPA developed these regulations, which included a default reasonable period of time of 60 days, limitations on certification modifications, and requirements for certification conditions, in response to practical challenges and issues arising from certification on EPA-issued permits. *Id.* Ultimately, despite the changes Congress made to the statutory text in 1972 and opportunities the Agency had to revisit the regulatory text during redesignation efforts in the 1970s, EPA did not substantively change the 1971 Rule until 2020.

2. EPA Guidance on 1971 Rule

Although EPA did not pursue any additional rulemaking efforts until 2019, the Agency issued three national guidance documents on the water quality certification process set forth in the 1971 Rule. The first and second guidance documents recognized the vital role section 401 certification can play in protecting state and Tribal water quality, sought to inform states and Tribes how to use the certification program to protect their waters, and explained how to leverage available resources to operate or expand their certification programs. These documents provided states and Tribes with background on the certification

process, discussed the relevant case law, and identified data sources that could inform the certification review process. Additionally, both documents provided tangible examples of state and Tribal experiences with section 401 that could inform other states and Tribes interested in developing their certification programs.

The first guidance document, issued in 1989, focused on how states and Tribes could use water quality certifications to protect wetlands. Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (“1989 Guidance”). While the 1989 Guidance focused on the use of water quality certifications in lieu of, or in addition to, state or Tribal wetlands regulatory programs, it provided helpful background information on the certification process in general. It also highlighted various state programs and water quality certification practices to demonstrate how other certifying authorities could approach the certification process. For example, the 1989 Guidance highlighted a certification denial issued by the then-Pennsylvania Department of Environmental Resources to illustrate that “all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State’s certification review.” *Id.* at 22–23. Additionally, the 1989 Guidance discussed considerations states and Tribes could examine when developing their own section 401 implementing regulations, as well as programs and resources states and Tribes could look to for technical support when making certification decisions. *Id.* at 30–37.

The second guidance document, issued in 2010, reflected the development of case law and state and Tribal program experiences over the two decades following the 1989 Guidance. Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) (“2010 Handbook”) (rescinded in 2019). Instead of focusing on certifications in the context of wetland protection, the 2010 Handbook described more broadly how the certification process could help states and Tribes achieve their water quality goals. Like the 1989 Guidance, the 2010 Handbook discussed the certification process, using state and Tribal programs as examples, and explored methods and means for states and Tribes to leverage available funding, staffing, and data sources to fully implement a water quality certification program. EPA

rescinded the 2010 Handbook on June 7, 2019, concurrent with the publication of the third guidance document.

EPA issued the third guidance document in 2019 pursuant to Executive Order 13868. Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 2019) (“2019 Guidance”) (rescinded). The 2019 Guidance was meant to “facilitate consistent implementation of section 401 and 1971 certification regulations” based on the view that the 2010 Handbook did not “reflect current case law interpreting CWA section 401.” 85 FR 42213. The 2019 Guidance focused on three topics: (1) timeline for certification review and action, (2) the scope of section 401, and (3) the information within the scope of a certifying authority’s review. 2019 Guidance at 1. EPA rescinded the 2019 Guidance on July 13, 2020, concurrent with the publication of the final 2020 Rule.

3. Development of the 2020 Rule

In addition to directing EPA to review its 2010 Handbook and issue new section 401 guidance, Executive Order 13868, entitled Promoting Energy Infrastructure and Economic Growth, also directed EPA to propose new regulations governing section 401 consistent with the policy set forth in the order to “promote private investment in the Nation’s energy infrastructure.” 84 FR 13495, 13496 (April 15, 2019). It is noteworthy that, even in the context of directing EPA to initiate changes to a water quality protection rule, the executive order did not direct the Agency to consider the water quality consequences of any such changes. EPA issued the proposed rule on August 22, 2019.²¹ EPA promulgated a final rule on July 13, 2020. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (“2020 Rule”).

The 2020 Rule reaffirmed that Federal agencies unilaterally set the reasonable period of time, clarified that the certification requirement was triggered by a point source discharge from a federally licensed or permitted activity into “waters of the United States,” and reaffirmed that certifying authorities may explicitly waive certification. The 2020 Rule also introduced several new features, including one that allowed Federal agencies to review certification decisions for compliance with the 2020 Rule’s requirements and, if the certification decision did not comply with these requirements, allowed

Federal agencies to deem such non-compliant certifications as waived. The 2020 Rule also prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request and rejected the scope of certification review (“activity as a whole”) affirmed by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), in favor of a more limiting interpretation (“discharge-only” approach) favored by two dissenting Justices in that case.

Following publication, the 2020 Rule was challenged in three Federal district courts by states, Tribes, and non-governmental organizations.²² Industry stakeholders and eight states intervened on behalf of EPA to defend the 2020 Rule. On October 21, 2021, following briefing and a hearing on EPA’s motion for remand without vacatur, the U.S. District Court for the Northern District of California both remanded and vacated the 2020 Rule. *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021) (*reversed and remanded* by 60 F.4th 583 (9th Cir. 2023)). The court found that vacatur was appropriate “in light of the lack of reasoned decision-making and apparent errors in the rule’s scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand.” *Id.* at 1026–27. The court order required a temporary return to EPA’s 1971 Rule until EPA finalized a new rule.²³ After the Ninth Circuit denied intervenors’ motion for stay pending appeal on February 24, 2022, intervenors filed an application for a stay of the vacatur pending appeal in the Supreme Court on March 21, 2022. On April 6, 2022, the U.S. Supreme Court granted the application for a stay of the vacatur pending resolution of the appeal of the vacatur in the Ninth Circuit. *Louisiana v. Am. Rivers*, No. 21A539 (S. Ct. April 6, 2022). On February 21, 2023, the Ninth Circuit reversed the remand with vacatur and remanded the case back to

the U.S. District Court for the Northern District of California for further proceedings. *In Re Clean Water Act Rulemaking*, No. 21–16958 (9th Cir. February 21, 2023).

4. Executive Order 13990 and Review of the 2020 Rule

On January 20, 2021, President Biden signed Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Order). 86 FR 7037 (published January 25, 2021, signed January 20, 2021). The Order provides that “[i]t is, therefore, the policy of my Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” *Id.* at 7037, Section 1. The Order “directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis.” *Id.* “For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.” *Id.*, section 2(a). The Order also revoked Executive Order 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth), which initiated development of the 2020 Rule, and specifically identified the 2020 Rule for review. See Fact Sheet: List of Agency Actions for Review, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (last visited on January 27, 2022).

EPA reviewed the 2020 Rule in accordance with Executive Order 13990 and, in the spring of 2021, determined that it would propose revisions to the 2020 Rule through a new rulemaking effort. See Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86

²² *In Re Clean Water Act Rulemaking*, No. 3:20–cv–04636–WHA (N.D. Cal.); *Delaware Riverkeeper et al. v. EPA*, No. 2:20–cv–03412 (E.D. Pa.); *S.C. Coastal Conservation League v. EPA*, No. 2:20–cv–03062 (D.S.C.).

²³ The two other courts also remanded the 2020 Rule to EPA, but without vacatur. Order, *Delaware Riverkeeper v. EPA*, No. 2:20–cv–03412 (E.D. Pa. August 6, 2021) (determining that vacatur was not appropriate because the court “has not yet, and will not, make a finding on the substantive validity of the Certification Rule”); Order, *S.C. Coastal Conservation League v. EPA*, No. 2:20–cv–03062 (D.S.C. August 2, 2021) (remanding without vacating).

²¹ Updating Regulations on Water Quality Certifications, 84 FR 44080 (August 22, 2019).

FR 29541 (June 2, 2021). EPA considered several factors in making this determination, including but not limited to the text of CWA section 401; congressional intent and the cooperative federalism framework of CWA section 401; concerns raised by stakeholders about the 2020 Rule, including implementation-related feedback; the principles outlined in the Executive Order; and issues raised in litigation challenging the 2020 Rule. *Id.* In particular, the Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. The Agency identified this and other concerns as they related to different provisions of the 2020 Rule, including certification requests, the reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, and modifications. *See id.* at 29543–44.

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”). Such a decision need not be based upon a change of facts or circumstances. A revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion.” *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (*citing Fox*, 556 U.S. at 514–15). The Agency reviewed the 2020 Rule, determined that the rule should be replaced, and proposed a replacement rule. Some commenters on the proposed rule opposed reconsideration of the 2020 Rule and asserted that EPA did not provide a basis for reconsideration of the 2020 Rule. EPA disagrees. EPA proposed the replacement rule only after reviewing the statutory text, legislative history, case law, and public comments. EPA found, and continues to find, it appropriate to revise the 2020 Rule for several reasons. First, the 2020 Rule does not represent the best statutory interpretation of fundamental concepts, such as the scope of certification. *See* section IV.E in this preamble for further discussion on why the 2020 Rule’s

interpretation of the scope of certification is inconsistent with the statutory text of section 401 and authoritative Supreme Court precedent interpreting that text. Further, the 2020 Rule did not align with the broader water quality protection goals of the Act or congressional intent behind development and passage of section 401. The 2020 Rule also failed to appropriately address adverse impacts to state and Tribal water quality, as evidenced in public comment.²⁴ *See e.g.*, section IV.E of this preamble for further discussion on the potential adverse water quality-related impacts of the 2020 Rule’s interpretation of the scope of certification.

Accordingly, EPA is now finalizing revisions to the 2020 Rule to be fully consistent with the 1972 and 1977 CWA amendments, the Agency’s legal authority, and the principles outlined in Executive Order 13990. This final rule revises the 2020 Rule to better reflect the CWA’s statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act. In addition, the final rule clarifies certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and it supports an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to the CWA and section 401.

D. Summary of Stakeholder Outreach

Following the publication of EPA’s notice of intent to revise the 2020 Rule, the Agency opened a public docket to receive written pre-proposal recommendations for a 60-day period beginning on June 2, 2021 and concluding on August 2, 2021. The Agency received nearly 3,000 recommendations from members of the public, which can be found in the pre-proposal docket. *See* Docket ID No. EPA–HQ–OW–2021–0302. The **Federal Register** publication requested feedback related to key issues identified during implementation of the 2020 Rule, including but not limited to issues regarding pre-filing meeting requests,

certification requests, reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, modifications, neighboring jurisdictions, data and other information, and implementation coordination. *See* 86 FR 29543–44 (June 2, 2021).

EPA also held a series of virtual listening sessions for certifying authorities (June 14, June 23, and June 24, 2021), project applicants (June 15, 2021), and the public (June 15, and June 23, 2021) to gain further pre-proposal input. *See id.* at 29544 (announcing EPA’s intention to hold multiple webinar-based listening sessions). EPA also met with stakeholders upon request during development of the proposed rule. More information about the outreach and engagement conducted by EPA during the pre-proposal input period can be found in Docket ID No. EPA–HQ–OW–2022–0128. Additionally, EPA also met with other Federal licensing and permitting agencies to solicit feedback on the **Federal Register** publication. At the virtual listening sessions, the Agency gave a presentation that provided background on section 401 and prior Agency actions and sought input on the Agency’s intent to revise the 2020 Rule and the specific issues included in the **Federal Register** publication described above.

The Agency heard from stakeholders representing a diverse range of interests and positions and received a wide variety of recommendations during this pre-proposal outreach process. Some certifying authorities expressed concern about the limited role of states and Tribes under the 2020 Rule, and they called for increased flexibility in implementing section 401 to fully protect their water resources. During the project proponent listening session, project proponents shared feedback about the need to streamline the certification process and recommended that the new rule prevent delays in determining certification decisions. In the public listening sessions, speakers from non-governmental environmental and water conservation organizations reinforced the idea that states and Tribes should be accorded greater deference in the certification process. An overarching theme articulated by many speakers from various stakeholder groups was the need for EPA’s new rule to provide increased guidance and clarity.

The Agency also initiated a Tribal consultation and coordination process on June 7, 2021. The Agency engaged with Tribes over a 90-day consultation period during development of the

²⁴ For example, commenters noted that use of the 2020 Rule’s procedural requirements on certifications for the Army Corps of Engineers’ (Corps) Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.F in this preamble, the Agency recognizes that a constructive waiver is a severe consequence; a waiver means that a Federal license or permit that could adversely impact the certifying authority’s water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed without any input from the certifying authority.

proposed rule that concluded on September 7, 2021, including two Tribal consultation kickoff webinars on June 29, 2021, and July 7, 2021. The Agency received consultation letters from eight Tribes and three Tribal organizations. The Agency did not receive any requests for consultation during that time, although several Tribes expressed an interest in receiving additional information and ongoing engagement throughout the rulemaking process. Several Tribes commented that the 2020 Rule impaired or undermined Tribal sovereignty and their ability to protect Tribal waters. Many Tribes provided input regarding section 401 certification process improvements. Most Tribes were generally positive about a provision for a pre-filing meeting request, however, some had concerns that the 30-day wait period (before a project proponent could request certification) is very rigid and preferred flexibility in allowing certifying authorities to waive the 30-day requirement. Some Tribes expressed “the reasonable period of time” should start when the application is deemed complete, not when the initial request for certification is received. Most Tribes argued that the 2020 Rule’s narrowing of the scope of certification was inconsistent with congressional intent for Tribes and states to have an effective tool to protect the quality of waters under their jurisdiction. A few Tribal organizations expressed concern that current implementation of section 401(a)(2) does not protect off-reservation treaty rights from discharges. Additional information about the Tribal consultation process can be found in section VI.F in this preamble and the “Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule,” which is available in the docket for this final rule.

The Agency signed a proposed rule updating the CWA section 401 water quality certification process on June 1, 2022. On June 9, 2022, the Agency published the proposed rulemaking in the **Federal Register**, 87 FR 35318 (June 9, 2022), which initiated a 60-day public comment period that lasted through August 8, 2022. EPA held a virtual public hearing on July 18, 2022, and hosted a series of stakeholder listening sessions throughout June 2022, including one listening session for project proponents on June 14, 2022, three listening sessions for States and territories on June 15, 22, and 28, 2022, and three listening sessions for Tribes on June 15, 22, and 28, 2022. The

Agency also hosted a Federal agency listening session on June 14, 2022.

In finalizing the proposed rule, the Agency reviewed and considered approximately 27,000 comments received on the proposed rulemaking from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the proposal, including the substantive and procedural aspects of the certification process, how the proposed rule would impact stakeholders, and the legal basis for the proposed rule. The Agency discusses comments received and responses in the applicable sections of the preamble to this rule. A complete response to comments document is available in the docket for this rule (Docket ID No. EPA-HQ-OW-2022-0128).

IV. Final Rule

EPA is the primary agency responsible for developing regulations and guidance to ensure effective implementation of CWA programs, including section 401. *See* 33 U.S.C. 1251(d), 1361(a). The Agency is finalizing revisions to the section 401 regulations to better align its regulations with the cooperative federalism and water quality protection principles enshrined in the text and legislative history of the CWA. Additionally, the final rule provides greater clarity and acknowledgment of essential water quality protection concepts from Executive Order 13990. In addition to providing a necessary regulatory reset on significant issues such as the scope of certification, the reasonable period of time, and Federal agency review, the Agency is finalizing its revisions to clarify and update the regulatory text to foster a more efficient and predictable certification process. As demonstrated by the extensive pre-proposal and proposed rule outreach, this rulemaking is well-informed by stakeholder input on all aspects of the section 401 certification process.

In addition to the revisions to part 121, EPA is also finalizing conforming changes to the part 124 regulations governing CWA section 401 certifications for EPA-issued NPDES permits. The final part 121 regulations apply to all Federal licenses or permits subject to CWA section 401 certification, including EPA-issued NPDES permits.²⁵ The purpose of these

²⁵ *See* § 121.1(c), (f) (defining “Federal agency” to mean “any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401,” and similarly defining “license or permit” to mean “any license or permit issued or granted by an agency of the Federal Government to conduct

conforming changes is to ensure that the part 124 regulations are consistent with the revised provisions of part 121. In the proposal for this rule, EPA requested comment on whether the Agency had identified all changes to the part 124 regulations that conflict or potentially conflict with the proposal and therefore warrant amendment. EPA is finalizing targeted revisions to specific provisions of the NPDES regulations at 40 CFR 124.53, 124.54, and 124.55 that implement section 401. Specifically, EPA is finalizing targeted revisions to 40 CFR 124.53(b) through (e), 124.54(a) and (b), and 124.55(a) through (d). In addition, EPA is finalizing targeted conforming revisions to the regulations at 40 CFR 122.4(b), 122.44(d)(3), and 122.62(a)(3)(iii). EPA explains in further detail the reasons for each conforming change (beyond mere technical revisions) in the preamble discussion at sections IV.C, IV.D, IV.E, IV.F, IV.G, and IV.I of this preamble.

EPA is also finalizing several revisions to the definitions section of the final rule at § 121.1. EPA is finalizing minor revisions to the definition of “Administrator,” located at § 121.1(a), to remove the reference to authorized representatives. Instead, the Agency is adding a separate definition for “Regional Administrator.” *See* § 121.1(i). The Agency is removing the definition for “certification,” which was located at § 121.1(b) in the 2020 Rule, because it is not necessary to define the term. Additionally, the Agency is removing the definitions for “certified project”²⁶ and “proposed project”²⁷ because the final rule does not include those terms. EPA is also clarifying the roles of the stakeholders in the certification process. First, the Agency is finalizing non-substantive modifications to the definition of “Federal agency” located at final rule § 121.1(c). Second, the Agency is retaining the term “project proponent” from the 2020 Rule to define the stakeholder seeking certification. 40 CFR 121.1(h). While the term “applicant” is used in section 401, that term does not clearly reflect and include all the stakeholders who might seek certification. For example, Federal agencies themselves (and not third-party applicants) seek section 401 certification on the issuance of general permits (e.g., Corps’ Nationwide Permits, EPA’s Construction General Permits). Additionally, contractors or other agents often seek certification on

any activity which may result in any discharge into waters of the United States”).

²⁶ 40 CFR 121.1(d) (2020).

²⁷ 40 CFR 121.1(k) (2020).

behalf of a project applicant. The term “project proponent” is meant to include the applicant for a Federal license or permit, as well as any other entity that may seek certification (e.g., agent of an applicant or a Federal agency, such as EPA when it is the permitting authority for a National Pollutant Discharge Elimination System (NPDES) permit). Lastly, the Agency is finalizing non-substantive changes to the definition of “certifying authority” located at final rule § 121.1(b). Other revisions to regulatory definitions are discussed throughout this preamble.

This section of the final rule preamble includes 12 sub-sections that each discuss: (1) the final rule provisions, (2) a summary of the Agency’s final rule rationale and public comments (where applicable), and (3) implementation considerations for the final rule provisions (where applicable). Section IV.A of this preamble discusses when section 401 certification is required. Sections IV.B through IV.F of this preamble walk readers through the section 401(a)(1) certification process in chronological order (*i.e.*, pre-filing meeting request through the certification decision). Section IV.G of this preamble discusses the Federal agency review process that follows the section 401(a)(1) certification process. Section IV.K of this preamble discusses the section 401(a)(2) neighboring jurisdictions process that occurs after the section 401(a)(1) certification process (if the certification was granted or waived), but before the Federal license or permit may be issued. Sections IV.I through IV.J of this preamble discuss events that may occur after the certification is granted until the Federal license or permit expires, including certification modifications (section IV.I of this preamble) and enforcement and inspection (section IV.J of this preamble). Section IV.H of this preamble discusses EPA’s roles under section 401, including EPA’s role as the certifying authority. Section IV.L of this preamble discusses the new provisions for Tribes to obtain treatment in a similar manner as a state (TAS) for section 401 or section 401(a)(2). Section IV.M of this preamble discusses general implementation considerations for this final rule. Lastly, section IV.N discusses severability of this final rule. This final rule is structured in a manner to clearly and transparently convey to stakeholders the CWA section 401 certification and post-certification processes.

A. When Section 401 Certification Is Required

1. What is the Agency finalizing?

EPA is finalizing the regulatory text located at final rule § 121.2 to affirm that a “[c]ertification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.” 40 CFR 121.2. The regulatory text clarifies the circumstances under which a section 401 certification is required and is consistent with the Agency’s longstanding interpretation of section 401, including in the 2020 Rule, that an applicant for a Federal license or permit to conduct any activity that may result in any discharge from a point source²⁸ into waters of the United States must obtain a section 401 certification or waiver. The Agency made minor revisions to the proposed text at § 121.2 to better match the statutory language in section 401(a)(1) and clarify when certification is required, including adding the word “Federal” before license or permit, “any” before both “activity” and “discharge,” and changing from “a water of the United States” to “waters of the United States.” To be clear, these changes do not represent a change in substance from proposal.

2. Summary of Final Rule Rationale and Public Comment

a. Federally Licensed or Permitted Activity

Section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge into “waters of the United States.” 33 U.S.C. 1341(a)(1). The Agency is retaining the 2020 Rule’s definition for a “license or permit” with minor modifications to clarify that section 401 is required for any federally licensed or permitted activity which may result in any discharge into waters of the United States. EPA is also adding the word “Federal” before “license or permit” throughout the final rule to further clarify that the license or permit subject to certification must be Federal.

The CWA is clear that the license or permit prompting the need for a section 401 certification must be a Federal

license or permit, that is, one issued by a Federal agency. This conclusion is supported by the legislative history of CWA section 401, which noted that “since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable.” H.R. Rep. No. 92–911, at 127 (1972). Additionally, the legislative history of the CWA amendments of 1977, discussing state assumption of section 404, noted that “[t]he conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority.” H.R. Rep. No. 95–830, at 104 (1977).

Section 401 certification is not required for licenses or permits issued by a state or Tribe that administers a federally approved permit program. For example, states and Tribes may be authorized to administer the section 402 NPDES permitting program²⁹ or the section 404 dredge and fill permitting program.³⁰ Permits issued by states or Tribes pursuant to their authorized or approved program are not subject to section 401 of the CWA as the programs operate in lieu of the Federal program, under state or Tribal authorities. The state or Tribal permit is not a “Federal” permit for purposes of section 401.

The Agency is not providing an exclusive list of Federal licenses and permits that may be subject to section 401. The CWA itself does not list specific Federal licenses and permits that are subject to section 401 certification requirements. The most common examples of Federal licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits issued by EPA in jurisdictions where the EPA administers the NPDES permitting program; CWA section 404 permits for the discharge of dredged or fill material permits issued by the Army Corps of Engineers as well as Rivers and Harbors Act sections 9 and 10 permits issued by the Army Corps of Engineers; and hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission (FERC).³¹ See

²⁹ 33 U.S.C. 1342(b).

³⁰ 33 U.S.C. 1344(g).

³¹ The Corps also requires section 401 certification for its civil works projects, even though there is no Federal license or permit associated with those projects. The Corps’ current regulations require the Corps to seek section 401 certification for discharges of dredged material or fill into waters of the United States. See 33 CFR 336.1(a)(1) (“The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S.”); 33 CFR 335.2

²⁸ For ease of discussion and comprehension, the Agency uses the term “discharge” interchangeably with the more precise “discharge from a point source” or “point source discharge.” As discussed in section IV.A.2.c of this preamble, several years after *PUD No. 1*, the Ninth Circuit clarified that the type of “discharge” that triggers section 401’s certification requirement is a “point source” discharge. *ONDA v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998).

section IV.A.3 *infra* for further discussion on the types of Federal licenses or permits subject to section 401.

b. Potential for a Discharge To Occur

Consistent with the 2020 Rule and the proposal, a certification or waiver is required for any Federal license or permit that authorizes any activity which *may* result in any discharge from a point source into waters of the United States. 40 CFR 121.2. The presence of, or potential for, a discharge is a key determinant for when a water quality certification is required. 33 U.S.C. 1341(a)(1) (“A certification is required for “a Federal license or permit to conduct any activity . . . which *may* result in any discharge into the navigable waters . . .”) (emphasis added); *see* 40 CFR 121.2. Most commenters supported the clarification in proposed § 121.2 that section 401 is triggered by a point source discharge as well as when any Federal license or permit authorizes any activity that *may* result in any point source discharge. A few commenters, seeming to refer to the proposal preamble as opposed to regulatory text, expressed concern that the addition of the word “potential” would change the universe of projects requiring 401 certification; EPA disagrees. EPA’s approach is consistent with the plain language of the statutory phrase “may result in any discharge.” The phrase “may result” contemplates that both the presence of, and/or potential for, any discharge triggers the requirement for a section 401 certification. This approach is also consistent with the Agency’s longstanding implementation of section 401. *See, e.g.*, 85 FR 42236 (July 13, 2020) (“Under this final rule, the requirement for a section 401 certification is triggered based on the potential for any federally licensed or permitted activity to result in a discharge from a point source into waters of the United States.”); 2010 Handbook at 4 (rescinded in 2019, *see supra*) (“It is important to note that [section] 401 is triggered by the potential for a discharge; an actual discharge is not required.”).

EPA requested comment on whether it should develop a specific process or procedure for project proponents, certifying authorities, and/or Federal

agencies to follow to determine whether a federally licensed or permitted activity may result in a discharge and therefore require section 401 certification. Some commenters asserted that EPA should not develop such a process because certifying authorities and/or Federal agencies have well-established practices and experience determining whether an activity will require a section 401 certification, including one commenter who asserted that an EPA-defined process could disrupt established efficiencies. Conversely, some commenters asserted that EPA should develop a process for determining when a federally licensed or permitted activity may result in a discharge and require section 401 certification for various reasons, asserting that such a process would allow for consistent implementation.

Based on comments, the Agency is not developing a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow to determine whether a federally licensed or permitted activity may result in a discharge and therefore require section 401 certification. After more than 50 years of implementing section 401, EPA’s experience is that Federal agencies and certifying authorities are well-versed in the practice of determining which federally licensed or permitted projects may result in discharges. Ultimately, the project proponent is responsible for obtaining all necessary permits and authorizations, including a section 401 certification. If there is a potential for a project to discharge into “waters of the United States,” a Federal agency cannot issue the Federal license or permit unless a section 401 certification is granted or waived by the certifying authority. EPA recommends that project proponents engage in early discussions with certifying authorities and Federal agencies to determine whether their federally licensed or permitted activity will require section 401 certification.

c. Discharge

Consistent with the Agency’s longstanding position and the 2020 Rule, EPA is finalizing that a discharge from a point source (or “point source discharge”), or potential for one, is required to trigger section 401. *See* 40 CFR 121.2. Additionally, the Agency is clarifying that, consistent with *S.D.*

Warren v. Maine Board of Environmental Protection, 547 U.S. 370 (2006), discussed below, a point source discharge triggering section 401 does not require the addition of pollutants. Although the Agency is retaining the same interpretation of “discharge” as

the 2020 Rule, to simplify the regulation, the Agency is removing the definition of “discharge”³² and instead incorporating those definitional concepts into the regulatory text at final rule § 121.2, which discusses when certification is required. This simpler approach will provide greater clarity about the nature of discharges that trigger the need for section 401 certification or waiver.

The CWA provides that “[t]he term ‘discharge’ when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants.” 33 U.S.C. 1362(16) (emphasis added). The CWA defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.” *Id.* at 1362(12). EPA and the Corps³³ have long interpreted the definition of “discharge” in way that gives meaning to the word “includes” in the definition. EPA and the Corps have interpreted the definition of “discharge” to be distinct from the term “discharge of pollutant” and therefore encompassing both the discharge without the addition of pollutants and the “discharges of pollutants.” Many commenters supported the Agency’s clear articulation of its longstanding interpretation that any discharge triggering a section 401 certification does not require an addition of pollutants. On the other hand, some commenters argued that eliminating the requirement that there be an addition of pollutants goes beyond the plain language of CWA section 401. As an initial matter, the final rule’s interpretation of discharge is not a change from longstanding practice, including the 2020 Rule. *See* 85 FR 42237 (“The EPA has concluded that unlike other CWA regulatory provisions, section 401 is triggered by the potential for any unqualified discharge, rather than by a discharge of pollutants.”). EPA strongly disagrees that the plain language of section 401 requires that any discharge triggering section 401 include an addition of pollutants. As discussed above, the statutory definition of “discharge” is broad and is not limited to a discharge of pollutants. Additionally, as discussed below, this interpretation is consistent with the text

³² 40 CFR 121.1(f) (2020).

³³ In the context of section 404, the Corps does the day-to-day work of conducting jurisdictional determinations though EPA has final administrative authority over the scope of CWA jurisdiction. Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act (“Civiletti Memorandum”), 43 Op. Att’y Gen. 197 (1979).

(“[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws.”). In these instances, EPA understands that the Corps will follow the certification process as described in the final rule.

of the statute as interpreted by the U.S. Supreme Court.

In *S.D. Warren*, a hydropower dam operator asserted that its dams did not result in discharges that would require section 401 certification because the dams only released water that “adds nothing to the river that was not there above the dams.” 547 U.S. 370, 374–75, 378 (2006). The Court stated that the term discharge is broader than “discharge of a pollutant” and “discharge of pollutants.” *Id.* Observing that the term “discharge” is not specifically defined in the statute, the Court applied the ordinary dictionary meaning, “flowing or issuing out.” *Id.* In applying this meaning to hydroelectric dams, the Court held that releasing water through a dam constituted a discharge for purposes of section 401 and, thus, the CWA provided states with the ability to address water quality impacts from these releases through the certification process. *Id.* at 385–86. The Court explicitly rejected the argument that an “addition” was necessary for a “discharge,” stating “[w]e disagree that an addition is fundamental to any discharge.” *Id.* at 379 n.5.

While the Supreme Court has held that the addition of a pollutant is not necessary for a discharge to prompt the need for a CWA section 401 certification, the Ninth Circuit has held that such certification-triggering discharges must be from point sources. *Or. Natural Desert Ass’n (ONDA) v. Dombeck*, 172 F.3d 1092, 1095–99 (9th Cir. 1998) (“*ONDA*”).³⁴ In *ONDA*, the Ninth Circuit addressed the issue of whether “the term ‘discharge’ in [section 401] includes releases from nonpoint sources as well as releases from point sources.” *Id.* at 1094–95. The court held that the “term ‘discharge’ in [section 401] is limited to discharges from point sources.” *Id.* at 1097. The court found its holding to be consistent with the Supreme Court’s holding in *PUD No. 1*, 511 U.S. 700 (1994).³⁵ The court in *ONDA* found that although *PUD No. 1* held that certification conditions may address water quality impacts from the certified activity beyond its discharges, a triggering discharge is still

required for section 401 to apply and “*PUD No. 1* did not broaden the meaning of the term ‘discharge’ under § 1341.” *Id.* at 1098–99.³⁶ EPA has consistently implemented the Ninth Circuit’s interpretation of section 401 as requiring the potential for a point source discharge (with or without the addition of pollutants) to trigger section 401. *See* 85 FR 42238; 2010 Handbook at 5–6 (rescinded in 2019, *see supra*) (discussing requirement of section 401 certification when there is a point source discharge).³⁷

EPA is finalizing the text at § 121.2, including the phrase “from a point source,” because it is consistent with the case law discussed above and the Agency’s longstanding approach, and because it provides greater clarity about the nature of discharges that trigger the need for section 401 certification or waiver. However, just as the Agency is not defining in regulation the term “discharge” for purposes of section 401, the Agency is not providing a distinct definition of the term “point source.” Rather, the Agency will continue to rely on the definition of “point source” in section 502(14) of the CWA.³⁸ For example, courts have concluded that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill material are “point sources” for purposes of the CWA. *See, e.g., Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff’d*, 852 F.2d 189 (6th Cir. 1988). On the other hand, courts have concluded that a water withdrawal is not a point source discharge and therefore does not require a water quality certification.³⁹

³⁶ Following the Supreme Court’s decision in *S.D. Warren* that the addition of a pollutant was not needed to trigger section 401, the Ninth Circuit reaffirmed its earlier decision that section 401 was only triggered by a discharge from a point source. *Or. Natural Desert Ass’n v. USFS*, 550 F.3d 778 (9th Cir. 2008). The Ninth Circuit held that “[n]either the ruling nor the reasoning in *S.D. Warren* is inconsistent with this court’s treatment of nonpoint sources in [section] 401 of the Act, as explained in [*ONDA*].” *Id.* at 785.

³⁷ The United States argued that section 401 requires the discharge to be from a point source in briefs filed before the Ninth Circuit. *See, e.g., Briefs of the United States in ONDA v. Dombeck*, Nos. 97–3506, 97–35112, 97–35115 (9th Cir. 1997), *ONDA v. USFS*, No. 08–35205 (9th Cir. 2008).

³⁸ The CWA defines point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft.” 33 U.S.C. 1362(14).

³⁹ *See, e.g., North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (holding that withdrawal of water from lake does not constitute discharge for CWA section 401 purposes).

Several commenters supported adding the phrase “from a point source” at proposed § 121.2. These commenters stated that the change is consistent with applicable case law and the text and structure of the CWA. In addition, these commenters appreciated that EPA clarified that section 401 was triggered by any discharge from a point source versus a discharge from a nonpoint source. Conversely, other commenters opposed adding the phrase “from a point source” at proposed § 121.2, arguing that EPA’s reliance on the definition of point source at 33 U.S.C. 1362(14) implicitly requires the addition of pollutants to trigger section 401 certification in contravention of *SD Warren*. The commenters also asserted that it appears to conflict with EPA’s concurrent proposal that the scope of review is restored to the “activity as a whole.” A few commenters suggested that if EPA did not strike the phrase “from a point source,” the rule should state that certification is triggered regardless of whether the discharge from a point source results in an addition of pollutants.

EPA disagrees with commenters asserting that the definition of “point source” located at 33 U.S.C. 1362(14) implicitly requires the addition of pollutants. The CWA provides that a point source is a conveyance “from which pollutants are or may be discharged.” 33 U.S.C. 1362(14) (emphasis added). Given the language of the statute, it is reasonable for EPA to conclude that a discharge of pollutants is not required for a conveyance to be considered a point source. The Agency also disagrees that the requirement of a point source discharge to trigger section 401 conflicts with the scope of review. As discussed in section IV.E in this preamble, once there is a prerequisite potential for a point source discharge into waters of the United States, then the certifying authority may evaluate and place conditions on the “activity,” which includes consideration of water quality-related impacts from both point sources and nonpoint sources. EPA appreciates commenter suggestions regarding regulatory text that states that a point source does not need to result in an addition of pollutants. EPA is declining to add such language in the regulatory text and instead relying on the statutory definition of “point source.” However, EPA has emphasized this point throughout this section of the preamble and will continue to do so in implementation of the final rule.

Many commenters who provided input on this topic urged EPA to revise the regulation to include discharges from both point and nonpoint sources.

³⁴ In *ONDA*, the United States took the position that the term “discharge” at 33 U.S.C. 1362(14) did not include nonpoint sources because there was nothing in the definition or the legislative history of the term that suggested it extended to nonpoint source pollution. Brief of the United States in *Or. Natural Desert Ass’n v. Dombeck*, Nos. 97–3506, 97–35112, 97–35115, at 18–21 (9th Cir. 1997). Additionally, the United States argued that section 401’s legislative history did not suggest that “discharge” included nonpoint sources. *Id.* at 23–24.

³⁵ *See* section IV.E of this preamble for further discussion of on *PUD No. 1*.

These commenters stated that the term “discharge” as used throughout the CWA means something broader than discharges from point sources, citing *SD Warren*, given that the goal of the CWA is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” See 33 U.S.C. 1251(a). The commenters asserted that revising the regulation to include discharges from nonpoint sources will ensure that states and Tribes are able to exercise their section 401 authority to protect water quality from federally licensed or permitted activities that would result in a nonpoint source discharge. One commenter encouraged the Agency to use the statutory language in section 401(a)(1) to describe the type of activity that triggers 401 and asserted that limiting discharges to point sources has no basis in the statutory text, while another commenter asserted that the Federal Government and the Supreme Court recognized that all discharges trigger section 401.

The Agency disagrees that the term “discharge” as used in CWA section 401 means something broader than discharges from point sources or that it has no basis in the statutory text. As discussed above, the *ONDA* court held that the “term ‘discharge’ in [section 401] is limited to discharges from point sources.” *Id.* at 1097. EPA also disagrees that the Federal Government has recognized that all discharges trigger section 401. As noted above, this was the Federal Government’s position before the Ninth Circuit in *ONDA*, see footnote 37, and EPA has consistently implemented this view in rulemaking, guidance, and through its actions pursuant to CWA section 401. EPA emphasizes that this final rule does not prevent or limit certifying authorities from protecting their water quality from federally licensed or permitted activities that would result in nonpoint source discharges. See 33 U.S.C. 1370. With respect to using section 401 certifications to address nonpoint source discharges, certifying authorities may consider water quality-related impacts from nonpoint source discharges after determining that the project satisfies the prerequisite potential for a point source discharge into waters of the United States.

d. “Into the Navigable Waters”

Consistent with the 2020 Rule and proposal, the final rule provides that section 401 certification is required for Federal licenses or permits that authorize any activity which may result in any discharge from a point source

into waters of the United States.⁴⁰ 40 CFR 121.2. Section 401 states that certification is required for any activity that “may result in any discharge into the navigable waters.” 33 U.S.C. 1341(a)(1). The term “navigable waters” is defined as “waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7). Requiring section 401 certification for any federally licensed or permitted activity that may result in any discharge into waters of the United States is consistent with the plain language of section 401(a)(1) and legislative history of the CWA. See H.R. Rep. No. 91–911, at 124 (1972) (“It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters.”). This reading is also consistent with the Agency’s longstanding position and practice. See, e.g., 2010 Handbook at 3, 5 (rescinded in 2019, see *supra*) (“Since [section] 401 certification only applies where there may be a discharge into waters of the [United States], how states or tribes designate their own waters does not determine whether [section] 401 certification is required.”).

Potential discharges into state or Tribal waters that are not “waters of the United States” do not trigger the requirement to obtain section 401 certification. However, as discussed in section IV.E in this preamble, the Agency concludes that while a certifying authority is limited to considering impacts to “waters of the United States” when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying compliance with requirements of state or Tribal law that otherwise apply to waters of the state or Tribe beyond waters of the United States.

3. Implementation

Although the Agency is not providing an exclusive list of all Federal licenses

⁴⁰ In *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, the Supreme Court addressed the question of whether the CWA requires a NPDES permit under section 402 of the Act when pollutants originate from a point source and travel through groundwater before reaching navigable waters. 140 S. Ct. 1462 (2020). The Court held that “the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.” *Id.* at 1476 (emphasis in original). The Court articulated several factors that may prove relevant for purposes of determining whether a section 402 permit is required. *Id.* at 1476–77. Consistent with the rationale of the Court’s decision in *County of Maui*, any point source discharge that is the functional equivalent of a direct discharge to navigable waters would also trigger section 401 if a Federal agency issues the applicable license or permit.

or permits subject to section 401, EPA recognizes that there is an array of licenses and permits that may trigger the need to seek certification. These may include, but are not limited to, CWA section 404 permits issued by the Corps for the discharge of dredge or fill material, Rivers and Harbors Act section 10 permits issued by the Corps for construction of wharves, piers, etc., Rivers and Harbors Act section 9 permits issued by the Corps (for the construction of dams and dikes) and the Coast Guard (for construction of bridges and causeways), FERC licenses for the construction and operation of non-Federal hydropower projects, FERC certificates for the construction and operation of interstate natural gas pipeline projects, shoreline permits issued by the Tennessee Valley Authority for shoreline construction activities, EPA-issued CWA section 402 permits for the discharge of pollutants, nuclear power plant licenses issued by Nuclear Regulatory Commission, permits for wineries and distilleries issued by the Alcohol and Tobacco Tax and Trade Bureau, and mine plans of operation for mining activities on National Forest Service Lands approved by the Forest Service. See also Economic Analysis for the Final Rule at section 3.4. As discussed above, the operative question is whether the federally licensed or permitted activity may result in any discharge into waters of the United States.

Section 401 is not limited to individual Federal licenses or permits, but also extends to general Federal licenses and permits such as CWA section 404 general permits (including Nationwide General Permits, Regional General Permits, and State Programmatic General Permits) and CWA section 402 general permits (including the Pesticide General Permit, Multi-Sector General Permit for stormwater discharges associated with industrial activity, and the Construction General Permit for stormwater discharges associated with construction activity). Several commenters requested clarification that the section 401 certification process only applies to individual Federal licenses or permits. Another commenter said that it is not clear how the proposed rule would apply to nationwide permits and state programmatic permits, and further suggested that these permits be exempted from the rule. EPA disagrees with these comments. General Federal licenses or permits that may result in a discharge into waters of the United States are subject to the same requirements under section 401 as an

individual Federal license or permit. Section 401 does not provide an exemption for any Federal licenses or permits that may result in a discharge into waters of the United States. Additionally, both case law and prior Agency rulemakings and guidance recognize that general Federal licenses or permits are subject to section 401 certification. *See U.S. v. Marathon Development Corp.*, 867 F.2d 96, 100 (1st Cir. 1989) (“Neither the language nor history of section 404(e) of the Clean Water Act . . . suggests that states have any less authority in respect to general permits than they have in respect to individual permits.”); 40 CFR 121.5(c), 121.7(d)(2) and (e)(2) (2020) (describing requirements for certification on the issuance of a general license or permit); 2010 Handbook at 29–30 (rescinded in 2019, *see supra*) (discussing the application of section 401 to general permits). Accordingly, EPA cannot adopt commenter suggestions to exempt general permits from the certification process.

Several commenters requested that EPA affirmatively state that the section 401 certification process does not apply to “verifications” of Federal general permit actions; instead, commenters suggested that the certification process should occur at the time the Federal general permit is issued. Federal agencies seek certification on general permits before the permits are issued. Accordingly, final rule § 121.5 provides the minimum content requirements for all requests for certification, including certification for the issuance of a general Federal license or permit. If a certifying authority grants or waives certification for either a CWA section 402 or 404 general permit, then entities seeking coverage under that general permit do not need to separately seek certification before doing so. When a certifying authority denies certification on a section 402 general permit, EPA can issue the general permit for the jurisdictions that granted or waived certification but cannot issue the permit for jurisdictions that denied certification.⁴¹ If a certifying authority grants certification with conditions on an EPA-issued general permit, then the certification with conditions becomes part of the general permit applicable within the certifying authority’s jurisdiction.

When a certifying authority denies certification for a CWA section 404 Nationwide or Regional General Permit,

the Corps allows specific projects to be covered by the Nationwide or Regional General Permit if the project proponent obtains certification from the certifying authority for that project. In that instance, a project proponent would submit a request for certification in accordance with final rule § 121.5 for individual Federal licenses or permits. When a certifying authority grants certification with conditions on a Nationwide or Regional General Permit, the Corps may either incorporate the conditions into a state- or Tribe-specific version of the general permit or require the project proponent to obtain certification from the certifying authority for that project to qualify for the general permit.

As discussed above, section 401 is triggered by a potential point source discharge from a federally licensed or permitted activity into waters of the United States. A few commenters recommended that the Agency explicitly acknowledge that point sources include discharges from CWA section 404 dredge and fill activities (*e.g.*, equipment, construction activities) in the regulatory text. Considering the broad applicability of section 401 to all Federal licenses or permits, the Agency does not find it necessary to focus the regulatory text on point sources from one type of federally licensed or permitted activity. Rather, the Agency intends to rely on the definition of point source at 33 U.S.C. 1362(14), which defines point source as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” As emphasized above, a point source does not require the addition of pollutants, but rather is a conveyance from which pollutants are or may be discharged. For example, a point source includes the turbine or tailrace of a hydroelectric dam, and bulldozers or other construction equipment. In both instances, the equipment (*e.g.*, turbine, bulldozer) acts as a discernable, confined, or discrete conveyance that pollutants could be discharged from, but the addition or existence of such pollutants is not necessary for the equipment to be considered a point source.

B. Pre-Filing Meeting Request

1. What is the Agency finalizing?

EPA is finalizing the requirement that “[t]he project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority’s applicable submission

procedures, unless the certifying authority waives or shortens the requirement for the pre-filing meeting request.” 40 CFR 121.4. This requirement will ensure that certifying authorities have an opportunity, should they desire it, to receive early notification and to discuss the project with the project proponent before the statutory timeframe for review begins. If a certifying authority does not communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification. The Agency is not defining the “applicable submission procedures” or other procedural aspects of a pre-filing meeting request or subsequent meeting. Accordingly, the Agency is finalizing the removal of the 2020 Rule’s recommendations for pre-filing meetings. *See* 40 CFR 121.4(c) and (d) (2020). The Agency is also finalizing the removal of regulatory text discussing the certifying authority’s obligations in response to a pre-filing meeting request because the final rule does not compel any action by the certifying authority. *See* 40 CFR 121.4(b) (2020).

2. Summary of Final Rule Rationale and Public Comment

The 2020 Rule introduced the pre-filing meeting request requirement to encourage early coordination between parties to identify needs and concerns before the start of the reasonable period of time. EPA interpreted the term “request for certification” in CWA section 401(a)(1) as being broad enough to include an implied requirement that a project proponent shall also provide the certifying authority with advance notice that a certification request is imminent. The time (no longer than one year) that certifying authorities are provided under the CWA to act on a certification request (or else waive the certification requirements of section 401(a)) provided additional justification in this context to interpret the term “request for certification” to allow EPA to require a pre-filing meeting request.

The 2020 Rule proposal originally limited the pre-filing meeting request requirement to project proponents seeking certification in jurisdictions where EPA acts as the certifying authority. However, in response to stakeholder feedback on the proposed 2020 Rule, the Agency extended the pre-filing meeting request requirement to all project proponents. As a result, the final 2020 Rule required all project proponents to request a pre-filing meeting at least 30 days prior to submitting a water quality certification

⁴¹ If a certifying authority denies certification on an EPA-issued NPDES general permit, dischargers could always apply for an individual NPDES permit. That individual permit would also require a 401 certification.

request. 85 FR 42241 (July 13, 2020). The 2020 Rule did not provide any mechanism for certifying authorities to waive or otherwise alter the 30-day period between a project proponent requesting a pre-filing meeting and subsequently submitting a certification request. Instead, there was a mandatory 30-day period that had to pass before the project proponent could submit a certification request.

During pre-proposal outreach on this rulemaking, some stakeholders found the pre-filing meeting request requirement to be essential to an efficient certification process, while others expressed concern about the mandatory 30-day “waiting period” between the pre-filing meeting request and the certification request, particularly in emergency permit situations. Stakeholders suggested that EPA should add flexibility to the process and give certifying authorities the ability to waive the pre-filing meeting request (e.g., for smaller and less complex projects and emergencies). In response to pre-proposal input, the Agency proposed to retain a pre-filing meeting request provision with modifications to provide certifying authorities the flexibility to waive or shorten this requirement.

Many commenters recognized that pre-filing meetings have the potential to facilitate and help streamline the certification process through early coordination. Conversely, other commenters expressed concern that the pre-filing meeting request requirement creates delays and administrative burden. Some commenters said that, in lieu of an actual requirement, EPA should only encourage pre-filing meeting requests. Several commenters supported the flexibility included in the proposed rule giving certifying authorities the ability to waive or shorten the requirement.

After considering public comment, EPA is finalizing the pre-filing meeting request requirement as proposed, with minor, non-substantive revisions. EPA finds that the final rule’s approach to the pre-filing meeting request requirement both facilitates early coordination in the certification process while recognizing that states and Tribes are in the best position to determine whether a particular project (or class of projects) would benefit from such early coordination. Accordingly, this final rule enables a certifying authority to shorten or waive the pre-filing meeting request requirement on a case-by-case or categorical basis. For example, certifying authorities may categorically waive or shorten the pre-filing meeting request requirement for less complex,

routine projects, as these projects most likely would not benefit from early engagement between the project proponent and certifying authority as large, complex projects would. This flexibility reflects both cooperative federalism principles and the reality that not every project will meaningfully benefit from a pre-filing meeting. EPA encourages certifying authorities to make their requests for certification requirements and the applicable submission procedures transparent to project proponents, especially in instances where the pre-filing meeting request requirement was waived, so that submission of the request for certification goes smoothly in cases where there is no early coordination through the pre-filing meeting process.

EPA requested comment on whether it should define the pre-filing meeting request process and “applicable submission procedures” for other certifying authorities in regulatory text. A few commenters stated that there should be procedures for the pre-filing meeting requests to increase clarity and consistency, including a list of minimum information to include in the meeting request. Other commenters opposed the idea of EPA setting procedures for pre-filing meetings to maintain flexibility. EPA finds that certifying authorities are best equipped to determine their procedures and needs for pre-filing meetings and requests. Like the approach taken under the 2020 Rule, EPA is not defining the process or manner to submit pre-filing meeting requests. Rather, EPA intends the term “applicable submission procedures” to mean the submission procedures deemed appropriate by the certifying authority. See *infra* for discussion on EPA’s applicable submission procedures when EPA acts as the certifying authority. The Agency is also not defining a pre-filing meeting process (e.g., identifying meeting subject matter or meeting participants) nor retaining the 2020 Rule’s recommendations for pre-filing meetings. In the 2020 Rule, the Agency “encouraged” but did not require the project proponent and the certifying authority to take certain steps with respect to the pre-filing meeting process. See 40 CFR 121.4(c) and (d) (2020). The Agency is removing these recommendations from the regulatory text because (1) they were not expressed as, or intended to be, regulatory requirements, and (2) certifying authorities and project proponents are best suited to determine the optimal pre-filing meeting process on a project-by-project, project type, or general basis.

EPA also requested comment on whether it should specify that all

certifying authorities should respond with written acknowledgement and determination of the need for a pre-filing meeting and timeline within five days of receipt of the pre-filing meeting request. Many commenters suggested that certifying authorities should be required to provide a written response within five days informing the project proponent if a pre-filing meeting is needed. The Agency is not adding a requirement that a certifying authority must respond in writing within five days of receipt of the pre-filing meeting request. Instead, similar to the 2020 Rule, this final rule does not require certifying authorities to grant or respond to a pre-filing meeting request. See 40 CFR 121.4(b) (2020). However, the Agency is finalizing removal of the 2020 Rule provision stating that the certifying authority is not obligated to grant or respond to a pre-filing meeting request because the regulatory text at § 121.4 does not compel any action by the certifying authority. Accordingly, the Agency does not find it necessary to expressly reiterate what the certifying authority is not obligated to do. If a certifying authority fails to communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification. Generally, EPA expects that it will provide written acknowledgement that the pre-filing meeting request has been received within five days of receipt. In its written response, the Agency will also state whether it has determined that the pre-filing meeting will be waived or when (if less than 30 days) the project proponent may submit the certification request.

EPA requested comment on whether project proponents should have the opportunity to participate in determining the need for a pre-filing meeting request. Some commenters argued that the project proponent should be involved in determining the need for a pre-filing meeting. After considering public comments, EPA is not requiring the participation of the project proponent when determining the need for a pre-filing meeting request. However, the Agency encourages certifying authorities to engage with project proponents early in the process as they can inform decisions based on their knowledge of the project.

3. Implementation

Pre-filing meeting requests ensure that certifying authorities can receive early notification of requests for certification and discuss the project and potential

information needs with the project proponent before the statutory “reasonable period of time” for certification review begins (e.g., they allow the certifying authority to collect important details about a proposed project and its potential effects on water quality). The intent of the pre-filing meeting request provision is to support early engagement and coordination between certifying authorities and project proponents as needed. However, EPA recognizes that there are various project types and complexities. Accordingly, this final rule provides certifying authorities with the flexibility to waive or shorten the requirement on a case-by-case or categorical basis. For example, certifying authorities could either require or waive the pre-filing meeting request requirement for all projects, specific types of projects (e.g., projects under 300 linear feet), or types of Federal licenses or permits (e.g., general permits). EPA recommends that certifying authorities clearly communicate to project proponents their expectations for pre-filing meetings requests and waivers (e.g., whether they may grant waivers, either categorically or on an individual basis, and any procedures and/or deadlines for submission of requests and the grant of waivers) so that project proponents may clearly and efficiently engage in the certification process. EPA also recommends that certifying authorities make this information readily available to project proponents in an easily accessible manner to allow for a transparent and efficient process (e.g., posting a list of project types that require a pre-filing meeting request on the certifying authority’s website).

Additionally, the final rule allows certifying authorities to determine appropriate submission procedures for pre-filing meeting requests. When EPA acts as the certifying authority, EPA would generally find the following submission procedures to be appropriate. First, EPA recommends that project proponents submit a pre-filing meeting request to the Agency in writing.⁴² Second, the Agency recommends that project proponents include the following information, as available, in any written request for a pre-filing meeting with EPA:

1. A statement that it is “a request for CWA section 401 certification pre-filing meeting,”

2. The name of the project proponent and appropriate point of contact,
3. The name of the Tribe or jurisdiction for which EPA is serving as the certifying authority,
4. The planned project location (including identification of waters of the United States into which any potential discharges would occur),
5. A list of any other necessary licenses/permits (e.g., state permits, other Federal permits, etc.),
6. The project type and a brief description of anticipated project construction and operation activities, and
7. The anticipated start work date.

These are good practices for any pre-filing meeting requests to any certifying authority.

The final rule allows certifying authorities flexibility to determine the procedures and content of pre-filing meetings. EPA, however, encourages project proponents and certifying authorities to use the pre-filing meeting to discuss the proposed project, as well as determine what information or data is needed (if any) as part of the request for certification to enable the certifying authority to take final action on the request for certification within the reasonable period of time. During the pre-filing meeting, project proponents could share a description and map of the proposed project location and timeline, as well as discuss potential water quality-related impacts from the activity. Certifying authorities could use the meeting as an opportunity to provide information on how to submit requests for certification (e.g., discuss procedural requirements for submission of a request for certification). Certifying authorities should also consider including the Federal agency in the pre-filing meeting process for early coordination where the Federal agency is not otherwise legally precluded. Additionally, the final provision provides flexibility for the certifying authority to determine whether the pre-filing meeting request requirements are fulfilled by any pre-application meetings or application submissions to the Federal licensing or permitting agency. Generally, EPA recommends that certifying authorities provide clear expectations for pre-filing meetings to ensure they are used efficiently and effectively.

C. Request for Certification

1. What is the Agency finalizing?

At § 121.5(a), EPA is requiring that all requests for certification be in writing, signed, and dated and include defined minimum contents. Unlike the proposed rule, which required a copy of the draft Federal license or permit for all requests

for certification, the Agency is bifurcating the minimum content requirements for an individual Federal license or permit and the issuance of a general Federal license or permit. Under the final rule, if the request for certification is for an *individual* Federal license or permit, the request for certification must include a copy of the Federal license or permit application and any readily available water quality-related materials that informed the development of the application. If the request for certification is for the issuance of a *general* Federal license or permit, then the request for certification must include a copy of the draft Federal license or permit and any readily available water quality-related materials that informed the development of the draft Federal license or permit. For all requests for certification, the final rule requires a certifying authority to send written confirmation to the project proponent and Federal agency of the date that a request for certification is received by the certifying authority in accordance with its applicable submission procedures.

Additionally, the final rule provides that where a project proponent is seeking certification from EPA when the Agency is the certifying authority, or from a state or authorized Tribe that does not specify additional contents of a request for certification (e.g., through regulation, forms, etc.), the project proponent must also submit seven additional components, as applicable, including: (1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity; (2) The specific location of any discharge(s) that may result from the proposed activity; (3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways; (4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation; (5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence; (6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and (7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing

⁴² Under final rule § 121.5(b)(7), a project proponent must submit documentation that a pre-filing meeting was requested, unless the pre-filing meeting request requirement was waived. See section IV.C in this preamble for further discussion on the contents of a request for certification when EPA is acting as the certifying authority.

meeting request requirement was waived. 40 CFR 121.5(b).

The Agency is also finalizing the ability for state or Tribal certifying authorities to define the additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification, in lieu of relying on EPA's default list of additional contents. Therefore, under this final rule, where a project proponent is requesting certification from a certifying authority other than EPA and that certifying authority has identified additional required contents of a request for certification beyond the minimum contents outlined in 40 CFR 121.5(a), then the request for certification must include those additional required contents.

The Agency restructured § 121.5 to clarify which components are required for all requests for certification versus which components depend on the certifying authority. Section 121.5(a) defines the minimal contents for all requests for certification, no matter the certifying authority (*i.e.*, states, Tribes, or EPA). Section 121.5(b) defines the additional contents in a request for certification when EPA is the certifying authority. Section 121.5(c) clarifies that if the certifying authority is a state or authorized Tribe that has identified additional contents for a request for certification, then the project proponent must include those additional contents in a request for certification. Lastly, § 121.5(d) clarifies that if the certifying authority is a state or authorized Tribe that has not identified additional contents for a request for certification, then the project proponent must include those additional contents defined at § 121.5(b) in a request for certification. This structural change is intended to provide greater clarity for stakeholders in implementation of this final rule.

2. Summary of Final Rule Rationale and Public Comment

Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent. 33 U.S.C. 1341(a) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a *request for certification*, within a reasonable period of time (which shall not exceed one year) after *receipt of such request*, the certification requirements of this subsection shall be waived with respect to such Federal application.") (emphasis added). The statute does not define

either "request for certification" or "receipt."

In the 2020 Rule, the Agency defined "certification request" for all certifying authorities and asserted that ambiguities in the statutory language had led to inefficiencies in the certification process. 40 CFR 121.5 (2020); *see* 85 FR 42243 (July 13, 2020). In particular, the 2020 Rule preamble provided that states and authorized Tribes could not rely on state or tribally defined "complete applications" to start the certification process, but rather must rely on a certification request as defined in EPA's regulation to initiate the process. The Agency relied on *New York State Department of Environmental Conservation v. FERC*, in which the Court of Appeals for the Second Circuit rejected New York's argument that the section 401 process "begins only once [the state agency] deems an application 'complete'" and, instead, agreed with FERC that the section 401 review process begins when the state receives a request for certification. 884 F.3d 450, 455 (2d Cir. 2018) ("*NYSDEC*"). The court found that "[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review" and reasoned that "[i]f the statute required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide they have all the information they need." *Id.* at 455–56.

Some commenters asserted that the 2020 Rule's approach provided clarity about the requirements for project proponents to request certification and when the reasonable period of time begins. These commenters stated that the 2020 Rule created a predictable and transparent certification process by defining a clear list of contents of certification requests. Conversely, some commenters highlighted challenges with implementing the 2020 Rule's approach for certification requests. Commenters stated that 2020 Rule requirements were disconnected from longstanding cooperative processes established among stakeholders and created confusion due to differences from certifying authorities' requirements.

EPA agrees that defining some minimum components of a request for certification increases clarity and efficiency in the certification process. Recognizing that some certifying authorities already have or will define additional requirements for requests for certification they receive, EPA is only defining minimum contents for all requests for certification. EPA finds this approach best respects longstanding state and Tribal processes familiar to

stakeholders and enables states and Tribes to determine their specific information needs. EPA is also finalizing additional contents for requests for certification to EPA or states and Tribes that fail to define such additional contents to provide stakeholders with greater certainty and predictability in the certification process. The final rule establishes an approach that provides efficiency for requests for certification, while staying consistent with cooperative federalism principles and case law.

EPA is also finalizing conforming changes to the part 124 regulations governing the contents of a request for certification of EPA-issued NPDES permits. EPA proposed to delete § 124.53(b) because the provision allowed a request for certification to precede development of a draft NPDES permit, which was inconsistent with the proposed rule. EPA also proposed to delete § 124.53(c) because the list of contents at § 124.53(c) differed from the proposed list of contents. *See* 87 FR 35336–57 (June 9, 2022). In light of changes in the final rule, EPA is not deleting in full § 124.53(b) or (c), and instead is making targeted revisions to be consistent with the final rule. First, EPA is revising 40 CFR 124.53(b), which provided that when EPA received a permit application without certification, EPA shall forward the application to the certifying authority with a request that certification be granted or denied. EPA is revising § 124.53(b) to clarify that EPA may forward permit applications for individual NPDES permits to a certifying authority and request certification consistent with final rule §§ 121.4 and 121.5 (*e.g.*, EPA will request a pre-filing meeting and include contents for a request for certification consistent with this final rule). It is worth noting that although § 124.53(b) allows EPA to request certification on a permit application for individual permits (consistent with this final rule), this approach is not common practice. Under the final rule and § 124.53(c), EPA may continue to request certification after the draft individual or general NPDES permit is prepared (and include a copy of draft permit in the request for certification). Nevertheless, EPA is retaining § 124.53(b) with the revisions discussed above to provide stakeholders and EPA with flexibility to request certification prior to developing a draft individual NPDES permit.

Second, EPA is also revising 40 CFR 124.53(c), which identified the required contents of a request for certification of an EPA-issued NPDES permit if a certification had not been received by the time the draft permit is prepared.

EPA is revising § 124.53(c) to specify that if certification has not been requested by the time a draft NPDES permit is prepared, EPA will send a request for certification consistent with final rule § 121.5, and will include a copy of the draft permit with that request. EPA is finalizing deletions of the required contents of a request for certification in § 124.53(c)(2) and (3) because the list of contents at § 124.53(c)(2) and (3) differ from the list of contents in § 121.5. Also, as explained in section IV.D in this preamble, the statement required at § 124.53(c)(3) regarding the reasonable period of time was not consistent with the approach to the reasonable period of time at § 121.6.

The following sections discuss the minimum contents for all requests for certification, state and Tribal authority to define additional contents, the additional contents defined by EPA and their application in instances where states and Tribes decline to define such additional contents, and when a certifying authority is in “receipt” of a request for certification.

a. Minimum Contents of a Request for Certification

i. Application or Draft Federal License or Permit

In a change from the proposed rule, EPA is finalizing that all requests for certification on an individual Federal license or permit shall include “[a] copy of the Federal license or permit application submitted to the Federal agency,” while all requests for certification on the issuance of a general Federal license or permit shall include “[a] copy of the draft Federal license or permit.” 40 CFR 121.5(a). EPA proposed in § 121.5(a) that all requests for certification “shall include a copy of the draft license or permit” to ensure that states and Tribes have the critical information to make a timely and informed certification decision. 87 FR 35332. Many commenters opposed this approach for various reasons, including but not limited to possible impacts to certifying authority practice and relationships, concerns over potential delays, and concerns over how the proposed approach would work in instances where a Federal agency does not develop a draft license or permit, particularly for individual Federal licenses or permits.

In response to comments, EPA decided to partially change the requirement in the final rule to require that all requests for certification on an individual Federal license or permit include the Federal license or permit

application at a minimum, instead of the draft Federal license or permit. *See* 40 CFR 121.5(a)(1). EPA recognizes that with respect to general Federal licenses and permits, there often is no formal “application,” and for that reason the final rule allows the Federal agencies issuing those general Federal licenses and permits to submit the draft general Federal license or permit to the certifying authority instead of a Federal license or permit “application.” *See* 40 CFR 121.5(a)(2). EPA’s bifurcated approach for requests for certification for individual Federal licenses or permits and for the issuance of general Federal licenses or permits promotes clarity and should minimize delays in the licensing and permitting process, since EPA anticipates most stakeholders are familiar with starting the section 401 certification process with a Federal license or permit application (for individual licenses or permits) or with a copy of the draft Federal license or permit (for the issuance of a general license or permit). Additionally, this bifurcation is modeled on the separate lists for the contents of requests for certification included in the 2020 Rule.

ii. Water Quality-Related Materials

In the final rule, EPA is requiring project proponents to include “any readily available water quality-related materials that informed the development of the application” for requests for certification for individual Federal licenses or permits. *See* 40 CFR 121.5(a)(1)(ii). In the case that the request for certification is for the issuance of a general Federal license or permit, it must include “any readily available water quality-related materials that informed the development of the draft Federal license or permit.” *See* 40 CFR 121.5(a)(2)(ii). The term “readily available water quality-related materials that informed the development of” either the application or the draft license or permit refers to existing water quality-related materials that are in the project proponent’s possession or easily obtainable⁴³ and informed the project proponent’s development of the application or draft license or permit. These materials for either request may include, but are not limited to, water quality baseline conditions from the project site, sediment and erosion control plans, restoration plans, alternatives analyses, mitigation plans, modeling, and/or other materials that have already been developed for the

Federal license or permit application or draft license or permit and would help inform the certifying authority of the water quality-related impacts from the activity.⁴⁴

The Agency had proposed that, at a minimum, all requests for certification include “any existing and readily available data or information related to potential water quality impacts from the proposed project.” EPA intended that providing certifying authorities with any existing and readily available data or information related to potential water quality impacts from the proposed project, such as studies or an EIS or Environmental Assessment (EA) or other water quality monitoring data, would reduce the need for duplicative studies and analyses. Several commenters supported the requirement that the request for certification include “any existing and readily available data or information related to potential water quality impacts from the proposed project,” and a few commenters noted that this information is important for decision-making and allows certifying authorities to better evaluate potential impacts of a project. Conversely, many commenters did not support the inclusion of “any existing and readily available data or information related to potential water quality impacts from the proposed project,” arguing that it was unclear and would be difficult to implement. Some of these commenters added that the requirement would create confusion and delays in the certification process.

In response to commenter concerns, EPA is adjusting the regulatory text in the final rule to read “any readily available water quality-related materials that informed the development of” the application or draft general Federal license or permit. *See* 40 CFR 121.5(a)(1)(ii), (a)(2)(ii). EPA recognizes the importance of providing certifying authorities with critical information to inform their analysis while at the same time considering important implementation details. First, this revision provides a predictable endpoint for project proponents because it is limited to existing data or information that was used in the development of the Federal license or permit application or the draft general Federal license or permit. Second, consistent with the

⁴³ For example, this could include maps, studies, or a reference to a website or literature that contain information that informed the development of the application or draft license or permit.

⁴⁴ These examples are not intended to be exhaustive, nor does EPA expect that all of the example materials listed will be readily available and/or materials that informed the development of the application or draft Federal license or permit in all cases. Rather, EPA is providing these examples because these are materials that EPA has previously asked for and found informative when conducting its reviews of requests for certification.

scope of review under this final rule, this revision limits any such materials to “water quality-related materials.” This will ensure that project proponents provide certifying authorities with pertinent water quality-related information to fully inform their certification analysis. EPA also finds that limiting such materials to “water quality-related” should clarify that project proponents may redact or exclude personally identifiable information (e.g., personal addresses, personal finance information) and/or other sensitive information.

A few commenters asserted that while they supported the minimum requirements of the proposed rule, they believed that the Agency should not limit certifying authorities to “any existing and readily available” and suggested deleting the phrase or clarifying that it should not be construed to restrict a certifying authority from requesting new, additional, or not-yet available data related to the proposed activity. EPA appreciates these concerns, however, as discussed above, the Agency finds it reasonable and appropriate for the rule to balance certifying authority information needs with legitimate implementation concerns by limiting the default requirements to existing, readily available information. However, if there are other materials that did not necessarily “inform the development” of the application or draft Federal license or permit (e.g., section 402 permit factsheets, permit description presentations, etc.), the certifying authority is free to define such materials in its additional contents for a request for certification, *see* discussion *infra*, or request such additional information after receiving a request for certification. A project proponent may also include any additional information in the request for certification. Furthermore, certifying authorities are encouraged to use the pre-filing meeting request process to further communicate appropriate water quality-related materials that would be helpful in reviewing a request for certification on an individual Federal license or permit.

b. Additional Contents in a Request for Certification

Consistent with the proposed rule, EPA is finalizing that where a “certifying authority has identified contents of a request for certification” that are relevant to the water quality-related impacts from the activity, in addition to the minimum requirements discussed above, “the project proponent shall include in the request for certification those additional contents

identified prior to when the request for certification is made.” 40 CFR 121.5(c). The Agency is also finalizing a set of additional contents that a project proponent must include in a request for certification when EPA acts as the certifying authority. 40 CFR 121.5(b). For further clarity, the additional contents listed at § 121.5(b) are required in each request for certification to a state or authorized Tribe that has not established its own list of requirements. If a state or authorized Tribe has established its own list for a request for certification, then EPA’s list of additional contents would not apply. The Agency has restructured § 121.5 to clearly distinguish between requirements that apply to all requests for certification, *see* § 121.5(a), versus requirements that only apply to requests for certification to EPA or states or Tribes that fail to define additional contents, *see* § 121.5(b) and (d), or requirements that apply to requests for certification to states or Tribes that define additional contents, *see* § 121.5(c).

EPA acknowledges that this final rule’s approach contrasts with the approach taken in the 2020 Rule, which defined the contents of a certification request for all certifying authorities. However, this final rule is a better—and more flexible—approach to defining the term “request” and consistent with *NYSDEC*. That decision holds that the reasonable period of time begins after receipt of a request for certification and not when a state deems it “complete;” it does not preclude EPA or other certifying authorities from defining—in advance—those contents a certification request must contain. As discussed below, this approach is consistent with stakeholder input and the cooperative federalism principles central to section 401 and the CWA.

i. State and Tribal Certifying Authorities

Under § 121.5(c), “[w]here a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of [§ 121.5], the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.” This approach is consistent with the proposal and the intent of the Act, is reasonable, is responsive to concerns and considerations raised through the public comment process, and ultimately is the most efficient path forward.

Many commenters supported certifying authorities having the ability to define the contents of a request for certification, saying that it ensures states and Tribes have the information they need to protect their water quality. Commenters provided a variety of reasons why they supported this approach, including asserting that it will ensure a comprehensive review under section 401 in the reasonable period of time and enable states and Tribes to ensure they have needed information to determine whether a project will comply with their water quality requirements. Several commenters argued that this approach is an improvement over the 2020 Rule’s “one-size fits all” approach to request for certification. EPA agrees that certifying authorities are best suited for determining their needs in making their certification decisions.

As an initial matter, the Agency finds it is reasonable for states and Tribes to have the authority to determine what information is necessary to initiate the certification process under section 401 in compliance with their own water quality requirements. In order to effectuate Congress’s goals and directives for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a copy of the Federal license or permit application and any water quality-related materials that informed the development of the application, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. Defining an exclusive list of components for requests for certification for all certifying authorities could inhibit a comprehensive review under section 401 in the reasonable period of time. The diverse nature of Federal licenses and permits and the variety of potential water quality impacts from those different types of activities do not lend themselves to a one-size-fits-all approach.

Indeed, to define an exclusive list of contents would frustrate the intent of the Act’s emphasis on cooperative federalism and lead to procedural inefficiencies. Specifically, a framework requiring the reasonable period of time to begin *before* the certifying authority has essential information that it has transparently publicized as necessary to make its own certification decision would be inconsistent with the language, goals, and intent of the statute. Congress clearly did not intend section 401 reviews to turn on incomplete applications, and the

reasonable period of time and one-year backstop were added by Congress to ensure that “sheer inactivity by the State . . . will not frustrate the Federal application.” H.R. Rep. No. 92–911, at 122 (1972). Moreover, this approach should be familiar to project proponents who followed specific requirements established by states and Tribes during the last approximately 50 years. The Agency’s final approach will allow for a transparent and timely process that respects the role of state and Tribal certifying authorities under the cooperative federalism framework of section 401.

Some commenters opposed the proposed rule and argued that the Agency cannot delegate the ability to define additional requirements for a certification request to certifying authorities under *NYSDEC*. The Agency does not agree. In *NYSDEC*, the Second Circuit never addressed the separate question of whether EPA or certifying authorities have the underlying authority to establish—in advance of receiving a request for certification—a list of required contents for such a request. Accordingly, the court’s holding that the reasonable period of time begins after “receipt” does not preclude the Agency from establishing such a list of minimum “request for certification” requirements, or from allowing certifying authorities to add requirements to EPA’s list or develop their own lists of request requirements. Because the statute does not define the term “request for certification,” EPA and other certifying authorities may do so in a reasonable manner that establishes—in advance of receiving the request—a discernable and predictable set of requirements for a request for certification that starts the reasonable period of time. No court has considered this issue and come to the opposite conclusion. The Agency decides, consistent with principles of cooperative federalism enshrined in the Act, to continue this lawful, familiar, and time-tested practice.

Most commenters that opposed this approach argued that, as an implementation matter, EPA is inviting certifying authorities to engage in the types of practices that were rejected by the Second Circuit in *NYSDEC*. Specifically, commenters asserted that the proposed approach would allow certifying authorities to issue regulations that expand the required contents of a request for certification without any oversight or limits and for reasons other than potential water quality impacts. Other commenters asserted that the proposed approach did not enforce any transparency

requirements against certifying authorities, and, therefore, certifying authorities would vaguely or broadly define the minimum contents or require information that was currently unavailable to stall the start of the reasonable period of time. Still other commenters argued that the ability of states and authorized Tribes to define the contents for a request for certification would result in a patchwork of different requirements, placing burdens on project proponents, especially for projects that span multiple states. The Agency acknowledges these concerns and has incorporated reasonable changes into the final rule that establish sufficient guardrails to prevent those practices, while also allowing certifying authorities to act on a request for certification in a timely and informed manner.

First, as identified in § 121.3, the scope of the certifying authority’s review is explicitly limited in the final rule to “the water quality-related impacts.” To clarify that such limitations extend to the contents of a request for certification, EPA added text at § 121.5(c) that such additional contents are “relevant to the water quality-related impacts from the activity.” Hence, contents of requests for certification that are substantively beyond the scope of water quality-related impacts cannot be reasonably necessary to make an informed decision regarding the potential water quality-related impacts from the activity, and thus would not be in conformity with the regulation. The regulatory text provides flexibility within the scope for certifying authorities interested in developing their own additional contents of requests for certification.

Next, § 121.5(c) itself limits the ability of a certifying authority to request materials to those “identified prior to when the request for certification is made.” Although the Agency is allowing states and authorized Tribes to define their own additional requirements for a request for certification, the rule provides a backstop for those states or authorized Tribes that either do not identify those additional requirements before the request for certification is made or change their requirements after the request for certification is made. In other words, certifying authorities cannot subsequently modify or add to the required contents of a request for certification after the request was submitted. This does not mean a certifying authority could not ask for additional information after a request for certification is made; rather, a

certifying authority cannot alter the required contents of a request for certification after it is received.

The Agency expects that those states and authorized Tribes that choose to identify additional contents in a request for certification will do so clearly enough to provide project proponents with full transparency as to what is required. Relatedly, to remain consistent with legal precedent, states and authorized Tribes should avoid non-exhaustive or vague lists that a certifying authority could rely on to continually deem requests incomplete. When developing their lists of additional contents in a request for certification, EPA recommends that certifying states and authorized Tribes look to § 121.5(b) for the list of contents EPA has outlined for requests for certification when it acts as a certifying authority as a guide to help the certifying state or authorized Tribe develop its own list.

The Agency originally proposed that the contents of a request for certification be established by a state or authorized Tribe in regulation. Several commenters disagreed that certifying authorities should be limited to defining the contents of a request for certification in regulation. A few commenters asserted that the contents do not need to be in a regulation to be transparent or publicly available, while a few commenters urged EPA to consider that some state processes are well-known to the regulated community or have been used for 50 years. A few of these commenters argued that states use different approaches to defining the contents of a certification request, including statute, policy documents, application forms, and guidance. These commenters asserted that placing the contents of a request in regulation would be an unnecessary burden, time consuming (*e.g.*, may require legislative approval before going into effect), and interfere with a state’s ability to describe the information in certification request. Conversely, some commenters asserted that by allowing the certifying authority to set the minimum requirements, and requiring those minimum requirements to be in regulation, the project proponent, the certifying authority, and the public would be fully informed of when the reasonable time begins and ends. One commenter asserted that Due Process and basic fairness require certifying authorities to publish such contents clearly and authoritatively and asserted that EPA should clarify that certification request requirements and receipt timing cannot be tied to procedures or requirements that are not adopted and published as regulations.

After considering public comments, the Agency is not requiring a state or authorized Tribe to define additional contents of a request for certification in regulation. The Agency agrees that the required contents of a request do not need to be in a regulation to be transparent, publicly available, and provide project proponents with adequate notice. The critical inquiry for state and Tribal certifying authorities to consider is whether the method of identifying the required contents in a request for certification is clear, objective, and authoritative such that notions of fairness and notice are served. The Agency notes that some of the state and Tribal processes are already well known to the regulated community, have been used for 50 years, and are not in regulation. As a practical matter, states and authorized Tribes use different approaches to define the required contents of a request for certification, including statute, regulations, policy documents, application forms, and guidance. The burden of putting the contents of a request in regulation can be time consuming (e.g., may require legislative approval before going into effect), and may interfere with certifying authorities' ability to describe the information they expect in a request for certification.

The final rule approach also addresses project proponent concerns about certifying authorities that, in the past, may have unexpectedly required additional information from the project proponent to satisfy the request for certification requirement before starting the clock on the "reasonable period of time." Under the approach EPA is finalizing, the reasonable period of time starts on the date that a "request for certification" was received in accordance with the certifying authority's applicable submission procedures. As discussed above, the request for certification is defined to mean a request that contains the contents required by EPA's final regulations and any additional state or Tribal requirements *identified prior to when the request for certification was made*. This approach creates a bright-line for project proponents seeking to avoid unexpected shifts and identify the necessary contents for a request for certification with certainty.

In 1971, the Agency opted to not define what information, if any, was sufficient to start the review process for all certifying authorities and instead opted to define the information only for EPA when it acts as the certifying authority. 40 CFR 121.22 (2019). As a result, over the last approximately 50 years, many states and authorized

Tribes established their own requirements for what constitutes a request for certification, also called a "certification request," typically defining it as a so-called "complete application." See, e.g., Cal. Code Regs. Tit. 23, sec. 3835; La. Admin. Code tit. 33, sec. IX-1507; Ohio Admin. Code 3745-32-03. Prior Agency guidance acknowledged this practice. See 1989 Guidance, at 31 (April 1989) ("Thus, after taking the federal agencies' regulations into account, the State's 401 certification regulations should link the timing for review to what is considered receipt of a complete application."); see also 2010 Handbook at 15-16 (rescinded in 2019, see *supra*) ("States and tribes often establish their own specific requirements for a complete application for water quality certification. . . . The advantage of a clear description of components of a complete [section] 401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun."). Some certifying authorities rely on a "complete application" to start the certification review process. In the Agency's view, a state requirement for submittal of a complete application, when the contents of such complete application are clearly identified ahead of time, is not inherently subjective and can be defined by the information identified by regulation or on a form. Establishing such a list of required elements in advance is consistent with the rationale of *NYSDEC* that criticized the state for relying on its "subjective" determination following submission regarding whether the request was "complete."

The use of a "completeness" standard for applications or similar documents is not a novel concept in CWA implementing regulations.⁴⁵ Both EPA and the Corps have developed regulations setting out requirements for "completeness" or "complete applications" to initiate the permitting process. See 40 CFR 122.21(e) (describing "completeness" for NPDES applications); 33 CFR 325.1(d)(10) (describing when an application is deemed "complete" for section 404 permits). Neither CWA section 402 nor section 404 uses the word "complete" to modify the term "application" in the statute, yet the agencies have reasonably interpreted the term "application" in

those contexts to allow for a "completeness" concept that provides a clear and consistent framework for stakeholders involved in the section 402 and 404 permitting processes. The Agency is unaware of significant issues with the use of "complete applications" in either the section 402 or section 404 permitting processes or a concern that it has led to a "subjective standard."

While acknowledging the ruling in *NYSDEC*, the Agency also notes that the Fourth Circuit ruled in support of the reasonable period of time beginning when the certifying authority deems the application complete. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009). The final rule approach is consistent with this decision in that regard, and not inconsistent with *NYSDEC*, as explained above.

States' and authorized Tribes' ability to define additional contents of a request for certification should ultimately reduce the need for certifying authorities to request additional information from project proponents after the request for certification has been submitted. The limitations referenced above do not preclude certifying authorities from asking for more information after they receive a request for certification and the reasonable period of time begins, if the certifying authority determines additional information would help inform its decision-making on the request for certification. However, these requests for additional information by a certifying authority should be targeted to information relevant to the potential water quality-related impacts from the activity. EPA also encourages certifying authorities and project proponents to discuss the necessary information that must be part of the request for certification during the pre-filing meeting process.

ii. Requirements When EPA Is the Certifying Authority

The Agency is finalizing a list of additional contents required for requests for certification submitted to EPA when EPA acts as a certifying authority.⁴⁶ This list also applies to requests for certification submitted to states and authorized Tribes that have not identified additional contents of a request for certification. As discussed below, these components contain some similarities to the 1971 Rule and 2020

⁴⁵ The use of "complete" applications is also applied in other Federal environmental realms (e.g., the Safe Drinking Water Act, the Clean Air Act). See, e.g., 40 CFR 144.31, 40 CFR 51.103, appendix V to part 51.

⁴⁶ EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). EPA acts as the certifying authority in two scenarios: (1) on behalf of Tribes without "treatment in a similar manner as a state" (TAS) and (2) on lands of exclusive Federal jurisdiction.

Rule, with revisions to provide further clarification and efficiency for project proponents, EPA when it acts as a certifying authority, and when a state or authorized Tribe has not established its own definition of “request for certification.”

EPA proposed a list of contents that shall be included in requests for certification to the Regional Administrator shall include the following, if not already included in the draft license or permit:

1. The name and address of the project proponent;
2. The project proponent’s contact information;
3. Identification of the applicable Federal license or permit, including Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency;
4. Where available, a list of all other Federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed activity and current status of each authorization; and
5. Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission requirements, unless a pre-filing meeting request has been waived. 40 CFR 121.5(c)

Proposed § 121.5(b) also provided that “[w]here a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified in regulation additional contents of a request for certification, the project proponent shall submit a request for certification as defined in [§ 121.5(c)].”

In this final rule at § 121.5(b), EPA is finalizing a slightly different list of additional contents in a request for certification than what was proposed that combines components proposed and offered as alternatives in the preamble to the proposed rule, due to the feedback received in the public comments and the removal of a draft Federal license or permit from the minimum contents for all requests for certification. The final list of additional contents for a request for certification when EPA is the certifying authority (or when states or Tribes fail to define such additional contents) includes seven components derived from the proposed approach and the alternative approach:

1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

2. The specific location of any discharge(s) that may result from the proposed activity;

3. A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;

6. A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

7. Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

A few commenters agreed that EPA’s additional contents for a request for certification should be the default contents for a request to a certifying authority that does not define additional contents. However, some commenters expressed concern that EPA’s default list of additional certification request components was inadequate and did not capture all the items a state or authorized Tribe may need for its analysis. One commenter asserted that EPA’s default additional components create a presumption that EPA’s list is sufficient for a request for certification, and recommended that EPA make clear that states and authorized Tribes have the authority to specify the contents of a request for certification where they are the certifying authority.

To provide transparency and predictability, the final rule requires project proponents seeking certification from a state or authorized Tribe that has not identified additional contents of a request for certification to submit the additional contents identified at § 121.5(b). *See* § 121.5(d). However, this final rule does not create the presumption that the contents identified at § 121.5(b) will be sufficient for all scenarios and all certifying authorities. Rather, the Agency is providing a list of minimum contents as a baseline and allowing state and Tribal certifying authorities to define additional contents for each request for certification. As discussed above, the additional contents in § 121.5(b) would not apply where a certifying authority has established its own list of requirements for a request

for certification. However, EPA recommends that certifying authorities wishing to establish their own lists of additional contents of requests for certification consider the requirements outlined by the Agency in § 121.5(b), as these contents reflect the additional information deemed necessary by EPA for the Agency to initiate its analysis of a certification request on a Federal license or permit application.

EPA requested comment on an alternative list of additional contents to accompany a request for certification on a Federal license or permit application. Under this alternative approach, the project proponent would be required to submit “proposed activity information” with six components, including the following:

1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

2. The specific location of any discharge(s) that may result from the proposed activity;

3. A map and/or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, highways;

4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) on which any discharge(s) will take place; and

6. Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements. 87 FR 35336.

A few commenters did not find the additional requirements for the alternative approach to be necessary, because the information would already be included in the application or under current state requirements. On the other hand, some commenters provided suggestions for the default additional contents. A few commenters recommended supplementing the default additional request components with the six additional components listed in the proposal preamble as an alternative, and as suggested by one of these commenters, revising as appropriate to address any duplication.

EPA does not agree with commenters asserting that additional components are unreasonable. While some commenters said doing so was unnecessary, the relevant inquiry is whether EPA’s

inclusion of additional components is “reasonable,” not whether it is “necessary.” EPA anticipates that the list of additional required contents at § 121.5(b) is appropriate for EPA as a certifying authority and as a default list for those other certifying authorities that have not identified additional required contents for requests for certification. EPA also does not intend for this list to be duplicative. Accordingly, EPA has added text at final rule § 121.5(b) to clarify that a project proponent only needs to provide the additional components where such components are not already included in the minimal contents of a request for certification defined at § 121.5(a). For example, if a map or diagram of the proposed activity site is part of the Federal license or permit application, the project proponent would not be required to submit a second copy of the map or diagram.

EPA agrees with commenters who suggested that the Agency combine the proposed and alternative lists of additional contents. As discussed below, the Agency has revised the list of additional contents to reduce duplication among the minimal contents of a request for certification. Additionally, the Agency recognizes that some of the components listed at § 121.5(b) may not be applicable if the project proponent is a Federal agency seeking certification on the issuance of a general Federal license or permit. Accordingly, the Agency has added regulatory text at § 121.5(b) to clarify that only the applicable additional components need to be included in a request for certification to EPA.

First, based on commenter recommendations, EPA is not finalizing the components of the proposed list that are expected to be captured by the requirements in § 121.5(a), such as the name and address of the project proponent, the project proponent’s contact information, and identification of the applicable Federal license or permit, including the Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency. Although this type of background information was included in the 1971 Rule and the 2020 Rule, this information is unnecessary and redundant to both the Federal license or permit application and draft Federal license or permit.

Second, similar to the 2020 Rule, the Agency is finalizing the requirement that the project proponent provide a list of other authorizations that are required for the proposed activity and the current status of such authorizations. This requirement will allow the Agency to

assess how water quality impacts may be addressed through other Federal, state, Tribal, or local authorizations and potentially reduce redundancies or inconsistencies between the certified Federal license or permit and other authorizations. When the project proponent is a Federal agency seeking certification, the Agency does not expect the Federal agency to be able to produce such a list. Typically, when a Federal agency seeks certification, it is seeking certification on general Federal licenses or permits that would be used by project applicants in the future. Therefore, at the time of the request for certification, the Federal agency is likely unable to provide any information on which authorizations, if any, are required for such a future project.

Third, like the 2020 Rule, the Agency is finalizing a requirement that the project proponent submit documentation that it requested a pre-filing meeting, unless the pre-filing meeting request has been waived. The documentation should be in writing, such as a copy of the email requesting the pre-filing meeting. As discussed in section IV.B in this preamble, a certifying authority may waive the requirement for a pre-filing meeting request. In that event, the project proponent would not need to produce documentation of a pre-filing meeting request.

Fourth, the Agency is adding five components that were offered as alternatives to the final rule text to provide EPA with information about the proposed activity, including a description of the proposed activity, the location of any discharge from the proposed activity, a map or diagram of the proposed activity site, a description of current activity site conditions, and the date(s) on which the proposed activity will begin and end. These components are similar to those in the 2020 Rule, *see* § 121.5(b)(4) (2020), and the 1971 Rule, *see* § 122.22(b), (d) (2019). These components are necessary to initiate EPA’s analysis of a request for certification on a Federal license or permit application.

The Agency is not including the sixth alternative component offered at proposal, which would have required a project proponent to submit any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements. EPA finds that such a component would be too vague and would not provide project proponents with a clear, predictable set of a requirements for a request for certification. However, if EPA later determines additional

information would be helpful to inform its decision-making on a request for certification, this final rule does not preclude EPA from asking for additional information after a certification request is submitted. But EPA cannot require additional components, aside from contents listed at § 121.5(a) and (b), in a request for certification.

The Agency is also finalizing the removal of the contents of the 2020 Rule at § 121.5(b)(5), (8), and (9); the 1971 Rule also contained similar contents to § 121.5(b)(5) of the 2020 Rule. *See* 40 CFR 121.22(c), (e) (2019). Section 121.5(b)(5) of the 2020 Rule, which required the project proponent to “[i]nclude a description of any methods and means proposed to monitor the discharge and the equipment or measures planned to treat, control, or manage the discharge,” is unnecessary since the final rule requires a project proponent to provide the Federal license or permit application or draft Federal license or permit, as appropriate, and any readily available water quality-related materials that informed the development of the application or draft Federal license or permit in its request. The Agency also finds it unnecessary to retain the requirements at § 121.5(b)(8) and (9) of the 2020 Rule. In 2020, EPA required the project proponent to include an attestation statement that the project proponent “certifies that all information contained herein is true, accurate, and complete to the best of my knowledge and belief” at § 121.5(b)(8) “to create additional accountability on the part of the project proponent to ensure that information submitted in a certification request accurately reflects the proposed project.” 85 FR 42245. EPA is unaware of any issues or concerns that project proponents will not provide accurate information in the request for certification without such attestation. Furthermore, the final contents for a request for certification include either the license or permit application or a copy of the draft Federal license or permit, which presumably incorporates accurate information about the proposed project. Additionally, § 121.5(b)(9) of the 2020 Rule, which required the project proponent to include a statement that it “hereby requests that the certifying authority review and take action on this CWA 401 certification request within the applicable reasonable period of time,” is unnecessary because a project proponent is required to submit a request for certification as defined in this final rule. Submitting a request for certification as defined in this final rule should be a clear

indication to the certifying authority that the project proponent is seeking certification.

A few commenters provided detailed, lengthy lists of additional contents, beside the seven that EPA is finalizing, that could be required by certifying authorities, including but not limited to various plans, photographs, field surveys, construction methods, and maps. Another commenter asserted that a request should include the requirements for a complete application that are at least as stringent as Federal agencies making similar determinations, such as the Corps' requirements for complete CWA section 404 permit applications.

EPA appreciates commenter suggestions and while EPA is not including additional contents in § 121.5(b), aside from those discussed above, the Agency emphasizes that certifying authorities are free to define additional contents for their requests for certification. As discussed in the prior subsection, EPA has adjusted the language in the final rule to increase flexibility for certifying authorities to define the additional contents of a request for certification in regulation or another appropriate manner, such as an official form used for requests for certification. Such additional contents should be communicated clearly and transparently for project proponents to be aware of before submitting a request for certification.

c. Defining "Receipt" of a Request for Certification

The Agency is clarifying at § 121.6(a) that "the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5, in accordance with the certifying authority's applicable submission procedures." In proposed § 121.6(a), EPA stated that "the reasonable period of time shall begin upon receipt of a request for certification." The Agency proposed to define "receipt" at § 121.1(k) to mean "the date that a request for certification, as defined by the certifying authority, is documented as received by a certifying authority in accordance with the certifying authority's applicable submission procedures." The final rule merely simplifies the proposed rule's approach to when the reasonable period of time begins by placing the definition of receipt in § 121.6(a).

The statute provides that the reasonable period of time begins "after receipt of such request." 33 U.S.C. 1341(a)(1). The statute does not define the term "receipt of such request," nor

does it define how a request for certification must be received by a certifying authority. The 1971 Rule did not address or define the term "receipt," however, the Agency opted to define the term in the 2020 Rule. 40 CFR 121.1(m) (2020). The 2020 Rule defined the term "receipt" as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures." *Id.* In implementation of the 2020 Rule, there was some confusion regarding whether it was the Federal agency's or certifying authority's responsibility to determine that a certification request, as defined by the 2020 Rule, was received.

Consistent with the statutory text, the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined at § 121.5, and is submitted in accordance with the certifying authority's applicable submission procedures. 40 CFR 121.6(a). As discussed in more detail below, the certifying authority must send written notification to the project proponent and Federal agency of the date the request for certification was received.

Some commenters asserted that, due to the wide variety of project types, the regulations should not dictate when the reasonable period of time begins. These commenters added that states and authorized Tribes should determine when the reasonable period of time starts, and when they have sufficient information to conduct a proper review, provided it does not exceed the statutory one-year limit. As described above, EPA provides in the final rule at § 121.6(a) that "the reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5, in accordance with the certifying authority's applicable submission procedures." This approach provides certifying authorities with a role in determining when the clock starts (*i.e.*, by defining additional contents of a request for certification and applicable submission procedures), while also providing transparency and consistency around the process for requesting certification and starting the reasonable period of time for project proponents.

Some commenters stated that the proposed definition of "receipt" would limit predictability and could allow certifying authorities to delay the certification process by saying they have not received the request for certification in full and in accordance with its submission procedures. A few commenters asserted that the Second Circuit held that allowing states to determine when requests are

"complete" could create a "subjective standard" in violation of the bright line requirements of section 401. *NYSDEC*, 884 F.3d at 455–56. While not retaining a definition of "receipt" in the final rule, EPA maintains that consistent with section 401(a)(1), the reasonable period of time clock starts when the certifying authority has received a request for certification, as defined in § 121.5 of the final rule, in accordance with the certifying authority's applicable submission procedures. *See* 40 CFR 121.6(a). EPA disagrees with commenter assertions that having the certifying authority determine when it has received a request for certification will lead to certifying authorities subjectively determining when a request for certification has or has not been submitted. Rather, this final rule expressly rejects such practices by limiting requests for certification from state and Tribal certifying authorities with additional required components to those that are identified prior to when the request for certification is made. *See* 40 CFR 121.5(c). This does not mean a certifying authority could not ask for additional information after a request for certification is made; rather, a certifying authority cannot alter the required contents of the request for certification after it is received. Similarly, the Agency disagrees that the concept of "completeness" is inherently subjective. As discussed above, having the certifying authority establish a list of additional required contents for a request for certification *before* receiving a request for certification, and therefore determine when the request has been received, is not at odds with the decision from the Second Circuit. *See* discussion *supra*.

The project proponent must submit the request for certification in accordance with the certifying authority's applicable submission procedures. Applicable submission procedures describe the manner in which a certifying authority will accept a certification request, *e.g.*, through certified mail or electronically. The Agency understands that certifying authorities may have different procedures for receiving certification requests (*e.g.*, receiving certification in different formats or requiring the payment of fees), and as such is not limiting or defining a set of standard applicable submission procedures. The certifying authority may provide these applicable submission procedures in regulations or another appropriate manner, such as an official form used for requests for certification. In whichever way the certifying authorities

provide their procedures, EPA encourages certifying authorities to communicate them transparently and publicly. EPA recommends that the certifying authority and project proponent communicate with each other (*e.g.*, during any pre-filing meeting engagement) to discuss submission procedures and contents of the request for certification.

As mentioned above, once a certifying authority receives a request for certification, the certifying authority must send written confirmation to the project proponent and the Federal agency of the date that the request for certification was received. The Agency proposed similar language at § 121.5(d). However, the Agency has moved this provision to § 121.6(a) to better clarify that the reasonable period of time does not start with the written confirmation from the certifying authority. Rather, consistent with section 401(a)(1), it begins on the date that the project proponent submitted the request for certification. EPA recognizes that the final rule no longer includes a strict period for negotiation on the length of the reasonable period of time between the certifying authority and the Federal agency at the start of the reasonable period of time, which means that the certifying authority may not promptly notify the project proponent and the Federal agency that the request for certification was received. Accordingly, the Agency is removing the regulatory text located at § 121.6(b) in the 2020 Rule, which required the Federal agency to communicate the date of receipt of the request for certification, the reasonable period of time, and the date waiver will occur. Under this final rule, the certifying authority is responsible for confirming the date of receipt of a request for certification with the project proponent and Federal agency. However, the final rule approach will not lead to the same level of confusion as the 2020 Rule requirement for the project proponent to submit the request for certification concurrently to the certifying authority and the Federal agency. Under the 2020 Rule, although the certifying authority was responsible for determining whether a request was received, a project proponent could submit a deficient certification request to the Federal agency and spur the Federal agency to communicate an inaccurate date of receipt for the request. The final rule approach avoids this potential miscommunication by relying on the certifying authority, rather than the project proponent, to communicate the date of receipt of a

request for certification with the project proponent and Federal agency.

3. Implementation

The Agency recommends that project proponents, certifying authorities, and Federal agencies work together to determine the most efficient and effective means of communication before the certification process begins to ensure a common understanding of the contents of a request for certification. The final rule's pre-filing meeting process provides an opportunity for such early engagement to identify and discuss the appropriate request for certification requirements. Because the final rule allows certifying authorities to require additional contents in a request for certification as long as they are identified prior to when the request for certification is made, certifying authorities should make their additional contents for request for certification and applicable submission procedures readily available and transparent to the regulated public. EPA intends to support certifying authority efforts to make the requests for certification requirements transparent. For example, EPA could provide links to other certifying authorities' websites on EPA's website or maintain an up-to-date list of points of contact to connect project proponents with the appropriate certifying authority.

Another way a certifying authority may further support the efficient review of requests for certification would be for the certifying authority to make available draft certification conditions that project proponents can consider while developing their project design plans and request for certification materials. Project proponents can save time and money by preparing for and mitigating the impacts from an activity that will not comply with applicable water quality requirements. EPA acknowledges that not all certifying authorities will be able to provide conditions that anticipate potential water quality impacts from various types of activities that will not comply with their applicable water quality requirements; however, some certifying authorities have made example certification conditions for certain project types or waterbodies available prior to receipt of requests for certification for those project types or geographic areas.

The Agency wishes to clarify several implementation questions or issues related to the request for certification that have previously arisen or were revealed through public comment on this rulemaking. First, with regards to project proponents seeking project-

specific certification to obtain authorization under a Corps general permit, project proponents must submit the minimum contents defined at § 121.5(a)(1). For example, if a state or authorized Tribe denied certification on the issuance of a Corps' general permit, then to obtain authorization under that general permit, the project proponent would need to obtain a project-specific certification or waiver from the state or authorized Tribe. In those cases, the "application" part of the request for certification may take the form of a pre-construction notification (PCN), along with any readily available water quality-related materials that informed the development of the application (*e.g.*, the general permit). Second, regarding individual projects that do not involve an "application" or a "license or permit" but still require certification, like Corps' civil works projects, the Agency expects the project proponent to provide documents in lieu of the application that are similar in nature, such as a "project study" when requesting certification. In both instances, the Agency expects the final rule's approach should be familiar to stakeholders who have previously sought certification on such Federal licenses or permits for 50 years under the 1971 Rule.

A few commenters also raised various implementation-related questions with the proposed inclusion of the draft Federal license or permit in all requests for certification. Several commenters expressed concern and confusion over the term "draft permit or license" in the proposed rule and requested that EPA define the term to clarify the appropriate level of detail (*e.g.*, license or permit is ready for issuance, final draft license or permit). Commenters also questioned what would occur if the project changed after receiving a draft Federal license or permit, as well as whether the project proponent was best suited to provide the certifying authority with a copy of the draft Federal license or permit.

As discussed above, in this final rule, a draft Federal license or permit is only required for requests for certification on the issuance of general Federal licenses or permits. Currently, the Agency is only aware of general permits for two Federal agencies: the Corps (section 404 program) and EPA (section 402 program). The Agency does not find it necessary to define "draft license or permit" for purposes of this rulemaking, in part because stakeholders should be familiar with the process of requesting certification on these Federal licenses or permits and Federal agencies will be acting as the "project proponent" in

these instances. This final rule does not require a Federal agency seeking certification on the issuance of a general Federal license or permit to seek certification immediately upon publication of the draft Federal license or permit. Rather, the Federal agency must request certification after publication of the draft Federal license or permit. For example, the Corps is required to request certification on the nationwide permits (NWP) when they are renewed every five years. First, the Corps proposes the draft NWP and takes comment on the proposals, and later finalizes the NWP after considering public comment. Under this final rule, the Corps may request certification on the NWP after it receives and considers public comment on the proposals but before finalizing the NWP. In that scenario, the Corps would provide the non-finalized NWP to the certifying authority as the draft permit in its request for certification to satisfy the requirements. EPA encourages Federal agencies and certifying authorities to work together to determine the point in time at which a request would be most appropriate to allow for an informed and efficient certifying authority review. Such coordination could also avoid questions or concerns arising over significant changes to the draft Federal license or permit post-request. However, there may always be a degree of uncertainty or possibility for project changes when it comes to certifying any project because a Federal agency must obtain a certification prior to issuing a Federal license or permit.⁴⁷ EPA encourages certifying authorities to engage early and often with project proponents and Federal agencies and develop certification conditions that allow for “adaptive management” in the event a project changes. *See* section IV.F in this preamble for further discussion on adaptive management conditions.

Neither the CWA nor this final rule require project proponents to submit the request for certification for an individual license or permit at the time a Federal license or permit application is submitted. Accordingly, project proponents would not be precluded from providing a copy of the draft Federal license or permit, in addition to

the Federal license or permit application, when requesting certification for individual Federal licenses or permits. For example, EPA can continue its longstanding practice of submitting a copy of the draft individual CWA section 402 NPDES permit to the certifying authority for its review. However, project proponents would not be required to wait to request certification for an individual Federal license or permit until a copy of the draft Federal license or permit is obtained, unless the certifying authority has defined in its additional contents for a request for certification that the request must include a copy of the draft Federal license or permit.

A few commenters recommended allowing certifying authorities to issue certification decisions in the absence of a request for certification. For purposes of section 401, EPA does not agree that a CWA section 401 certification can be issued in the absence of a project proponent requesting certification for a Federal license or permit that may result in any discharge into waters of the United States. *See* section IV.A in this preamble for further discussion on when certification is required.⁴⁸ Similarly, if the certifying authority never received a request for certification or if the request for certification or Federal license or permit application was withdrawn, then the certifying authority is no longer responsible for acting on the request for certification because the pre-requisite “request” is absent. *See* section IV.D.2.c in this preamble regarding the Agency’s position on the legality of the practice of withdrawing and resubmitting requests for certification.

As mentioned above, once a certifying authority receives a request for certification, the certifying authority must send written confirmation to the project proponent and the Federal agency of the date that the request for certification was received. 40 CFR 121.6(a). If a project proponent submits a request for certification that does not meet the requirements of § 121.5 of this final rule, the Agency recommends that the certifying authority promptly notify the project proponent that it did not submit a request for certification in accordance with § 121.5 of this final rule. However, as discussed previously, certifying authorities and project proponents can avoid such outcomes by leveraging early engagement opportunities (*i.e.*, pre-filing meetings)

to ensure a common understanding of the required contents of a request for certification.

D. Reasonable Period of Time

1. What is the Agency finalizing?

Under section 401, when a certifying authority receives a request for certification, the certifying authority must act on that request within a “reasonable period of time (which shall not exceed one year).” 33 U.S.C. 1341(a)(1). At § 121.6(a), EPA clarifies that the reasonable period of time begins on the date that a request for certification, as discussed in the previous section, is received by the certifying authority in accordance with its applicable submission procedures. Section 121.6(b) provides Federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided it does not exceed one year from the date that the request for certification was received. The final rule clarifies that the joint determination of the reasonable period of time may happen on a case-by-case basis or categorically. *See* 40 CFR 121.6(b).

Under this final rule, if the Federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time will be six months from the date that the request for certification was received. *See* 40 CFR 121.6(c). This default approach obviates the need for a dispute resolution process in the event the certifying authority and Federal agency are not able to agree on the reasonable period of time. The Agency proposed a 60-day default reasonable period of time. However, for several reasons discussed below, the Agency is not finalizing the proposed 60-day default reasonable period of time.

The pre-filing meeting could be a venue for the Federal agency and certifying authority to discuss the length of the reasonable period of time, particularly because the project proponent participates in that meeting and will, therefore, be informed of any reasonable period of time-related discussions and decisions. EPA also recognizes that the Federal agency and the certifying authority may benefit from discussing the length of the reasonable period of time before the pre-filing meeting to then use the pre-filing meeting to inform the project proponent of the agreed-upon length. Although the Agency is not listing factors that Federal agencies and certifying authorities must consider when establishing the reasonable period of time that the certifying authority has to act on the

⁴⁷ A final Federal license or permit may not be issued until after a certification or waiver is obtained by the project proponent. 33 U.S.C. 1341(a)(1) (“No license or permit shall be granted until certification required by this section has been obtained or has been waived as provided in the preceding sentence.”) Therefore, requiring a copy of the final Federal license or permit to initiate the certification process would be inconsistent with the plain language of section 401.

⁴⁸ EPA is aware that in some instances, certifying authorities use section 401 certifications as state permits under state law; however, this final rule does not address such practices.

request for certification, Federal agencies and certifying authorities might consider factors such as project type, complexity, location, and scale; the certifying authority's administrative procedures; other relevant timing considerations (e.g., Federal license or permit deadlines; associated National Environmental Policy Act deadlines; and/or anticipated timeframe for neighboring jurisdictions process); and/or the potential for the licensed or permitted activity to affect water quality. Federal agencies and certifying authorities might also elect to establish joint reasonable period of time procedures and/or agreements through a memorandum of agreement (MOA) or similar. Such MOAs could apply to all federally licensed or permitted activities or only to specific types of activities (e.g., activities covered by general permits). The requests for certification that fall under these MOAs would not require individual written agreements confirming the reasonable period of time between the Federal agency and certifying authority for each Federal license or permit. Alternatively, Federal agencies and certifying authorities might prefer to agree and establish the reasonable period of time in writing on a case-by-case basis.

EPA is finalizing as proposed that after the reasonable period of time is set, the Federal agency and certifying authority may agree to extend the reasonable period of time, provided that it does not exceed one year from the date that the request for certification was received. *See* 40 CFR 121.6(e). Section 121.6(d) also provides automatic extensions for certain situations, as EPA recognizes there are circumstances under which the Federal agency must extend the reasonable period of time without the certifying authority needing to negotiate an agreement. Such circumstances are where a certification decision cannot be rendered within the negotiated or default reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters) and when state or Tribal public notice procedures necessitate a longer reasonable period of time.

If a longer period of time to review the request for certification is necessary due to either of these circumstances, upon written notification to the Federal agency by the certifying authority prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the amount of time necessitated by public notice procedures or the force majeure event, as long as it does not cause the

reasonable period of time to exceed one year from the date that the request for certification was received. In its notification, the certifying authority must provide the Federal agency with a written justification for the automatic extension. The justification must describe the circumstances supporting the extension (i.e., accommodating the certifying authority's public notice procedures, government closures, or natural disasters) and does not require Federal agency approval before taking effect. The extended reasonable period of time would take effect upon notification by the certifying authority to the Federal agency.

Aside from these automatic extensions, the Agency expects that certifying authorities and Federal agencies will collaboratively agree to discretionary extensions to the reasonable period of time where appropriate. For example, the certifying authority and Federal agency could develop, in a MOA or similar instrument, a process to identify scenarios where changes to the reasonable period of time would be appropriate. Such scenarios may include situations where relevant new information becomes available during the reasonable period of time. EPA notes that the final rule promotes early collaboration and pre-filing meetings to allow the Federal agency, certifying authority, and the project proponent to discuss project complexity, seasonal limitations, and other factors that may influence the amount of time needed to complete the certifying authority's analysis. These opportunities may reduce the need to extend the jointly established or default reasonable period of time.

Consistent with the proposal, EPA is not taking a position on the legality of withdrawing and resubmitting a request for certification. While there may be situations where withdrawing and resubmitting a request for certification is appropriate, drawing a bright regulatory line on this issue is challenging, and the law in this area is dynamic. *See, e.g., Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (holding that repeated, coordinated withdrawal and resubmission of a certification request resulted in a waiver); *N.C. Dep't of Envtl. Quality (NCDEQ) v. FERC*, 3 F.4th 655, 676 (4th Cir. 2021) (finding that the record did not support FERC's determination that the state and project proponent withdrew and resubmitted the certification request in a coordinated fashion resulting in waiver). For these reasons, the final rule does not take a position on this issue, instead allowing the different state and Tribal certifying

authorities, Federal agencies, and/or possibly project proponents to make case-specific decisions addressing the practice.

The Agency is also finalizing deletions in the part 124 provisions regarding the reasonable period of time for certification on EPA-issued NPDES permits, formerly located at 40 CFR 124.53(c)(3), in favor of the reasonable period of time provisions in the final rule at § 121.6. The approach to the reasonable period of time taken in § 124.53(c) was not fully consistent with the approach at § 121.6. For instance, the standard reasonable period of time was 60 days instead of the default six months in § 121.6(c). Further, unlike § 121.6(b), § 124.53(c)(3) did not include a provision allowing certifying authority collaboration in setting the reasonable period of time. And unlike § 121.6(d), § 124.53(c)(3) did not allow for automatic extensions to accommodate a certifying authority's public notice procedures or force majeure events (instead allowing extensions beyond the default 60 days only if EPA finds "unusual circumstances" require a longer time). Consequently, EPA has deleted § 124.53(c)(3). In addition, EPA has made conforming changes in § 124.53(c) for consistency with the request for certification requirements in § 121.5.

2. Summary of Final Rule Rationale and Public Comment

Section 401(a)(1) provides that a certifying authority waives its ability to certify a Federal license or permit if it does not act on a certification request within the reasonable period of time. 33 U.S.C. 1341(a)(1) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."). Other than specifying its outer bound (one year), the CWA does not define what length of time is "reasonable." The 1971 Rule explained that a certifying authority would waive its opportunity to certify if it did not act within "a reasonable period of time" and provided that: (1) the Federal licensing or permitting agency determines the length of the reasonable period of time, and (2) the reasonable period of time "shall generally be considered to be six months, but in any event shall not exceed one year." *See* 40 CFR 121.16(b) (2019).

The 2020 Rule provided that the Federal agency alone sets the reasonable

period of time and defined a process for how it should be determined. *See* 40 CFR 121.6 (2020). This process specified when a Federal agency must communicate the reasonable period of time to the certifying authority and identified factors that the Federal agency must consider when setting the reasonable period of time. *See id.*; 85 FR 42259–60 (July 13, 2020). The 2020 Rule did not maintain the 1971 Rule’s six-month default and reiterated that the reasonable period of time could not exceed one year from receipt of the certification request. 40 CFR 121.6 (2020). The 2020 Rule also defined the term “reasonable period of time” as the length of time during which the certifying authority may act on a request for certification. 40 CFR 121.1(l) (2020).

Some Federal agencies promulgated regulations describing a reasonable period of time for section 401 certification in relation to those agencies’ licenses or permits prior to the 2020 Rule. For example, FERC has explicitly defined the reasonable period of time to be one year. *See* 18 CFR 4.34(b)(5)(iii), 5.23(b)(2), 157.22(b).⁴⁹ The Corps has routinely implemented a 60-day reasonable period of time for section 401 decisions commencing when the certifying authority receives a section 401 certification request. *See* 33 CFR 325.2(b)(1)(ii). EPA established a 60-day reasonable period of time for NPDES permits. *See* 40 CFR 124.53(c)(3).

In pre-proposal input on the rulemaking, project proponents generally supported the reasonable period of time provisions in the 2020 Rule, whereas most states, Tribes, and non-governmental organizations expressed concern with various aspects of it. Some certifying authorities also pointed out that short reasonable periods of time (e.g., 60 days) do not allow the state or authorized Tribe sufficient time to fulfill certain state or Tribal law requirements, such as public notice procedures, or allow them to obtain all the information they need about a project to make an informed certification decision. As a result, these certifying authorities asserted that for complex projects, their only realistic options are to waive or deny certification. EPA expressed similar concerns in its notice of intent to revise the 2020 Rule. *See* 86 FR 29543 (June 2, 2021) (“Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient

role in setting the timeline for reviewing certification requests . . .”).

The Agency proposed at § 121.6(b) that the Federal agency and certifying authority may jointly set the reasonable period of time on a case-by-case or project type basis. Additionally, the proposal included a default reasonable period of time of 60 days if the Federal agency and certifying authority are not able to come to an agreement within 30 days of receipt of the request of certification at § 121.6(c). Proposed § 121.6(c) and (d) also introduced extensions of the reasonable period of time. It was proposed that the negotiated or default reasonable period of time would automatically be extended to accommodate public notice and comment processes or due to force majeure events. The Federal agency and certifying authority could also agree to extend the reasonable period of time for any reason, provided it did not exceed the statutory one-year maximum. Lastly, in the proposal, the Agency did not take a stance on the legality of the withdrawal and resubmittal approach to restart the clock. 87 FR 35341–42 (June 9, 2022).

Similar to the proposal, this final rulemaking not only affirms and clarifies that—consistent with the statutory text—the reasonable period of time may not exceed one year from the date the request for certification is received, but it also finalizes the proposed approach that the Federal agency and certifying authority may collaboratively set the reasonable period of time on a project-by-project basis or categorical project type basis (e.g., through development of procedures and/or agreements), provided that it does not exceed one year. 40 CFR 121.6(b). Under this final rule, in a change from proposal, if the Federal agency and certifying authority do not agree upon the reasonable period of time in writing, the default reasonable period of time would be six months from the date the request for certification is received. 40 CFR 121.6(c). The final rule also allows for extensions under certain circumstances. 40 CFR 121.6(d) and (e). Additionally, the Agency is removing as unnecessary the definition for “reasonable period of time.” *See* 40 CFR 121.1(l) (2020). Like that definition, the final rule language in § 121.6(b) itself provides that the reasonable period of time is the time during which the certifying authority must act on the request for certification. As a result, the Agency finds it duplicative and unnecessary to include a separate definition for the term “reasonable period of time.”

a. Reasonable Period of Time Determination

i. Joint Setting of the Reasonable Period of Time

The collaborative approach in this final rule (*i.e.*, the Federal agency and certifying authority may jointly set the reasonable period of time with a default of six months if an agreement is not reached) differs from the approach in both the 1971 Rule and the 2020 Rule where the reasonable period of time was determined solely by the Federal agency. *See* 40 CFR 121.16(b) (2019); 40 CFR 121.6(a) (2020). The approach taken in the 1971 and 2020 Rules is not compelled by the statutory text because CWA section 401(a)(1) is silent regarding who may or must determine the reasonable period of time. Nor does the statute imply that the Federal agency is the only entity that may establish the reasonable period of time. As such, and as described below, EPA finds that the best reading of the statute is to allow both entities—the certifying authority and the Federal agency—to play a role in establishing the reasonable period of time, and only include the EPA-derived default of six months if they cannot come to an agreement.

As stated above, Federal agencies and certifying authorities may collaboratively set the reasonable period of time in lieu of relying on the default of six months. Under this approach, Federal agencies and certifying authorities can offer each other their expertise relevant to determining what timeframe is reasonable. Federal agencies are in the best position to opine on timing in relation to their Federal licensing or permitting process. Likewise, certifying authorities are in the best position to determine how much time they need to evaluate potential water quality impacts from federally licensed or permitted activities. Certifying authorities are also best positioned to opine on the impacts of state or Tribal procedures governing the timing of decisions with respect to environmental review and public participation requirements.⁵⁰ Given that

⁴⁹ FERC proposed and finalized regulations to codify FERC’s practice of a one-year reasonable period of time on natural gas or liquefied natural gas infrastructure projects after the 2020 Rule. *See* 86 FR 16298 (March 29, 2021).

⁵⁰ Section 401(a)(1) requires a State or interstate agency to establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. However, section 401(a)(1) does not set any requirements or time limits on those public notice procedures or how those procedures should be considered when setting the reasonable period of time. Some certifying authorities have public notice procedures that exceed the default reasonable period of time in place for some Federal agencies (e.g., longer than the Corps’ or EPA’s

EPA is deferring to the combined expertise of the Federal agencies and certifying authorities for establishing the reasonable period of time, this final rule does not retain the list of factors that a Federal agency shall consider, under the 2020 Rule at § 121.6(c), when establishing the reasonable period of time. However, the Agency notes that Federal agencies and certifying authorities might consider factors such as project type, complexity, location, and scale; the certifying authority's administrative procedures; other relevant timing considerations (*e.g.*, Federal license or permit deadlines; associated National Environmental Policy Act deadlines; and/or anticipated timeframe for neighboring jurisdictions process); and/or the potential for the licensed or permitted activity to affect water quality. Importantly, this final rule approach addresses state and Tribal stakeholders' concerns that, under the 2020 Rule, certifying authorities did not have enough influence in determining the length of the reasonable period of time for a particular project.

Many commenters expressed support for the collaborative approach of the Federal agency and certifying authority setting the reasonable period of time together. These commenters said that the joint determination is consistent with cooperative federalism principles and allows certifying authorities to provide input as the stakeholder that conducts the review of the request for certification. Some commenters also supported the setting of reasonable periods of time through MOAs between the Federal agency and certifying authority to reduce the need to determine the reasonable period of time on a case-by-case basis. Commenters also suggested that the final rule should provide that Federal and state agencies can agree to categorical time periods for state review of certain types of permits, licenses, or projects, pursuant to written agreements, which many did before the 2020 Rule. A few commenters raised concerns about the time and resources that would be needed to set a reasonable period of time for every review of a request for certification and suggested that the final rule should clarify that categorical agreements, in addition to case-by-case agreements, are permissible.

While the Agency agrees that the joint agreement approach promotes cooperative federalism, EPA recognizes that coordinating the reasonable period of time for reviewing requests for certification requires time and resources

for Federal agencies and certifying authorities. Therefore, EPA encourages the creation of MOAs between Federal agencies and certifying authorities as appropriate to help reduce the need for determining the reasonable period of time on a case-by-case basis for every request. In response to commenters' concerns about setting the reasonable period of time each time a request for certification is submitted, the final rule clarifies that Federal agencies and certifying authorities may set categorical reasonable periods of time through written agreements—for example, based on certain types of Federal licenses or permits.

Other commenters did not support setting the reasonable period of time through a joint agreement between the Federal agency and certifying authority. Some commenters said that EPA should remain silent on who sets the reasonable period of time and that certifying authorities should apply their own procedures. Some of these commenters argued that the Federal agency should not be placed on the same footing as the certifying authority in determining the reasonable period of time because the certifying authority is the expert regarding their own procedures, resources, and applicable state and Tribal laws. Conversely, other commenters stated that the Federal agency should set the reasonable period of time. One commenter stated that having a Federal agency set the default serves to minimize the arbitrary delays and bureaucratic gamesmanship, and thus EPA should continue to have Federal agencies establish it, as they have done for decades. Several commenters also expressed concern that the collaborative approach would cause instability or inefficiencies for various reasons, including the fact that there could be different reasonable periods of time if it is set on a case-by-case basis or may differ by certifying authority.

This joint agreement approach is the optimal interpretation of the statute as it balances equities between the Federal agency and certifying authority and utilizes the expertise of both stakeholders. EPA disagrees that having the Federal agency alone set the default serves to minimize arbitrary delays and bureaucratic gamesmanship because that approach leaves the certifying authority out of the decision-making process. And as stated above, EPA anticipates that certifying authorities and Federal agencies will enter into categorical agreements, which will minimize, if not eliminate, any potential arbitrariness and bureaucratic gamesmanship. Additionally, written agreements between Federal agencies

and certifying authorities with categorical reasonable periods of time would create efficiency while still taking advantage of the knowledge of both parties for determining the time necessary for reviewing each request for certification.

One commenter asked that the joint agreement between the Federal agency and the certifying authority be made in consultation with the project proponent to allow for greater regulatory predictability for project proponents and reduce any confusion among the parties. EPA disagrees that any joint agreement between the Federal agency and the certifying authority must be made in consultation with the project proponent. Considering the high annual average number of requests for certification,⁵¹ and therefore project proponents, it is unlikely it would reduce confusion or allow for regulatory predictability. Rather, instead of relying on categorical reasonable periods of time (*e.g.*, by project type, by Federal license or permit type), certifying authorities and Federal agencies would have to consult with project proponents on *every* request for certification. Consistent with the cooperative federalism principles imbued in section 401, Federal agencies and certifying authorities, not project proponents, have primary roles in the certification process. That is, it is the Federal agency whose license or permit is subject to section 401, and the certifying authority is responsible for determining compliance with applicable water quality requirements in accordance with section 401.

Additionally, requiring project proponent consultation in every case would add unnecessary across-the-board procedure and coordination into the certification process. However, EPA notes that certifying authorities and Federal agencies are welcome to consult with project proponents if they wish. For example, early engagement with the project proponent during any pre-filing meeting discussions could serve to gather input from project proponents that may help in setting the reasonable period of time. Federal agencies and certifying authorities may also choose to include input from project proponents when setting categorical reasonable periods of time via MOAs.

Some commenters who also expressed concern about the 30-day negotiation period between the Federal agency and certifying authority in the proposed

current default 60-day reasonable period of time for federally issued CWA section 404 and 402 permits).

⁵¹ EPA estimates that the average annual number of certification requests is 1,947 requests per certifying authority. See Supporting Statement for the Information Collection Request (ICR).

rule. Some of these commenters stated that certifying authorities would need to expend their resources on both negotiating the reasonable period of time and trying to review the request for certification due to the clock already running during the negotiation period. In response to commenters' concerns, EPA is not finalizing a timeframe for the negotiation between Federal agencies and certifying authorities—especially because the final rule makes it clear that the certifying authority and Federal agency may coordinate categorical agreements prior to the date that a request for certification was received. However, the Agency encourages prompt negotiations between the Federal agencies and certifying authorities for both individually determined reasonable periods of time and categorical reasonable periods of time to give clarity to project proponents as early as possible.

ii. Default Reasonable Period of Time

Section 401(a)(1) provides that the reasonable period of time “shall not exceed one year.” 33 U.S.C. 1341(a)(1). The phrase “shall not exceed one year” means that the reasonable period of time need not be one full year and that a certifying authority should not necessarily expect to be able to take a full year to act on a section 401 request for certification. If Congress had meant for the reasonable period of time to be one year in all cases, it would have simply written “shall be one year” instead of “shall not exceed one year.” Under this final rule, the certifying authority could be subject to a shorter than one-year reasonable period of time to render its decision, provided that the Federal agency and the certifying authority have agreed to a shorter time, or as discussed below, when the parties do not reach agreement and instead rely on the default reasonable period of time of six months. This approach is consistent with case law. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (“[W]hile a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year.”).

As discussed in more detail below, many commenters opposed the default 60-days for a variety of reasons and offered alternative reasonable periods of time, such as 90 days, 120 days, 180 days, and one year. For the final rule, EPA decided on six months as the default reasonable period of time for several reasons. First, as stated above, a default six-month reasonable period of time is consistent with the Agency's longstanding 1971 regulations, which provided that the reasonable period of

time is generally considered to be six months. *See* 40 CFR 121.16(b) (2019). Thus, EPA's decision to choose six months as the default is consistent with almost 50 years of program implementation under EPA's 1971 regulations. Second, six months is exactly half of one year, which is the statutory maximum for the reasonable period of time. If the Federal agency and certifying authority cannot reach an agreement, it seems reasonable to designate half of the statutory maximum as the default reasonable period of time as a middle ground to best balance equities between the Federal agency and certifying authority. Third, six months should give the Federal agency and certifying authority ample time to negotiate an alternate reasonable period of time if they do not want to be subject to the six-month default. At the same time, the six-month period serves as a default should Federal agencies and certifying authorities fail to agree on a different time period. Finally, EPA's proposed 60-day default reasonable period of time was based largely on EPA's concurrent proposal to require that requests for certification include a copy of the draft Federal license or permit. Since the certifying authority would have more information upfront (the draft Federal license or permit instead of only the application), the Agency proposed that the default reasonable period of time could be shorter. But since EPA has decided not to finalize the proposed draft Federal license or permit requirement (for individual Federal licenses and permits) and instead only require that a request for certification include the Federal license or permit *application*, certifying authorities will have less information and may need more time to review requests for certification, hence the six-month default reasonable period of time (which only applies if the certifying authority and Federal agency do not agree on an alternative).

Although EPA proposed 60 days as the default reasonable period of time, the Agency requested comment on whether and, if so, why the default should be longer than 60 days (*e.g.*, 120 days, six months, one year). 87 FR 35339–40 (June 9, 2022). EPA noted that the default may depend on when certification is requested during the Federal licensing or permitting process, *e.g.*, if EPA were to decide that a draft Federal license or permit is not a required component of a certification request, a longer default reasonable period of time may be appropriate. *Id.* Based on comments received on the proposed rule, it seems that many, if not

most, commenters would support a six-month default reasonable period of time, as described in this section.

A few commenters supported the proposed 60-day default and pointed out that certifying authorities often review many simpler projects in 30 days or less, and in some jurisdictions, applicable law already requires certifying authorities to approve or deny the certification request within 60 days of receipt of a complete application. A few commenters argued that the 60-day default would ensure consistency and predictability for stakeholders. One commenter proposed that the default be 60 days unless the Federal agency regulations define a different reasonable period of time, provided it is not less than 60 days, which would allow FERC to continue applying one year, per its regulations. Relatedly, other commenters opined that the final rule should clarify that if a Federal agency has a regulation or guidance document establishing a longer period for a particular type of request, that regulation or guidance document applies.

EPA agrees in part and disagrees in part with these comments. EPA agrees that some certifying authorities often review many simpler projects in a short period of time, such as 30 or 60 days. EPA recognizes that a 60-day reasonable period of time is being implemented for section 401 decisions for some licenses and permits, including by EPA for draft NPDES permits and by the Corps. EPA disagrees that 60 days as a default reasonable period of time for all projects is practical for the reasons provided in the Agency's rationale above, in addition to the many comments summarized below explaining why a 60-day default for all projects is not sufficient. EPA agrees that a uniform period can provide clarity to project proponents and other stakeholders, but any uniform period should only be a default to allow the certifying authority and Federal agency to determine, as appropriate, the review timeframe on an individual or categorical basis. While this may reduce the ability of project proponents to anticipate the timeline for the certification process, they will still have six months as a default guidepost, plus EPA encourages certifying authorities and Federal agencies to enter into categorical agreements that will allow project proponents to anticipate timelines for certification processes. The default reasonable period of time would not apply if the Federal agency and certifying authority agree to a different time. EPA does not agree that Federal agency defaults in regulation that are less than one year should supersede the

need for a certifying authority and Federal agency to collaborate in setting the reasonable period of time. That said, if a Federal agency establishes a one-year reasonable period of time in regulation, it would not be at odds with the final rule's language or intent. Rather, in such a scenario (e.g., FERC regulations), it is unnecessary for the certifying authority and Federal agency to negotiate an alternate reasonable period of time because the Federal agency has already agreed to the maximum amount of time statutorily allowed, and if the certifying authority determines that one year is too long, it may act on the request for certification as early as it chooses. In these circumstances, individual written agreements for each request for certification would not be necessary, since a negotiation between the certifying authority and Federal agency would not need to occur.

Most commenters opposed the 60-day default reasonable period of time. Commenters noted that while 60 days may be enough time for simpler or more routine projects, which may include some projects covered by general or nationwide permits, 60 days would be insufficient for especially novel, complicated, controversial, or complex projects. Some commenters provided various examples of such project types, including FERC pipeline authorizations, relicensing of hydroelectric dams, water supply projects, liquefied natural gas (LNG) terminals, deep-water ports, and projects that trigger the need for an environmental impact statement (EIS) or multiple Federal permits. Commenters also added that each request is different and carries unique implications to be examined based on the specific characteristics of the water bodies and proposed project and Federal license or permit in question. Some commenters said that because the proposed rule would require agreement between the Federal agency and certifying authority on a different amount of time, the proposal would effectively and inappropriately give Federal agencies veto power over certifying authorities, infringing on principles of collaborative federalism. Commenters also said that states and Tribes know their own procedures, resources, and applicable requirements and should have input into deciding the length of the reasonable period of time. Lastly, commenters argued that the 60-day default would be inadequate if the final rule does not require submittal of the draft Federal license or permit in a request for certification, noting that the proposed default appeared to be

predicated on the assumption that the "request" the certifying authority will receive will include a draft Federal license or permit.

The Agency has decided to finalize a default reasonable period of time of six months to best balance equities between the Federal agency and certifying authority. As discussed above, Federal agencies and certifying authorities offer different types of relevant expertise for setting the reasonable period of time, and EPA encourages them to establish categorical reasonable period of time. The final rule default provides both parties with ample time to negotiate the reasonable period of time and inform its length based on their respective expertise but provides a default middle ground (half of the maximum one year) in the event an agreement cannot be reached. EPA acknowledges that 60 days may not be a sufficient default for certain project types and has accordingly shifted the default reasonable period of time to six months. However, the Agency emphasizes that the default only applies in the absence of a written agreement between the certifying authority and Federal agency, either categorically or on a case-by-case basis. The Agency encourages consideration of project complexities when setting the reasonable period of time.

Some commenters alleged that the proposed default reasonable period of time is contrary to the plain language and intent or purpose of CWA section 401. These commenters said Congress did not authorize EPA to contravene the statute by mandating action, or allowing the Federal agency to mandate action, in less than one year; and if there should be any default, it should simply be the one year allowed under the statute. EPA disagrees with these commenters. As discussed above, section 401(a)(1) provides that the reasonable period of time "shall not exceed one year," which means that the reasonable period of time can be less than one year. As stated above, if Congress meant for the reasonable period of time to be one year in all cases, it would have simply written "shall be one year." But Congress did not do that. For the reasonable period of time to "not exceed one year," it must either be less than or equal to one year. Under the clear language of the statute, Congress envisioned a scenario in which the reasonable period of time could be less than one year. For the reasons explained in this section, EPA reasonably decided on six months as the default, which is half of the maximum allowable time, substantially longer than the proposed and often applied 60 days, and

consistent with almost 50 years of implementation under the 1971 Rule. Again, the default only applies where the Federal agency and certifying authority cannot agree on another period of time, which EPA expects to be rare. In sum, this approach is consistent with the plain text of CWA section 401 and the Agency's longstanding implementation of that text under the 1971 Rule, which acknowledged that the reasonable period of time may be less than one year and is generally considered to be six months. See 40 CFR 121.16(b) (2019). Nevertheless, the Agency re-emphasizes that six months is only the default, and that certifying authorities and Federal agencies may agree to a reasonable period of time less than or equal to one year on a case-by-case or categorical basis.

b. Extensions to the Reasonable Period of Time

As mentioned previously, the final rule provides that Federal agencies and certifying authorities may agree to extend the reasonable period of time, provided it does not exceed the statutory one-year limit. Additionally, there may be circumstances where the established or default reasonable period of time is not sufficient to allow the certifying authority to complete its review. Therefore, the final rule provides automatic extensions to accommodate public notice procedures or due to force majeure events. In these two circumstances, the reasonable period of time is extended by the time needed by public notice procedures or the force majeure event, which would be communicated in the written justification by the certifying authority to the Federal agency. The Agency is finalizing that extensions of the reasonable period of time must occur to accommodate certifying authority public notice "procedures," rather than public notice "requirements" as was proposed. This change is consistent with the statutory language that certifying authorities "shall establish procedures for public notice in the case of all applications for certification." 33 U.S.C. 1341(a)(1). The change to "procedures" also clarifies that extensions to the reasonable period of time could be due to subsequent public hearing procedures, and this language is consistent with the final rule language for certification decisions and Federal agency review at §§ 121.7 and 121.8. The statute does not address extending the reasonable period of time once it has started; it does not prohibit extending the reasonable period of time as long as the certifying authority "acts" within one year from the date the request for

certification is received. The statute also does not specify who may extend the reasonable period of time or the terms on which it may be extended. The 1971 Rule was also silent on extensions. However, several Federal agencies, including EPA and the Corps, have established regulations allowing extensions to their default reasonable periods of time. See 40 CFR 124.53(c)(3) (2022) (allowing for a reasonable period of time greater than 60 days for certification requests on NPDES permits where the EPA Regional Administrator finds “unusual circumstances”); 33 CFR 325.2(b)(1)(ii) (allowing for a reasonable period of time greater than 60 days for certification requests on Corps permits when the “district engineer determines a shorter or longer period is reasonable for the state to act.”). The 2020 Rule allowed certifying authorities to request an extension of the reasonable period of time. 40 CFR 121.6(d) (2020). However, only the Federal agency had the power to extend the reasonable period of time. *Id.*; see also 85 FR 42260. Under the 2020 Rule, the Federal agency was not required to grant extension requests. See 40 CFR 121.6(d)(2) (2020). As a result, Federal agencies denied those requests even in situations where the certifying authority said it was not able to act within the established timeframe (*e.g.*, where state public notice procedures required more time than the regulatory reasonable period of time). For instance, one commenter noted that its requests for extensions due to public notice procedures were refused by the Corps for the 2020 Nationwide General Permits.

The Agency proposed at § 121.6(d) to allow certifying authorities and Federal agencies to jointly extend the reasonable period of time in a written agreement, as long as the project proponent was consulted, and the extension did not exceed one year from the receipt of request for certification. The Agency also recognized that there were circumstances under which the Federal agency *should* extend the reasonable period of time without the certifying authority needing to negotiate an agreement. Accordingly, the Agency proposed at § 121.6(c) to identify two scenarios that would require the extension of the reasonable period of time: force majeure events and public notice procedures. Under the proposed rule, the certifying authority had to notify the Federal agency through a written justification prior to the end of the reasonable period of time. Upon notification, the reasonable period of time would be extended by the period needed to fulfill public notice

procedures or the force majeure event, provided such extension did not exceed one year from receipt of the request for certification.

The Agency is finalizing its proposed approach to extending the reasonable period of time, including allowing certifying authorities and Federal agencies to determine collaboratively whether and how the reasonable period of time should be extended, as well as allowing for automatic extensions in limited scenarios, as long as it does not exceed one year. 40 CFR 121.6(d) and (e). The final rule approach balances Federal agency and certifying authority equities better than the 1971 Rule and the 2020 Rule for the reasons explained in this section. This approach is consistent with the approach for joint establishment of the reasonable period of time. It also aligns with cooperative federalism principles central to the CWA. Although the Agency is not finalizing the requirement to consult with the project proponent, the final rule does allow for input from the project proponent. The certifying authority and Federal agency should communicate any extensions to the reasonable period of time to the project proponent.

Most of the commenters who addressed extensions of the reasonable period of time supported allowing certifying authorities and Federal agencies to agree to extensions. A few commenters said that the Federal agency should have the sole discretion to extend the reasonable period of time, and another commenter said that the certifying authority should be the only one to determine the extension. One commenter suggested that extensions should be granted only if EPA finds that unusual circumstances require a longer time. Some commenters recommended that the project proponent should also be engaged in the determination of extending the reasonable period of time. Multiple commenters said that extensions agreed on by the Federal agency and certifying authority should have justifiable and reasonable limits that address the concerns of the project proponent. Conversely, other commenters recommended that project proponents not be consulted but rather notified about any extensions.

Consistent with the final rule’s collaborative approach for setting the reasonable period of time, EPA maintains that the Federal agency and certifying authority should be able to jointly agree to extensions, provided any extension does not exceed one year from the receipt of the request for certification. Both the Federal agency and certifying authority can provide

insight on the length of time a review needs to be extended, based on their knowledge of the Federal licensing or permitting process and their knowledge of water quality and applicable state or Tribal laws, respectively. The Agency is not finalizing proposed text that would have required project proponent consultation. Under this final rule, the project proponent does not play a role in setting the reasonable period of time, see § 121.6(b), so it is unnecessary to provide the project proponent with a role in extensions. Additionally, considering the annual average number of certification requests,⁵² and therefore possible extension requests, EPA finds it unreasonable to require project proponent consultation on all requests for extension. However, the final rule does not prevent the certifying authority and Federal agency from seeking input from the project proponent. EPA also notes that this final rule allows certifying authorities, in limited circumstances, to unilaterally extend the reasonable period of time. The final rule recognizes that there are circumstances the reasonable period of time should be extended without the certifying authority needing to negotiate an agreement: where a certification decision cannot be rendered within the reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters) and where the state or Tribal public notice and comment process takes longer than the negotiated or default reasonable period of time.

All commenters who addressed extensions of the reasonable period of time expressed support for extensions due to unforeseen circumstances such as government closures or force majeure events. Several commenters suggested that extensions should be limited only to such events and not include public comment and other known procedures that were in place at the time the reasonable period of time was established. Other commenters expressed support for an expanded list of situations that warrant automatic extensions and for maximum flexibility in terms of extensions to address such things as public hearings, responding to comments, revisions to the certification based on community engagement, appeals under state laws, project complexity, and inadequate information or unresponsive project proponents. A few commenters supported defining specific situations warranting extensions for efficiency and predictability, while a few commenters stated that the final rule should not

⁵² See footnote 51.

include a defined list that would limit the circumstances under which an extension can occur.

The Agency maintains that providing a limited list of scenarios that warrant automatic extensions promotes efficiency and clarity, while providing some flexibility for stakeholders when unforeseen circumstances arise. EPA retained the accommodation for public notice procedures in the list of circumstances warranting automatic extensions to capture unanticipated occurrences such as extended public notice periods. This approach also supports section 401's emphasis on public notice opportunities and is consistent with the spirit of cooperative federalism in balancing the interests of certifying authorities with those of Federal agencies. However, to be clear, the Agency finds that such extensions only apply to public notice procedures in effect at the time the written notification for an extension is received. Due to the final rule's collaborative approach to setting the reasonable period of time, which allows for consideration of certifying authority public notice procedures, the Agency expects that the need for automatic extensions to accommodate public notice procedures will be rare.

Some commenters noted that the rule should provide more clarity such as specifically defining public notice procedures and providing more details on how extensions would work. In response to these comments, the Agency has revised § 121.6 to clearly differentiate automatic extensions from agreed-upon extensions. Additionally, the Agency has revised what is now § 121.6(d) to clarify that in the certifying authority's written notification to the Federal agency, it must identify how much additional time is required by either the public notice procedures or the force majeure event in addition to the justification for such extension.

c. Withdrawal and Resubmissions of Requests for Certification

As proposed, EPA is removing § 121.6(e) from the 2020 Rule, which prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. Instead, the Agency is finalizing as proposed to take no position on the legality of withdrawing and resubmitting a request for certification.

Several commenters expressed opposition regarding EPA's decision not to retain the 2020 Rule's regulatory text at § 121.6(e) and the approach not to take a position on the permissibility of withdrawing and resubmitting a request

for certification. Some commenters supported the 2020 Rule's position on withdrawals and resubmittals, stating that this position has helped ensure that the certification process cannot be misused to delay or prevent issuance of the Federal license or permit. Commenters expressed concern that EPA's proposed approach to refrain from taking a position on the legality of withdrawing and resubmitting a request for certification suggested that this process may be used as a loophole to circumvent the one-year time limit described in section 401, which would increase uncertainty, costs, and indefinitely delay Federal licensing or permitting processes, especially if there is an increase in litigation. Most of the commenters opposed to EPA's proposed approach pointed out that Congress was clear in its intent for including the statutory maximum one-year period of time in section 401 to "guard against a situation where the water pollution control authority in the State in which the activity is to be located . . . simply sits on its hands and does nothing." See 115 Cong. Rec. at 9,259 (starting debate on H.R. 4148, Water Quality Improvement Act of 1969), 9,264–65 (amendment offered and discussed), and 9,269 (amendment accepted) (Apr. 16, 1969). These commenters urged EPA to retain the language of the existing regulation at 40 CFR 121.6(e) since Congress already created a "bright line" in section 401 of one year.

EPA disagrees with the above comments and is aware that, historically under the 1971 Rule, certifying authorities sometimes asked project proponents to withdraw and resubmit their requests for certification to restart the clock and provide more time to complete their certification review. Neither the text of section 401 nor *Hoopa Valley Tribe* categorically precludes withdrawal and resubmission of a request for certification. EPA understands and shares the concern expressed by the D.C. Circuit in *Hoopa Valley Tribe* that prolonged withdrawal and resubmission "schemes" might—under certain facts—unreasonably delay and frustrate the Federal licensing and permitting process. To be clear, EPA does not find that mere coordination between the certifying authority and project proponent, as encouraged throughout this preamble, rises to a withdrawal and resubmittal scheme. Yet, the potential factual situations that might give rise to, and potentially justify, withdrawal and resubmission of a request for certification are so varied that the Agency is not confident that it can create regulatory "bright lines" that

adequately and fairly address each situation. By EPA not taking a regulatory position on this issue, it is up to project proponents, certifying authorities, and/or possibly Federal agencies to determine on a case-by-case basis whether and when withdrawal and resubmittal of a request for certification is appropriate. Such determinations are ultimately subject to judicial review based on their individual facts.

Other commenters expressed support for EPA's proposed approach of not taking a position on the legality of withdrawal and resubmittal. Some commenters acknowledged that flexibility is important for project proponents and certifying authorities, while others described the need for more guidance to reduce litigation on the withdrawal and resubmittal practice. Conversely, some commenters expressed support for withdrawal and resubmission in certain situations, encouraging EPA to make clear in the final rule that withdrawal and resubmission of requests for certification may occur except where there is evidence that the certifying authority and applicant are attempting to collude to thwart Congress's intention to avoid undue delay in processing applications. A few commenters asserted that withdrawal and resubmission of requests for certification may occur to avoid denials of certification, and a few suggested that allowing a certifying authority to discuss withdrawal and resubmittal with a project proponent is in the project proponent's interest because they may be able to avoid unnecessary denials of certification.

EPA recognizes that the practice of withdrawal and resubmittal has been subject to litigation. The 2020 Rule prohibited the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. 40 CFR 121.6(e) (2020). In support of that position, the 2020 Rule relied on a broad reading of the D.C. Circuit's decision in *Hoopa Valley Tribe* and asserted that the regulatory text at § 121.6(e) is a "clear statement that reflects the plain language of section 401 and . . . is supported by the legislative history." 85 FR 42261. In that case, which featured highly unusual facts,⁵³ the court rejected the particular

⁵³ The court held that the project proponent and the certifying authorities (California and Oregon) had improperly entered into an agreement whereby the "very same" request for state certification of its relicensing application was automatically withdrawn and resubmitted every year for a decade by operation of "the same one-page letter"

“withdraw and resubmit” strategy the project proponents and states had used to avoid waiver of certification for a FERC license. 913 F.3d at 1105. The court held that a decade-long “scheme” to subvert the one-year review period characterized by a formal agreement between the certifying authority and the project proponent, whereby the project proponent never submitted a new request, was inconsistent with the statute’s one-year deadline. *Id.* Significantly, the court said it was not addressing the legitimacy of a project proponent withdrawing its request and then submitting a new one, or how different a new request had to be to restart the one-year clock. *Id.* at 1104.

On the other hand, at least three circuit courts have acknowledged the possibility that withdrawal and resubmittal of a request for certification may be a viable mechanism for addressing complex certification situations. *See NCDEQ*, 3 F.4th at 676 (withdrawal and resubmittal was appropriate where the certifying authority and project proponent did not engage in a coordinated scheme to evade the reasonable period of time); *NYSDEC*, 884 F. 3d at 456 (noting in dicta that the state could “request that the applicant withdraw and resubmit the application”); *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920 (9th Cir. 2022) (vacating FERC orders where FERC had found that the certifying authority had waived certification by participating in a coordinated scheme to allow the project proponent to withdraw and submit its application for certification before the reasonable period of time expired).⁵⁴ Additionally, EPA’s guidance prior to the 2020 Rule acknowledged use of the withdrawal and resubmittal approach, as well as the “deny certification without prejudice to refile” approach, but noted that “[t]his handbook does not endorse either of the two approaches. . . .” 2010 Handbook at 13, n.7 (rescinded in 2019, *see supra*). With the dynamic case law related to the topic of withdrawal and resubmittal and the complexities of certain certification situations,⁵⁵ EPA’s

approach in this final rule lets certifying authorities, Federal agencies (*e.g.*, as the project proponent where it is the Federal agency issuing the license or permit), and/or possibly project proponents take the lead in deciding whether and when it is reasonable to allow withdrawal and resubmittal of requests for certification. This final rule approach resets EPA’s interpretive position to silent and neutral on withdrawal and resubmittal, where it was before the 2020 Rule.

3. Implementation

As previously explained, EPA has added regulatory text to clarify that the certifying authority and Federal agency may enter into written agreements that establish categorical reasonable periods of time for certain types of Federal licenses or permits. This regulatory text gives the certifying authority and Federal agency the option of establishing the reasonable period of time for certain categories of Federal licenses or permits at any time without needing to wait until a Federal license or permit application (or draft general Federal license or permit) is submitted. For example, the certifying authority and Federal agency could enter into an agreement that establishes a reasonable period of time for all NPDES permits or for certain categories of NPDES permits such as some general permits or minor individual permits. The addition of the regulatory text regarding written agreements was supported by some commenters who stated that the final rule should allow the Federal agency and certifying authority to agree in writing to categorical time periods for the certifying authority to review certain types of permits, licenses, and/or projects. These commenters noted that this was done prior to the 2020 Rule, and in the past, such agreements improved efficiency and predictability by allowing Federal agencies, certifying authorities, and project proponents (if applicable) to understand the reasonable period of time prior to submitting an application. EPA agrees that the addition of the regulatory text will allow for more efficiency and predictability.

Commenters also noted that the proposed rule stated that the reasonable period of time must be agreed upon within 30 days of the receipt of request

and then resubmit a new certification request either immediately or at some later date. The Agency recognizes that there may be legitimate reasons for withdrawing and resubmitting certification requests, including but not limited to the following potential reasons: a new project proponent, project analyses are delayed, and/or the project becomes temporarily infeasible due to financing or market conditions.

for certification, which suggested that categorical agreements entered into prior to the date that the request for certification was received would not satisfy the regulatory requirement. EPA has addressed this concern by deleting the phrase “within 30 days of receipt of a request for certification.” By deleting this phrase, the regulation makes clear that the Federal agency and certifying authority may agree to a reasonable period of time through written agreements that can be entered into prior to a request for certification.

Several commenters identified specific types of permits and/or processes that require a longer reasonable period of time than the proposed 60-day default. Specifically, several commenters stated that the 60-day default reasonable period of time would not align with the concurrent Federal consistency reviews that are required for some projects pursuant to the Coastal Zone Management Act (CZMA). In addition, several commenters noted that FERC pipeline authorizations or relicensing of hydroelectric dams can require up to one year. While most of these comments are addressed through the establishment of a longer default reasonable period of time of six months, EPA also notes that these are the types of permits, licenses, and/or projects that could warrant a categorical agreement between the Federal agency and certifying authority to establish the appropriate reasonable period of time. Furthermore, as discussed above, if a Federal agency establishes a one-year reasonable period of time in regulation (*e.g.*, FERC regulations), it is unnecessary for the certifying authority and Federal agency to negotiate because the certifying authority is already provided the maximum amount of time statutorily allowed.

E. Scope of Certification

1. What is the Agency finalizing?

The Agency is finalizing its proposed approach to the scope of certification at § 121.3 with modifications to the regulatory text to better clarify the extent of the activity subject to certification and the water quality limitations inherent to section 401. The finalized approach returns to the scope that is consistent with not only the statutory language and congressional intent but also longstanding Agency guidance and decades of Supreme Court case law. In addition, EPA’s final rule makes clear that a certifying authority’s review is limited to considering impacts to waters of the United States except where a state or authorized Tribe has

repeatedly submitted to the states before the statute’s one-year waiver deadline. 913 F.3d at 1104.

⁵⁴ The respondent-intervenors in the Ninth Circuit case petitioned the Supreme Court for certiorari but the Supreme Court denied the petition on May 15, 2023. *Nevada Irrigation District, et al. v. Cal. State Water Res. Control Bd., et al.*, Docket No. 22–753.

⁵⁵ Historically, certifying authorities and project proponents have used the “withdraw and resubmit” approach for dealing with the one-year deadline for complex projects. There are a multitude of permutations, but the basic idea is that the project proponent would withdraw the certification request

state or Tribal laws that apply to waters of the state or Tribe.

The 2020 Rule substantially narrowed the scope of a certifying authority's review. Before the 2020 Rule, a certifying authority considered whether the whole "activity" subject to the Federal license or permit will comply with applicable water quality requirements. Under the 2020 Rule, the certifying authority could only consider potential water quality impacts from the project's point source "discharges." See 85 FR 42229 (July 13, 2020). This interpretation was heavily criticized by many states, Tribes, and non-governmental organizations as unlawfully narrowing the certifying authorities' scope of review under section 401 and was subject to multiple legal challenges.

Having now carefully reconsidered the 2020 Rule's "discharge-only" interpretation of scope of review, EPA has concluded that the best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges. This reading is further supported by the legislative history of section 401, authoritative Supreme Court precedent, and the goals of section 401, which include recognition of the central role that states and authorized Tribes play in protecting their own waters. It also realigns scope with accepted practice for the preceding 50 years. Consistent with this interpretation, EPA is finalizing revisions to § 121.3 that reaffirm the activity scope of review that Congress intended when it first enacted the water quality certification provision in 1970 and reaffirmed when it amended the CWA in 1972 and 1977. Additionally, in response to comments, EPA is finalizing revisions to § 121.3 that clarify important limiting principles and provide greater regulatory certainty.

The final rule at § 121.3 provides that when a certifying authority reviews a request for certification, the certifying authority "shall evaluate whether the activity will comply with applicable water quality requirements." It further provides that the certifying authority's evaluation by the certifying authority is "limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation." Finally, it provides that a certifying authority "shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements." 40 CFR 121.3

The final rule adopts the proposed scope of certification but with textual edits made in response to public comment. First, the final rule no longer divides its regulatory text regarding scope between two separate sections of part 121. The Agency proposed a definition of "activity as a whole" at § 121.1 and also addressed scope of certification at § 121.3. After considering public comment, the Agency finds this structure unnecessary and confusing and instead has incorporated its full interpretation of scope in final rule § 121.3. See section IV.E.2.b of this preamble for further discussion.

Second, the Agency removed the phrase "as a whole" from the regulatory text throughout part 121. This does not represent a change in substance from proposal. The Agency does not interpret the terms "activity" and "activity as a whole" as having different meanings; rather, EPA included the phrase "as a whole" in the proposed rule simply to emphasize that a certifying authority's evaluation extends to the activity in its entirety, as opposed to only the point source discharges associated with the activity. After considering public comment and the statutory text, EPA concludes that the final regulatory text at § 121.3 makes this clear without the need to add "as a whole" and best reflects the statutory text. See section IV.E.2.b of this preamble for further discussion.

Third, the final rule adds regulatory text clarifying that a certifying authority's evaluation "is limited to the water quality-related impacts" from the activity subject to the Federal license or permit. This is not a change in substance from proposal. This concept was captured in the proposed definition of activity as a whole at § 121.1(a) ("activity as a whole means any aspect of the project activity with the potential to affect water quality") and, in the preamble at proposal, EPA was clear that section 401 is limited to addressing only water quality-related impacts. 87 FR 35343 (June 9, 2022). EPA finds that this clarification best reflects the statutory language and purpose of section 401. See section IV.E.2.c of this preamble for further discussion.

Fourth, the proposal defined "activity as a whole" to mean any aspect of the activity "with the potential" to affect water quality. As discussed above, EPA is not finalizing that definition, and further, the final regulatory text does not refer to "potential" to affect water quality. 40 CFR 121.3(a). EPA made this change in response to several commenters who questioned the breadth of the term "potential,"

suggesting that the term "potential" authorized certifying authorities to consider purely speculative "potential" impacts to water quality. EPA did not intend for its proposed language to establish the required degree of causality between the activity and the impact to water quality. The Agency finds it unnecessary to do so in this rulemaking. Consistent with the statutory text and purpose of section 401, final rule § 121.3 clearly limits a certifying authority's analysis of any given activity to the water quality-related impacts that may prevent compliance with water quality requirements. It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements. See section IV.E.2.b of this preamble for further discussion.

Fifth, § 121.3(b) provides that the scope of conditions in a grant of certification is the same as the scope of review when acting on a request for certification; certifying authorities are to impose conditions "necessary to assure that the activity will comply with applicable water quality requirements." This is not a change in substance from proposal. Proposed rule § 121.7(d)(2) included the same concept by requiring a grant with conditions to include "[a]ny conditions necessary to assure that the activity as a whole will comply with water quality requirements," and EPA was clear at proposal that the scope for the purpose of including conditions in a certification and the scope of review for purposes of whether to grant certification are the same. 87 FR 35346. EPA continues to find this interpretation best aligns with the statutory text and purpose of section 401. See section IV.E.2.e of this preamble for further discussion.

Next, EPA's final regulatory text provides that the certifying authority's evaluation of the activity includes "the activity's construction and operation." At proposal, EPA explained that it did not intend for its proposed scope to cover only those portions of the activity directly authorized by Federal license or permit in question. 87 FR 35346. EPA specifically requested comment on this interpretation. *Id.* After considering comments and the statutory text of section 401, EPA is finalizing its proposed interpretation and including regulatory text to reflect it. Specifically, final rule § 121.3(a) states that the certifying authority's evaluation includes "the activity's construction and operation" without reference to whether the Federal license or permit at issue covers both aspects of the activity.

The Agency focused on construction and operation because those are the two aspects of an activity that Congress referenced throughout section 401. See section IV.E.2.b of this preamble for further discussion.

The Agency is also finalizing the definition of “water quality requirements” at § 121.1(j) as proposed (“*Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law”). The 2020 Rule narrowed the ability of certifying authorities to include conditions in their certifications pursuant to section 401(d) to protect the quality of their waters. Before the 2020 Rule, a certifying authority could add conditions to its certification as necessary to assure compliance with the specifically enumerated sections of the CWA and “any other appropriate requirement of State [or Tribal] law.” 33 U.S.C. 1341(d). In the 2020 Rule, however, EPA promulgated a narrow regulatory interpretation of the section 401(d) term “other appropriate requirements of State law,” limiting it to “state or tribal regulatory requirements for point source discharges into waters of the United States.” 40 CFR 121.1(n), 121.3 (2020); see also 85 FR 42250. In this rulemaking, EPA is returning to an interpretation of “any other appropriate requirement of State law” that is more closely aligned with the statutory text and more environmentally protective. See further discussion at section IV.E.2.c of this preamble.

The Agency also is finalizing an interpretation regarding which waters a certifying authority can consider when determining whether to grant certification. After considering public comment, the Agency concludes that a certifying authority is limited to considering “navigable waters” as defined in the CWA, except where a state or authorized Tribe has state or Tribal laws that apply to waters of the state or Tribe. This interpretation is supported by the text of section 401 and reflected in prior Agency guidance. See section IV.E.2.d of this preamble for further discussion.

As discussed below, the interpretations in this final rule of section 401’s scope of review and conditions reflect the best reading of the statute. Even if some commenters may disagree that these interpretations reflect the best reading, there can be no doubt that they are imminently reasonable, for the same reasons

articulated below for why EPA’s interpretation represents the best reading. They also advance the water quality protection goals of section 401, are consistent with the principles of cooperative federalism that underlie the CWA and especially section 401, and restore the full measure of authority that Congress intended to grant states and authorized Tribes to protect their critical water resources.

2. Summary of Final Rule Rationale and Public Comment

The following subsections describe the Agency’s finalization of the five key aspects of the scope of a certification: (a) return to activity scope of certification; (b) defining the “activity” subject to certification; (c) water quality requirements; (d) waters considered in acting on a request for certification, and (e) scope of conditions.

a. Return to “Activity” Scope of Certification Review and Conditions

Consistent with the proposal, EPA is returning the scope of certification review and conditions to the “activity” subject to the Federal license or permit. EPA is returning to the “activity” scope because it best reflects congressional intent and appropriately restores consistency with the “activity as a whole” scope that the Supreme Court affirmed in *PUD No. 1* over a quarter of a century before the 2020 Rule. After reviewing the considerable number of comments received on this aspect of the proposed rule, EPA concludes that the “activity” interpretation of scope affirmed by the Supreme Court in 1994 best reflects the statutory text, history, and purpose of CWA section 401. By allowing states and authorized Tribes to protect their water quality from the full activity made possible by a Federal license or permit, this interpretation also effectuates Congress’s goal of maximizing protection of the nation’s waters by providing an independent grant of authority to states and authorized Tribes to ensure that federally licensed or permitted activities do not frustrate attainment of their water quality protection goals. See, e.g., 116 Cong. Rec. 8984 (1970) (explaining that the new certification provisions were meant to ensure that “[n]o State water pollution control agency will be confronted [with] a fait accompli by an industry that has built a plant without consideration of water quality requirements”). Although this is a reversal of the approach taken by the Agency in 2020, any disruption to the certification process will be manageable in part because this final rule realigns scope with well-established practice for

the nearly 50 years preceding the 2020 Rule, and all prior EPA interpretations, some dating from the 1980s.⁵⁶ Also, the 2020 Rule, departing from this longstanding regime, was in effect for only a few years. Further, the final rule addresses stakeholder concerns regarding the pre-2020 Rule landscape and provides regulatory certainty by clarifying important concepts such as how certifying authorities are limited to considering adverse impacts to water quality.

While disruption to the certification process will be modest, the additional protections to water quality, on the other hand, are significant. As commenters observed, the distinction between certifying the activity and certifying only its associated discharges is more than semantic and can in some cases have significant consequences. A point source discharge emanates from a “discernible, confined and discrete conveyance.” 33 U.S.C. 1362(14). Impacts to water quality from point source discharges are a small subset of the water quality impacts that may result from a federally licensed or permitted activity. For example, as commenters observed, there are many situations where reductions in stream flows or increases in thermal loading caused by aspects of the federally licensed or permitted activity not directly related to point source discharges can have devastating impacts on a waterbody or watershed. This can be especially true in the dam context (at issue in *PUD No. 1*), where construction and operation unrelated to point source discharges can cause, among other adverse water quality effects, a change in the timing and flow of water, blockage of nutrients, and altered chemical makeup of water due to reservoirs. But even beyond the dam context, the additional water quality protections offered by an “activity”-based scope may be significant for certain types of federally licensed or

⁵⁶ All EPA interpretations of scope prior to the 2020 Rule reflected the “activity” or “project” scope affirmed in *PUD No. 1* and reinstated in this final rule. See e.g., Memorandum from Catherine A. Winer to David K. Sabock, Section 401 Certification of Marina (Nov. 12, 1985) (hereinafter, Winer Memorandum) (concluding that “section 401 may reasonably be read as . . . allowing state certifications to address any water quality standard violation resulting from an activity for which a certification is required, whether or not the violation is directly caused by a ‘discharge’ in the narrow sense”); 1989 Guidance at 22 (“[I]t is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.”); 2010 Handbook at 17 (rescinded in 2019, see *supra*) (“Thus, it is important for the [section] 401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.”).

permitted activities, such as the construction and operation of a pipeline project. See *supra* section IV.E.2.a.iv of this preamble. Moreover, as explained in the following sections, an “activity”-based scope is consistent with the longstanding Supreme Court precedent of *PUD No. 1* and bolstered by additional textual support and the legislative history.

i. The Supreme Court in *PUD No. 1* Affirmed the Proper Scope of Certification

The 2020 Rule rejected the scope of certification affirmed by the Supreme Court in *PUD No. 1*, precedent in effect for a quarter of a century. In *PUD No. 1*, the Court held, based on a textual analysis, that section 401 “is most reasonably read” as authorizing the certifying authority to place conditions on what the Court described as the “project in general” or the “activity as a whole” once the predicate existence of a discharge is satisfied. *Id.* at 711–12. Before the Court was a section 401 certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. The principal dispute in *PUD No. 1* was whether a certifying authority could require a minimum stream flow as a condition in its section 401 certification. The project applicant identified two potential discharges from its proposed hydroelectric facility: “the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.” *Id.* at 711. The project applicant argued that because the minimum stream flow condition was unrelated to these discharges, it was beyond the scope of the state’s authority under section 401. *Id.*

The Court examined sections 401(a)(1) and 401(d), specifically the use of different terms in those paragraphs, to inform its interpretation of the scope of a section 401 certification. The Supreme Court, recognizing the ambiguity created when in 1972 Congress amended the language in section 401(a)(1) and added section 401(d), held that section 401(d) “is most reasonably read” as authorizing the certifying authority to place conditions on the “activity as a whole” once the predicate existence of a discharge is satisfied. *Id.* at 711–12. EPA agrees that section 401 is ambiguous regarding the scope of certification and conditions, and EPA agrees with the Court’s textual analysis of the statute. The Court reasoned:

If § 401 consisted solely of subsection (a), which refers to a state certification that a “discharge” will comply with certain

provisions of the Act, petitioners’ assessment of the scope of the State’s certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State’s authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth “any effluent limitations and other limitations . . . necessary to assure that any applicant” will comply with various provisions of the Act and appropriate state law requirements. 33 U.S.C. 1341(d) (emphasis added). The language of this subsection contradicts petitioners’ claim that the State may only impose water quality limitations specifically tied to a “discharge.” The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose “other limitations” on the project in general to assure compliance with various provisions of the Clean Water Act and with “any other appropriate requirement of State law.” Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Id. at 711–12 (emphasis in original).⁵⁷ EPA agrees with the Court’s interpretation regarding the proper scope of certification. Specifically, EPA agrees with the Court’s analysis of section 401(a)(1) and section 401(d). Because section 401(d) requires that a section 401(a)(1) certification include conditions necessary to assure the “applicant . . . will comply” with water quality requirements, section 401 is most reasonably read to require the certifying authority—when it reviews a request for certification under section 401(a)(1)—to review the applicant’s activity subject to the Federal license or permit, and not merely the potential point source discharges. This is the best interpretation of the combined text of sections 401(a)(1) and 401(d) partly because it accounts for the fact that the activity is made possible by the applicant’s Federal license or permit, and that activity might involve a wide

⁵⁷ Note that, as EPA felt the Supreme Court need not reach the question of the scope of certification in *PUD No. 1*, the Agency did not directly address this issue in its *amicus* brief. The *amicus* brief filed by the Solicitor General on behalf of the EPA in this case did not grapple directly with the language in sections 401(a) and (d), and argued that “[e]ven if a condition imposed under Section 401(d) were valid only if it assured that a ‘discharge’ will comply with the State’s water quality standards, the Section 401(d) condition imposed by the State in this case satisfies that test.” Brief for the United States as *Amicus Curiae* Supporting Affirmance, *PUD No. 1*, No. 92–1911 at 11, 12 fn. 2. (Dec. 1993).

range of actions beyond any potential discharge that could significantly affect compliance with water quality requirements. In order to assure—as it must under section 401(d)—that the “applicant” will comply with all applicable water quality requirements, the certifying authority must be able to evaluate water quality-related impacts from the activity made possibly by the applicant’s license or permit beyond those related to its triggering discharge(s).

As suggested by the Court, it is significant that Congress chose to use the term “applicant” in section 401(d), which it added to section 401 at the same time that it changed “activity” to “discharge” in section 401(a)(1). Congress could easily have used the term “discharge” in section 401(d) as it did in section 401(a)(1) in place of “applicant” and chose not to. Congress used similar phrasing in other parts of the CWA. For example, CWA section 402 contemplates that an NPDES permit may issue only upon a showing that a “discharge will meet” various enumerated provisions. 33 U.S.C. 1342(a). Congress could have used the same term (discharge) in section 401(d) but it did not. EPA’s interpretation of section 401 accounts for the distinct language Congress employed. See *Transbrasil S.A. Linhas Aereas v. U.S. Dep’t of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.”) (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984)).

In conclusion, EPA agrees with the Court’s interpretation regarding the proper scope of certification. Specifically, EPA agrees with the Court’s analysis of section 401(a)(1) and section 401(d), and, as discussed below, has identified additional support for the Agency’s interpretation in the statutory text of section 401, the legislative history of section 401, the water quality protection goals of section 401, and the principles of cooperative federalism that underlie the CWA.⁵⁸

ii. Additional Textual Support for “Activity” Scope of Certification

In *PUD No. 1*, the Court focused its analysis on sections 401(a)(1) and (d). However, additional text in section 401(a)(1) and section 401(a)(3)–(5) adds

⁵⁸ It is also instructive to note that a unanimous Supreme Court left *PUD No. 1* untouched in *S.D. Warren*, which found that “[s]tate certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . .” 547 U.S. at 386.

further support for a scope of review encompassing the activity subject to the Federal license or permit, not just its discharges. Section 401(a)(1) provides that “[i]n the case of any *such activity* for which there is not an applicable [water quality requirement,⁵⁹] the State shall so certify . . .” 33 U.S.C. 1341(a)(1) (emphasis added).⁶⁰ This final rule interprets this language to mean that if the certifying authority determines that no water quality requirements are applicable to the activity, the certifying authority shall grant certification. 40 CFR 121.7(g). Important to interpreting scope, what matters for this provision is whether there are water quality requirements applicable to the “activity,” not the “discharge.” Congress added this provision in the same 1972 act that changed “activity” to “discharge” earlier in section 401(a)(1). Yet Congress used “activity” here. Congress’s use of “activity” in this provision of section 401(a)(1) instead of “discharge” adds further support to the conclusion that Congress intended for the scope of certification to encompass the activity subject to the Federal license or permit, not just its discharges.

Section 401(a)(3)–(5) adds more support.⁶¹ Section 401(a)(3) provides that a certification for the “construction” of a “facility” fulfills the section 401 obligations with respect to the facility’s “operation” unless the certifying authority determines there is no longer reasonable assurance of compliance with water quality requirements. *See* 33 U.S.C. 1341(a)(3). “Construction” and “operation” of a “facility” are clearly broader concepts than “discharge.” In addition, section 401(a)(4) allows the certifying authority the opportunity to “review the manner in which the [previously certified] facility or activity shall be operated or conducted” prior to initial operation for the purpose of assuring this will not violate applicable water quality requirements. *See id.* at 1341(a)(4). Reviewing how the “facility or activity”

is “operated or conducted” goes well beyond simply evaluating any related “discharge.” Continuing with this language, Congress provided that if this review results in suspension of the facility or activity’s Federal license or permit, the license or permit remains suspended until notification from the certifying authority that there is reasonable assurance that “such facility or activity”—not discharge—“will not violate” water quality requirements. *Id.* Lastly, section 401(a)(5) provides that any certified Federal license or permit may be suspended or revoked by the Federal licensing or permitting agency upon an entry of judgment that “such facility or activity,” not discharge, has been operated in violation of applicable water quality requirements. *See id.* at 1341(a)(5). The scope of review employed in each of these subsections is whether there has been compliance by the “facility or activity” with the five CWA sections identified in section 401(a)(1) (*i.e.*, CWA sections 301, 302, 303, 306, and 307), and not merely compliance by the “discharge.” Congress’s choice to use broad words such as “facility” and “activity,” rather than the narrower “discharge,” to describe what is subject to the substantive requirements in section 401(a)(3)–(5) should be given meaning and is in this final rule. For a discussion on the text of section 401(a)(2), *see* section IV.K of this preamble, *infra*.

iii. Legislative History Confirms Congress Intended an Activity-Based Scope

The legislative history of CWA section 401, and of its predecessor section 21(b) of the Water Quality Improvement Act of 1970 where the certification requirement was first enacted, provides persuasive evidence that Congress intended the scope of certification to include the activity subject to the Federal license or permit, not only its point source discharges. As discussed in section III of this preamble, Congress significantly revised the statutory water quality protection framework in 1972, focusing more on effluent limitations and numeric limits than water quality standards to try to drive down pollution levels. While Congress largely retained the water quality certification scheme it enacted in 1970, it did make several revisions, including some in the subsections relevant to interpreting the scope of certification. As discussed below the legislative history of the 1972 CWA amendments demonstrates that these changes were not intended to significantly narrow the scope of section 401, contrary to what some commenters

argued and what EPA stated in its justification for the 2020 Rule.

The pre-1972 version of section 401 indisputably authorized certifying authorities to review the entire activity, not only its point source discharges. Congress originally enacted the water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970. Public Law 91–224, 84 Stat. 91 (April 3, 1970). That section provided that any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction and operation of facilities, which may result in any discharge into the navigable waters of the United States, “shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that there is reasonable assurance . . . that *such activity will be conducted in a manner which will not violate applicable water quality standards.*” Public Law 91–224, 21(b)(1), 84 Stat. 91 (April 3, 1970) (emphasis added). Had this language remained untouched, there would be no question regarding congressional intent; the 1970 language clearly envisioned a broad “activity” scope of certification.

However, in 1972, Congress changed the above italicized language to “such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act.” Public Law 92–500, 401(a)(1), 86 Stat. 816 (Oct. 18, 1972). While Congress changed the word “activity” to “discharge” in this one instance when overhauling the CWA in 1972, the rest of the legislative history of the 1972 amendments demonstrates that Congress did not intend this one edit to section 401(a)(1) to dramatically narrow the scope of certification.⁶² First, as discussed above, Congress made other revisions in 1972 that demonstrate Congress’s intent to

⁵⁹ Specifically, the provision lists “an applicable effluent limitation or other limitation under sections 1311(b) and 1312 [301(b) and 302] of this title, and . . . an applicable standard under sections 1316 and 1317 [306 and 307] of this title.” As discussed *infra* at section IV.E.2.c of this preamble, section 301(b), specifically section 301(b)(1)(C), incorporates by reference section 303, and section 303 is not limited to regulating point source discharges.

⁶⁰ The provision goes on to say that any such certification (of no applicable water quality requirements) “shall not be deemed to satisfy section 1371(c),” *i.e.*, CWA section 511(c) (pertaining to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA)).

⁶¹ *See* 87 FR 35344–45 (discussing section 401(a)(3)–(5) in support of an “activity” based scope of certification).

⁶² While Congress was otherwise engaged in a “total restructuring” of the CWA in 1972, *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (quoting legislative history of the 1972 amendments), Congress deemed the water quality certification scheme so important that Congress carried it over, largely unchanged. Much of the legislative history of the 1972 amendments focuses on the total restructuring of the act, not explaining the pre-existing certification requirement. The legislative history is accordingly relatively sparse regarding certification. Much of the discussion that does exist concerns the change from certifying compliance with “applicable water quality standards” (in the 1970 version) to “the applicable provisions of sections 301, 302, 306, and 307” of the 1972 CWA. Congress amended section 401 in this way to reflect its new strategy to more effectively advance water quality protection and improvement; it is difficult to see why it would, at the same time, significantly narrow the scope of certification so as to undermine its power and effectiveness.

retain a broader activity-based scope. Congress used the phrase “such activity” (instead of “such discharge”) in the very next sentence of section 401(a)(1) and added section 401(d), which authorizes certification conditions that assure that “any applicant” (instead of “any discharge”) will comply with water quality requirements. The broad phrasing in section 401(a)(3)–(5) existed in section 21(b) and, tellingly, was not revised by Congress in 1972. Further, the legislative record shows that, in 1972, Congress understood it was making only “minor,” insubstantial changes to section 21(b) to harmonize with the substantial new provisions of the CWA pertaining to regulation of point source discharges.⁶³ The Senate Report stated that section 401 was “substantially section 21(b) of the existing law.” S. Rep. No. 92–414, at 69 (1971); *see also* remarks of Sen. Baker: “Section 21(b), with minor changes, appears as section 401 of the pending bill S.2770.” 117 Cong. Rec. 38857 (1971). Nowhere in the legislative history is there a statement to the effect that Congress intended to dramatically shrink section 401’s scope of review and protection to only those water quality effects caused by a potential point source discharge. To the contrary, the House Report stated that “[i]t should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters.” H.R. Rep. 92–911, at 124 (1972) (emphasis added). Indeed, in summarizing section 401, Senator Muskie stated that “[a]ll we ask is that activities that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and recommendation before the Federal license or permit be granted.” 117 Cong. Rec. 38854 (1971) (emphasis added). *See also* H.R. Rep. 92–911, at 121 (1972) (stating that “[t]he term ‘applicable’ as used in section 401 . . . means that the requirement which the term ‘applicable’ refers to must be pertinent and apply to the activity . . .”) (emphasis added). In light of the lack of any compelling evidence in the legislative history that Congress intended to fundamentally constrain the certification power it granted just two years before, and the abundant evidence to the contrary, EPA adopts the full

activity scope of review included in the proposed rule.⁶⁴

iv. Response to Comments Regarding an Activity-Based Scope of Certification

The Agency received numerous comments on the proposed return to an activity-based scope of certification review, including comments about the statutory language, legislative history, *PUD No. 1*, and the water quality harms associated with the 2020 Rule. This subsection contains summaries of these comments and the Agency’s response. Comment summaries and additional discussion of other aspects of scope of certification (*i.e.*, defining the “activity” subject to certification, water quality requirements, waters considered in acting on a request for certification, and scope of conditions) are included elsewhere in this section of the preamble.

A. Comments Regarding the Language in Section 401

The best reading of the statutory text is that the scope of certification is the activity subject to the Federal license or permit, not merely its potential point source discharges. While the statutory text lends itself to more than one conceivable interpretation, the interpretation adopted in this final rule is the best reading of the text and follows the Supreme Court’s authoritative interpretation in *PUD No. 1*. Some commenters asserted that the text of section 401 dictates a single interpretation of scope, although those commenters disagreed on that interpretation. A few such commenters argued that section 401(a)(1) unambiguously limits the scope of certification to discharges, and that the reference in subsection 401(d) to the “applicant’s” compliance does not create any ambiguity regarding the scope of certification. Conversely, other commenters argued that the statutory language of section 401 unambiguously provides for certification on all aspects of the applicant’s activity subject to the Federal license or permit, not only its potential point source discharges. A few of these commenters argued that the Court’s holding in *PUD No. 1* was based

on the unambiguous language of the statute.

EPA disagrees with both sets of commenters. Although the Supreme Court’s assessment of the statute in *PUD No. 1* is the best reading of the text with regard to the proper scope of certification, the text is subject to more than one possible interpretation. EPA’s conclusion is supported not only by the two separate sets of commenters arguing in support of contrary “plain meaning” interpretations of the proper scope, but also by the Supreme Court’s interpretation of the statute in *PUD No. 1*. The Supreme Court held that the text regarding the scope of certification “is most reasonably read” as pertaining to the activity, the way EPA interprets the statute in this final rule. 511 U.S. at 712. In the 2020 Rule, EPA likewise acknowledged that the statutory language addressing scope of review is subject to more than one possible interpretation. *See* 85 FR 42232, 42251 (“The Agency also disagrees with commenters who asserted that the scope of certification is expressed unambiguously in section 401.”). Congress’s use of “discharge” and “activity” in section 401(a)(1) and “applicant” instead of “discharge” in section 401(d) introduced some uncertainty as to the proper scope of section 401 review and conditions. In this final rule, EPA is following the Supreme Court’s authoritative interpretation of the statute while also exercising its authority granted by Congress to construe, interpret, and implement the CWA.

B. Comments Regarding Statutory Interpretation

Some commenters asserted that EPA misconstrued section 401(d), often reasserting arguments made in the preamble to the 2020 Rule or the dissenting opinion in *PUD No. 1*. Some commenters echoed arguments made by the dissenting opinion in *PUD No. 1* that section 401(a)(1) limits a certifying authority to “ensuring that any discharge resulting from a project will comply” with water quality requirements and therefore, “while § 401(d) permits a State to place conditions on a certification to ensure compliance of the ‘applicant,’ those conditions must still be related to discharges.” 511 U.S. at 726 (Thomas, J., dissenting). Other commenters similarly argued that the reference in section 401(d) to “applicant” merely indicates who must comply with certification conditions. These comments are similar to the position taken in the 2020 Rule that “the term ‘applicant’ in section 401(d) [was] merely identifying the

⁶³ Indeed, the 1971 Senate Report provided that section 401 was “amended to assure consistency with the bill’s changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.” S. Rep. No. 92–414, at 69 (1971).

⁶⁴ Congress’s revisions to section 401 in the 1977 CWA amendments also suggest continued support for a broader “activity” approach. As discussed more fully in section E.2.c below, in 1977, Congress made further minor changes to section 401, this time inserting section 303 into the list of CWA sections for which a state must certify compliance. In the legislative history, Congress explained this “means that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303.” H.R. Rep. No. 95–830, at 96 (1977) (emphasis added).

person or entity responsible for obtaining and complying with the certification and any associated conditions and not as expanding the regulatory scope of that section.” 85 FR 42232.

EPA disagrees with the arguments made by these commenters, the dissent in *PUD No. 1*, and the preamble to the 2020 Rule. First, Congress could easily have used the term “discharge” in section 401(d) in place of “applicant” and chose not to. Congress used similar phrasing in other parts of the CWA. For example, CWA section 402 contemplates that an NPDES permit may issue only upon a showing that a “discharge will meet” various enumerated provisions. 33 U.S.C. 1342(a). In fact, Congress used this very phrasing in section 401(a)(1)—requiring certification that “any such *discharge* will comply.” *Id.* at 1341(a)(1) (emphasis added). It is Congress’s use of these different phrases in section 401(a)(1) and section 401(d) that led the Supreme Court to decide the issue in *PUD No. 1* and now requires the Agency to interpret the proper scope of certification. Congress added section 401(d) in the same legislation in which it revised section 401(a)(1) to refer to “discharge.” Congress could have used the same term in section 401(d) but it did not. EPA’s interpretation of section 401(d) accounts for these considerations. *Transbrasil*, 791 F.2d at 205 (D.C. Cir. 1986) (“[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.”).

EPA disagrees with the commenters that suggested that section 401(d) is irrelevant to the scope of certification. Section 401(d) requires the certifying authority—when making a decision to certify under section 401(a)(1)—to include conditions necessary to assure that the license or permit *applicant* will comply with water quality requirements, including applicable requirements of state law listed only in section 401(d). As the Court in *PUD No. 1* recognized, section 401(d) is central to interpreting the scope of section 401. 511 U.S. at 711–712 (analyzing both section 401(a)(1) and section 401(d) to interpret scope). Following this approach, this final rule adopts the interpretation of section 401 that, when read as a whole, best aligns with the language Congress chose for section 401(a)(1) and section 401(d), not just the language of section 401(a)(1).

C. Comments on Legislative History

Some commenters asserted that Congress’s 1972 revisions to section

401(a)(1) support a “discharge-only” approach. These commenters argued that, when Congress revised “such activity” to “such discharge,” Congress unambiguously limited the scope of certification to the “discharge,” rather than the “activity.” EPA disagrees that the better interpretation of the 1972 revisions is that Congress intended to narrow the scope of certification. That interpretation considers only a portion of the 1972 amendments. It does not grapple with how to reconcile the revisions to section 401(a)(1) with the addition of section 401(d), which broadly authorizes certifying authorities to condition certification decisions—made under section 401(a)(1)—to assure that the “applicant” complies with water quality requirements. It also does not grapple with the use by the 1972 amendments of “such activity” later in section 401(a)(1), regarding activities without applicable water quality requirements. When Congress added section 401(d) and added the new sentence to section 401(a)(1) regarding activities without applicable water quality requirements, Congress could have used the term “discharge” but chose not to do so. EPA’s interpretation of section 401’s scope must account for that choice. Moreover, the commenter’s interpretation does not harmonize with the extensive legislative history suggesting that Congress had no intention of substantially narrowing the certification power it had previously granted to states. *See* section IV.E.2.a.iii of this preamble, *supra*.

A couple of commenters asserted that Congress’s revised certification language reflected a new emphasis in the CWA on directly regulating point source discharges of pollutants, away from indirectly regulating activities through ambient water quality standards. The preamble to the 2020 Rule made a similar point, that the 1972 amendments to section 401 made it “consistent with the overall framework of the amended statutory regime, which focuses on regulating discharges to attain water quality standards and adds new federal regulatory programs to achieve that purpose.” 85 FR 42232. While EPA agrees that the 1972 amendments reflected a new overall emphasis in the CWA on regulating point source discharges (through section 402 NPDES permits and section 404 dredge and fill permits), this does not change EPA’s conclusion regarding how best to interpret the scope of section 401. Section 401 predates these discharge-related permitting provisions and, even after the 1972 amendments, remains significantly different in character. It

remains a direct congressional grant of authority for states and authorized Tribes to protect their water resources from impacts caused by federally licensed or permitted projects. As discussed directly above at section IV.E.2.a.iii of this preamble, the legislative history shows that when Congress was enacting new discharge-related permitting provisions in 1972, it had no intention of fundamentally constraining the certification power that Congress granted just two years before.

D. Comments Regarding *PUD No. 1*

A few commenters asserted that the Court in *PUD No. 1* relied on, and deferred to, EPA’s 1971 Rule and guidance derived from that rule. One commenter asserted that the *PUD No. 1* decision was based on judicial deference to EPA regulations that predated the 1972 CWA amendments and should be distinguished on this basis. Another commenter asserted that the Court’s reliance on the 1971 Rule significantly undermines the validity and applicability of the *PUD No. 1* decision for this rulemaking. Similar to these commenters, the dissenting opinion in *PUD No. 1* also asserted that the majority relied “at least in part” on the 1971 Rule. 511 U.S. at 728–29 (Thomas, J., dissenting).

EPA first notes that the Court did not rely on EPA’s 1971 Rule during the Court’s own analysis of the statutory text. The Court first undertook its own examination of the statutory text, concluding that section 401(d) “is most reasonably read” as authorizing conditions on the entire activity at issue. *Id.* at 712. Only after reaching that conclusion did the Court note that “[o]ur view of the statute is consistent with EPA’s regulations implementing § 401.” *Id.* Therefore, EPA disagrees with commenters that asserted that the Court’s analysis of the statutory text relied on the 1971 Rule. EPA also disagrees with commenters that the Court’s discussion of the 1971 Rule undermines the applicability of *PUD No. 1* for this rulemaking. As described above, EPA is not concluding that the proper scope of certification is the activity subject to the Federal license or permit solely because that was the Supreme Court’s holding in *PUD No. 1*, although the Court’s authoritative holding on the issue offers compelling support. Instead, EPA has independently reviewed the statutory text, and agrees with the Court’s analysis of section 401(a)(1) and section 401(d). EPA finds further support for its conclusion in additional statutory text of section 401 beyond what the Court analyzed in *PUD No. 1*, the legislative

history of section 401, the water quality protection goals of section 401, and the principles of cooperative federalism that underlie the CWA—particularly section 401 itself.

E. Comments Regarding Water Quality Harms of the 2020 Rule

As commenters observed, the distinction between certifying the activity or only its associated discharges is more than semantic and can in some cases have significant consequences for water quality protection. For example, one commenter argued that the 2020 Rule's narrower "discharge-only" approach to section 401 prohibited states and Tribes from considering activities that can result in violations of water quality requirements, such as impacts from reduced stream flows, thermal loading from removal of streamside vegetation, increases or decreases in sediment load, and destabilized stream banks. One commenter argued that activities directly adjacent to streams and wetlands have a direct relationship to the biological, physical, and chemical components and overall health of the water resource. Another commenter asserted that without the ability to consider the entire activity subject to certification, states and Tribes would underestimate the implications of projects on watershed scales and lose capacity to manage designated uses. Several commenters specifically discussed the importance of an activity-based scope for hydroelectric dam projects. One commenter asserted that review under the 2020 Rule left water quality impacts from a dam unmitigated, including a change in the timing and flow of water, blockage of nutrients, and altered chemical makeup of the water due to reservoirs. Similarly, another commenter provided additional examples of the water quality impacts from hydroelectric dams that are not tied to a specific discharge and therefore left out under the 2020 Rule, including increased water temperature from decreased water flows, vegetation loss and reduced shading from dam reservoirs, fish kills from turbines, and increased toxin mobility from elevated turbidity. A different commenter asserted that the discharge from the powerhouse or tailrace of FERC-licensed hydropower projects is not the only impact from those projects, but rather the entire project fundamentally alters the chemical, physical, and biological integrity of a river.

EPA is concerned that some, if not many, of the water quality-related impacts identified by commenters might fall outside the scope of review under

the 2020 Rule's "discharge-only" approach to scope of review. While the potential additional water quality protections associated with the "activity"-based scope (as opposed to a "discharge-only" scope) will vary depending on the nature, size, location, and type of project that requires a Federal license or permit, this final rule provides the opportunity for additional water quality protections compared to the 2020 Rule's approach. For example, when looking at a hydropower project, the "activity" scope allows a certifying authority to consider water quality-related impacts beyond the discharges from the tailrace or powerhouse. Depending on the activity specifics, such consideration could result in certification conditions that could include building or maintaining fish passage or habitat restoration related to water quality protection. As another example, when reviewing the construction of a pipeline project, the "activity" scope allows a certifying authority to consider water quality-related impacts beyond the discharge of dredge or fill material from the construction and placement of the pipeline and, depending on the activity specifics, can include water quality impacts from non-discharge related erosion or sedimentation from the pipeline construction, as well as later water quality impacts from erosion or sedimentation from the operation and maintenance of the pipeline. Certifying authorities can consider certification conditions that include monitoring, reporting, and adaptive management in response to the non-discharge-related water quality impacts of the activity, such as temperature, flow, riparian buffer conditions, and species impacts.⁶⁵ As another example, when reviewing the construction of a boat marina, the "activity" scope allows a certifying authority to consider not only the discharges associated with dredging and placement of fill for the marina, but also, depending on the activity specifics, erosion or sedimentation related to construction of the marina, as well as water quality impacts related to the subsequent operation of the marina (e.g., increased vessel pollution in the water associated with increased vessel traffic due to the construction of the dock). See section IV.E.2.b of this preamble, directly *infra*, regarding what is included as part of the "activity" subject to certification. The inability of

states and authorized Tribes to protect against such impacts under the 2020 Rule could seriously impair their ability to protect valuable water resources. This would be inconsistent with Congress's intention to provide states and authorized Tribes with a powerful tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits.

b. Defining the "Activity" Subject to Certification

As discussed above, the Agency is revising § 121.3 regarding scope of certification to clarify that a certifying authority's evaluation is limited to the water quality related-impacts from the activity subject to the Federal license or permit. This is the best interpretation of the statutory language and is consistent with congressional intent, the Agency's longstanding interpretation prior to the 2020 Rule, and *PUD No. 1*. Although this reading had been the Agency's longstanding interpretation prior to the 2020 Rule and should be familiar to stakeholders, in response to comments and to aid in implementation of this final rule, the Agency is providing further clarification around the "activity" subject to certification.

The Agency proposed a definition of the term "activity as a whole" at § 121.1(a). In this final rule, the Agency is removing the phrase "as a whole" from the regulatory text throughout part 121. Although the Supreme Court used the phrase "as a whole" in *PUD No. 1*, 511 U.S. at 712, the phrase is not found in the statutory text. This modification does not represent a change in substance from proposal. The Agency does not interpret the terms "activity" and "activity as a whole" as having different meanings; rather, EPA included the phrase "as a whole" in the proposed rule simply to emphasize that a certifying authority's evaluation extends to the activity in its entirety, as opposed to just the point source discharges associated with the activity. EPA concludes that the final regulatory text at § 121.3 makes this clear without the need to add "as a whole." The Agency has historically used the word "activity" to refer to the scope of certification. See, e.g., 1989 Guidance at 8 ("If a State grants water quality certification to an applicant for a federal license or permit, it is in effect saying that the proposed activity will comply with State water quality standards (and the other CWA and State law provisions enumerated above)."), 23 ("all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and

⁶⁵ See also Economic Analysis for the Final Rule at section 4.5 for further discussion on the environmental benefits and incremental costs associated with the final rule as compared to the 2020 Rule baseline.

operations—should be part of a State’s certification review.”); 2010 Handbook at 10 (rescinded in 2019, *see supra*) (“The granting of § 401 water quality certification to an applicant for a federal license or permit signifies that the state or tribe has determined that the proposed activity and discharge will comply with water quality standards as well as the other identified provisions of the CWA and appropriate requirements of state or tribal law.”). The Court in *PUD No. 1* appeared to use the terms “activity as a whole,” “activity,” and even “project in general” interchangeably. *PUD No. 1*, 511 U.S. at 711–12. Accordingly, the Agency is removing the phrase “as a whole” to better reflect the statutory text and to reduce any confusion that this phrase caused commenters.

The Agency proposed at § 121.1(a) to define the term “activity as a whole” to capture “any aspect of the project activity with the potential to affect water quality.” EPA intended for this proposed definition to provide certifying authorities with the ability to consider any aspect of the federally licensed or permitted activity that may adversely impact water quality. The impacts of a federally licensed or permitted project on a certifying authority’s water resources may be caused by aspects of the project’s activity other than the potential discharge that triggered the need for a section 401 certification (e.g., non-discharge impacts from the construction and operation of the project). The Agency’s proposed definition for the term “activity as a whole” was meant to include all aspects of the proponent’s “project in general” with the potential to affect water quality. *PUD No. 1*, 511 U.S. at 711. Many commenters asserted that the proposed definition was ambiguous, confusing, and circular. In light of commenter concerns and in the interest of greater clarity, the Agency is not finalizing the proposed definition for “activity as a whole,” and instead will rely on clarifying edits in final rule § 121.3 to articulate the activity subject to a certifying authority’s review.

Consistent with its proposal, 87 FR 35345, the Agency finds that section 401 is not constrained to those activities directly authorized by the Federal license or permit in question. Section 401(a)(3) provides compelling textual support for this reading. Specifically, section 401(a)(3) makes clear that a certification for a Federal license or permit for construction may address potential water quality impacts from the subsequent operation even though the operation may be subject to a different Federal license or permit. 33 U.S.C.

1341(a)(3) (“The certification . . . with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility” except in the circumstances described in section 401(a)(3)). By providing that a construction permit certification shall also serve as an operating permit certification (unless notice is given of changes which call into question whether the operation will in fact comply with water quality requirements), section 401(a)(3) necessarily contemplates that the certification of the construction permit will have considered whether the subsequent operation will comply with water quality requirements.

EPA finds additional support for this interpretation in section 401(a)(4). That provision authorizes a certifying authority, after it has granted certification for a facility or activity, to review, prior to its initial operation, the manner in which a facility or activity will be operated if the “facility or activity is not subject to a Federal operating license or permit.” 33 U.S.C. 1341(a)(4). If the certifying authority has already granted certification and the facility or activity is not subject to a Federal operating license or permit, by implication the certifying authority has certified a pre-operational Federal license or permit such as a construction permit. Yet section 401(a)(4) tasks a certifying authority that has certified a construction permit with reviewing the subsequent operation “for the purposes of assuring” that “the manner in which the facility or activity shall be *operated or conducted*” will not violate water quality requirements. *Id.* (emphasis added). For this reason, section 401(a)(4) adds further support to EPA’s conclusion that section 401 is best read to authorize a certifying authority to consider all aspects of the activity, not only those directly authorized by the relevant Federal license or permit at hand.

This interpretation is consistent with EPA’s longstanding position before the 2020 Rule. Previously issued EPA guidance provided that “because the States’ certification of a construction permit or license also operates as certification for an operating permit (except for in certain instances specified in Section 401(a)(3)), it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.” 1989 Guidance at 22; 2010 Handbook at 17 (rescinded in 2019, *see supra*) (“Thus, it is important for the

[section] 401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.”) (*citing PUD No. 1*, 511 U.S. at 712 (1994)). Additionally, the Agency issued a memorandum in 1985 discussing a question from a certifying authority about whether a certification for a section 404 permit for the construction of a marina could consider the subsequent operation of the marina. Winer Memorandum. The Agency concluded, based largely on its reading of section 401(a)(3), that when acting on a request for certification for a section 404 permit for the construction of a marina, the certifying authority will have considered water quality impacts resulting from the subsequent operation of the marina.

The legislative history offers additional support for this interpretation. The legislative history reveals Congress’s intent to ensure that federally licensed or permitted activities are not considered in a piecemeal fashion; rather, Congress recognized the importance of considering the effects of subsequent operations during site selection, *see* S. Rep. No. 91–351, at 8 (August 7, 1969) (“Site location is integral to effective implementation of the Nation’s water quality program. There are sites where no facility should be constructed, because pollution control technology is not adequate to assure maintenance and enhancement of water quality. Those who make the decision on site location should be aware of this prior to making any investment in new facilities.”), and of early planning to avoid later adverse effects, *see* H.R. Rep. 91–127, at 6 (March 25, 1969) (“The purpose of subsection 11(b) is to provide reasonable assurance . . . that no license or permit will be issued by a Federal agency for an activity that through inadequate planning or otherwise could in fact become a source of pollution.”). After reviewing comments that the Agency requested on the issue, EPA concludes that section 401 is best read to authorize a certifying authority to consider all aspects of the activity, not only those directly authorized by the relevant Federal license or permit.

Accordingly, the revised text at final rule § 121.3 indicates that a certifying authority shall evaluate the water quality-related impacts of the entire activity subject to the Federal license or permit, including the construction and operation, and not solely the aspect of the activity directly authorized by a given Federal license or permit. For example, a section 401 certification on

a CWA section 404 permit authorizing the discharge of dredge or fill material in waters of the United States may consider both the construction associated with dredging (*e.g.*, removing sediment from the waterbody to place dock pilings) as well as the subsequent operation associated with the completion of the dredging (*e.g.*, increased vessel pollution in the water associated with increased vessel traffic due to the construction of the dock).

EPA requested comment on how a Federal licensing or permitting agency could implement certification conditions addressing aspects of the activity that the Federal agency does not otherwise have licensing or permitting authority over. One commenter asserted that the bounds of the permitting authority of the Federal permitting agency cannot dictate the scope of state or Tribal authority under section 401, observing that section 401(d) requires the Federal agency to incorporate into the Federal license or permit those certification conditions the state or authorized Tribe includes to ensure compliance with water quality requirements. EPA generally agrees with this commenter. Section 401 requires the certification conditions to become conditions of the Federal license or permit subject to certification, regardless of whether the Federal agency has independent authority to condition its license or permit to ensure compliance with water quality requirements. However, EPA emphasizes that—for purposes of section 401—certification conditions cannot “live on” past the expiration of the Federal permit to which they attach. Section 401(d) requires certification conditions to be incorporated into the Federal license or permit. Accordingly, once the Federal license or permit expires, any certification conditions incorporated into the Federal license or permit also expire. This principle holds true regardless of the scope of section 401. However, it does not mean that when a certifying authority considers whether to grant or deny certification, the certifying authority is limited to considering only those aspects of the activity that will occur before the expiration of the Federal license or permit. For example, if the certifying authority determines that no conditions could assure that the activity, including post-expiration aspects of the activity, will comply with water quality requirements, denial of certification would be appropriate.

A few commenters asserted that the definition for “activity as a whole” could be used by certifying authorities to impose conditions on activities that

may only be speculatively or obscurely linked to the actual discharge. In addition, a few commenters requested that the Agency revise the proposed definition for “activity as a whole” to provide more clarity on the boundaries of such a term, such as what impacts can be considered by the certifying authority and how indirect the impacts may be to water quality.

In response to comments, the Agency revised its explanation of the “activity” approach from proposal to provide more clarity. Although each determination will be fact specific, the Agency is clarifying important limiting principles that inform delineation of the “activity” under review by the certifying authority. The Agency finds that its approach to “activity” in this final rule is appropriately bounded to allow certifying authorities to only consider adverse impacts to waters that prevent compliance with water quality requirements. The final text at § 121.3 also makes it clear that the analysis is limited to the applicant’s activity subject to the Federal license or permit at issue (and to considering that activity’s adverse impacts on water quality). Consistent with the intent of the proposed rule, § 121.3 in the final rule clearly limits a certifying authority’s analysis of any given activity to adverse water quality-related impacts that may prevent compliance with water quality requirements. As discussed below, the phrase “will comply” used in sections 401(a)(1) and 401(d) means that the certifying authority is limited to examining whether the activity will meet water quality requirements; only if the activity will not comply with such requirements, does section 401 authorize certifying authorities to either condition the activity in such way to ensure compliance or deny the activity where compliance cannot be ensured with conditions. Accordingly, section 401 and this final rule do not authorize certifying authorities to deny or condition a certification due to impacts from the activity that do not adversely affect water quality. However, the Agency wishes to make clear that certifying authorities may address not only adverse water quality impacts caused exclusively by the federally licensed or permitted activity, but also adverse impacts contributed to by a federally licensed or permitted activity. For example, a certifying authority may deny or condition an activity that will contribute to ongoing noncompliance with water quality requirements. Relatedly, section 401 and this final rule do not authorize a certifying authority to condition an activity for the purpose of

protecting waters that are not impacted by the activity or include conditions that do not otherwise affect compliance with the applicable water quality requirements in the waters impacted by the activity.

The Agency also finds it unnecessary to establish in this rulemaking how indirect or certain the impacts of the activity may be to water quality. It is incumbent on the certifying authority to develop a record to support its determination that an activity will or will not comply with applicable water quality requirements. The Agency encourages certifying authorities to clearly state in a certification decision why a condition is necessary to assure that the activity will comply with water quality requirements or, in a denial, why it cannot certify that the activity will comply with water quality requirements. *See* 40 CFR 121.7; *see also* *infra* section IV.F of this preamble. If the project proponent believes the certification decision is premised on, in the words of one commenter, a “statistically insignificant aspect of the project,” it may challenge the sufficiency of the decision in a court of competent jurisdiction. If a project proponent believes a certification decision is based on unreasonable conclusions regarding the water quality-related impacts of the activity, it may likewise challenge that decision in court. This outcome is consistent with congressional intent. The legislative history reveals that Congress intended project proponents to seek relief in state courts in instances where it disagreed with a certification decision. *See, e.g.*, 116 Cong. Rec. 8805, 8988 (1970) (Conf. Rep.) (“If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so.”); H.R. Rep. No. 92–911, at 122 (1972) (same).

One commenter argued that the Agency had not adequately explained how the “activity as a whole” scope would function in practice, and, as a result, the definition would introduce regulatory uncertainty, pose litigation risk regarding certification decisions, and threaten infrastructure projects. The Agency disagrees. When *PUD No. 1* endorsed a scope of “activity as a whole” almost thirty years ago, the Court did not offer a specific definition or explanation of that term. Nevertheless, certifying authorities and Federal agencies have gained significant experience over nearly 50 years implementing an “activity” approach, and EPA expects that certifying authorities and Federal agencies remain capable of appropriately delineating the

“activity” based on the facts of each situation. EPA is not aware of and did not receive any comments identifying any cases in which delineation of “activity” has been litigated, provided that the scope of review was limited to water quality. Moreover, this final rule addresses commenter concerns regarding regulatory certainty by clarifying important limiting principles that inform delineation of the “activity” under review by the certifying authority including that certifying authorities are limited to considering adverse impacts to water quality from the activity subject to the Federal license or permit. *See supra* for further discussion.

c. Water Quality Requirements

As proposed, EPA is finalizing the definition of water quality requirements as “any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.” 40 CFR 121.1(j). The final rule definition is consistent with congressional intent as well as long-standing Agency interpretation of the CWA. A fundamental factor in the scope of a section 401 certification is that the certifying authority is limited to considering whether the activity will comply with applicable water quality requirements. *See* 33 U.S.C. 1341(a), (d). This serves as a key limitation on the otherwise broad authority granted by Congress to certifying authorities. As discussed in more detail below, this approach was supported by the overwhelming majority of commenters on the proposed rule.

i. Water Quality-Related Impacts From Federally Licensed or Permitted Projects

EPA is finalizing that when a certifying authority reviews a request for certification, “[t]he certifying authority’s evaluation is limited to the *water quality-related impacts* from the activity subject to the Federal license or permit, including the activity’s construction and operation.” 40 CFR 121.3(a) (emphasis added). This limitation to evaluating water quality-related impacts was included in EPA’s proposed definition of “activity as a whole”—“any aspect of the project activity with the potential to *affect water quality*”—and EPA’s proposal was clear that section 401 is limited to addressing only water quality-related impacts. 87 FR 35343.

The CWA’s overall objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a).

Among the Act’s policy declarations is “the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution.” *Id.* at 1251(b). When Congress gave certifying authorities the ability to review any activity subject to a Federal license or permit that may result in a discharge into waters of the United States, it added a key limiting principle to that otherwise broad authority—the review is limited to determining compliance with water quality requirements. From its first inclusion of then-section 21(b) in the Water Quality Improvement Act of 1970, Congress intended to provide states and Tribes with a powerful tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits. *See* 116 Cong. Rep. 8805, 8984 (March 24, 1970) (“Mr. Muskie: No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard.”). Although Congress has changed the words and phrases that convey that limitation, legislative history shows consistent congressional intent over time. *See, e.g.,* S. Rep. 92–414, at 1487 (1971) (“The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”). In short, Congress intended section 401 to provide certifying authorities with broad authority with respect to protecting water quality within their jurisdiction but specifically confined that authority to water quality.

Judicial and EPA interpretation on this point also have remained constant. The courts have consistently agreed that certifying authorities are limited to considering water quality effects. *See PUD No. 1*, 511 U.S. at 711–713 (holding that a state’s authority to impose conditions under section 401(d) “is not unbounded”); *see also Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) (“Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another.”). The same is true for prior Agency interpretations, as articulated in the 2020 Rule and in prior Agency guidance. *See* 85 FR 42250; 1989 Guidance at 22 (“[I]t is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.”).⁶⁶

⁶⁶ It is also consistent with EPA’s interpretation in the 1971 Rule regarding section 21(b) in the Water Quality Improvement Act of 1970 (the

The overwhelming majority of commenters agreed that the scope of section 401 certification is limited to water quality. Accordingly, while EPA continues to interpret section 401 as providing broad authority to certifying authorities to review activities subject to a Federal license or permit, the review must be limited to the water quality-related impacts from the activity. It would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based on potential impacts that have no connection to water quality (*e.g.*, based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality).

Several commenters asserted that certifying authorities considered non-water quality-related factors prior to the 2020 Rule and provided examples of such factors and the consequences, including project delays, ambiguity, and undue burdens on project proponents. A few commenters asserted that a handful of states have attempted to block or constrain projects based on non-water quality-related reasons and discussed specific certification actions as “state abuse” of section 401. Based on commenter feedback and EPA’s experience implementing section 401, EPA finds that the vast majority of certification decisions are based entirely on water quality considerations. Nevertheless, the final rule reiterates that certifying authorities are limited to considering the water quality-related impacts from an activity when determining whether to issue a section 401 certification. *See* § 121.1(j), 121.3.

A few commenters asserted that the proposed rule would allow certifying authorities to condition or deny projects as long as there is a nexus to water quality. These commenters argued that the proposed rule would allow states to block projects for non-water quality reasons, which the commenters asserted include effects on designated uses of a water body that are not associated with water quality changes (*e.g.*, changes in water flow that might affect aquatic habitat). EPA strongly disagrees that this final rule would permit certifying authorities to consider non-water quality-related factors as the basis for a certification denial or condition. The scope of certification is limited to adverse water quality-related impacts from the activity. That said, water quality-related impacts can encompass impacts that adversely affect the

precursor to current section 401). *See, e.g.,* 40 CFR 121.2(a)(3) (2019) (certification decisions concern whether “the activity will be conducted in a manner which will not violate applicable water quality standards”).

chemical, physical, and biological integrity of waters, which could include, for example, changes in water flow that might affect aquatic habitat. EPA has consistently interpreted water quality impacts broadly. *See, e.g.*, 1989 Guidance at 22 (“all of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State’s certification review”); 2010 Handbook at 17 (rescinded in 2019, *see supra*) (“Thus, it is important for the [section] 401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project”). In 1991, EPA sent a letter to FERC in response to various FERC documents discussing “inappropriate” section 401 certification conditions, including conditions related to fish, wildlife, vegetation, and recreation. Letter from LaJuana S. Wilcher, Assistant Administrator of the Office of Water, to Lois D. Cashell, FERC Secretary (Jan. 18, 1991). In this letter, EPA expressly rejected the notion that water quality is a narrow concept; rather, the Agency asserted that the “protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system.” *Id.* The letter further noted that water quality issues can include toxic pollutants, pollutant bioaccumulation, aquatic species composition and diversity, habitat loss, stormwater impacts, nonpoint source impacts, and hydrological changes. *Id.* The Agency finds that a multi-faceted interpretation of water quality-related impacts represents the best interpretation of section 401 and best allows certifying authorities to realize the water quality protection goals of the CWA and section 401.

ii. Definition of Water Quality Requirements

To clarify which provisions of Federal, state, and Tribal law a certifying authority may consider when evaluating and ultimately deciding which action to take on a request for certification, the Agency is finalizing the definition of “water quality requirements” as proposed (“*Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those

sections, and any other water quality-related requirement of state or Tribal law.”). *See* 40 CFR 121.1(j).

The term “water quality requirements” is used throughout section 401, and the term “any other appropriate requirement of State law” is used in section 401(d), but neither term is defined in the CWA. The Agency did not interpret the terms “water quality requirements” and “other appropriate requirement of State law” in the 1971 Rule, as they were not introduced into the statute until the 1972 CWA amendments. Prior to 1972, what is now section 401(a) of the statute used the term “water quality standards,” and section 401(d) was not part of the statute. *See* Public Law 91–224, 21(b)(1), 85 Stat. 91 (1970); Public Law 92–500, 401, 85 Stat. 816 (1972).

The 2020 Rule defined the term “water quality requirements” and interpreted the statutory phrase “any other appropriate requirement of State law.” 40 CFR 121.1(n) (2020); *see* 85 FR 42253. Consistent with what EPA characterized as the “discharge-only” scope of section 401 certification, the 2020 Rule limited “water quality requirements” to only the enumerated provisions of the CWA listed in section 401(a)(1) and “state or tribal regulatory requirements for point source discharges into waters of the United States.” 40 CFR 121.1(n) (2020). Citing Justice Thomas’s dissent in *PUD No. 1*, the Agency relied on the principle of *ejusdem generis* (“of the same kind”) to argue that the term “appropriate requirement of State law” was limited “only to provisions that, like other provisions in the statutory list, impose discharge-related restrictions.” 511 U.S. at 728 (Thomas, J., dissenting); 85 FR 42453. As a result, the 2020 Rule narrowed the scope of review and ability of certifying authorities to include conditions to protect their water quality. For example, a few commenters asserted that the 2020 Rule’s approach to water quality requirements impeded certifying authorities’ ability to impose conditions that protect water quality, such as standards for erosion and sedimentation control, stormwater management, endangered species protection, minimum in-stream flows, prevention of aquatic habitat loss, and prevention of groundwater contamination. A few other commenters stressed the importance of this authority for FERC licensed projects in particular because of the length of the license and preemption of state regulatory oversight on FERC licenses.

In finalizing the definition of “water quality requirements” as proposed, the Agency has reconsidered the 2020

Rule’s definition of the term and finds that section 401 is best interpreted in a way that respects the breadth of the Federal and state and Tribal water quality-related provisions that Congress intended a certifying authority to consider when determining whether to grant certification. Accordingly, EPA is defining “water quality requirements” to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state or Tribal laws or regulations implementing the enumerated provisions, and any other water quality-related requirement of state or Tribal law—regardless of whether they apply to point or nonpoint source discharges. *See* 40 CFR 121.1(j); 87 FR 35347 (noting that the proposed definition applied to state or Tribal water quality requirements regardless of whether they apply to point or nonpoint source discharges).

Many commenters supported the proposed approach to “water quality requirements,” including its inclusion of state and Tribal laws applying to either point and nonpoint sources, noting it is more holistic, consistent with the Act and its purpose, consistent with case law, and that it restores and reinforces the authority Congress reserved for states and Tribes. However, several commenters did not support the proposed approach to defining “water quality requirements,” arguing that the term should be limited to point source discharges and/or limited to whether the discharge complies with water quality standards. A few commenters asserted that the term “water quality-related requirements of state or Tribal law” was too broad and would allow certifying authorities to include conditions unrelated or weakly related to water quality. Conversely, several other commenters believed the proposed definition of “water quality requirements” was overly restrictive, including a few commenters who recommended removing the term “water quality-related” in the definition for water quality requirements. As discussed below, EPA finds that its definition of “water quality requirements” is the best interpretation considering the text of section 401 and appropriately allows certifying authorities to certify compliance with the enumerated provisions of the CWA and state and Tribal water quality-related provisions (for both point and nonpoint sources). EPA’s final definition is also supported by the purpose, and legislative history of the statute.

First, the wording that Congress used in the text of section 401 demonstrates

that the certifying authority's review is limited to water quality-related provisions. Looking at the text of the various subsections of section 401, each subsection that refers to the act of certifying either uses the phrases "effluent limitation," "quality of waters," or "water quality requirements," or explicitly enumerates subsections of the CWA having to do with water quality—section 301 (effluent limitations), section 302 (water quality-related effluent limitations), section 303 (water quality standards and implementation plans), 306 (national standards of performance), and 307 (toxic and pretreatment effluent standards). See 33 U.S.C. 1341(a), (d).

Second, the text is not limited to certifying compliance with provisions addressing point source discharges. Section 401(d) includes the phrase "any other appropriate requirement of State law." 33 U.S.C. 1341(d) (emphasis added). The phrase "any other appropriate" bears examination. The word "any" is capacious in its scope, literally meaning "all" such state law requirements and not just a limited subset such as point source-related requirements. See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008); *Harrison v. PPG Industries*, 446 U.S. 578 (1980). The word "other" refers to requirements aside from the statutory provisions listed in the preceding list in section 401(d) (CWA section 301, etc.). While the word "appropriate" provides a limiting principle with respect to which requirements may be considered and applied, the word "appropriate" is to be interpreted broadly in light of the statute's text and purpose. *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (stating that "appropriate" is a broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors). In this context, the phrase "any other appropriate" is best understood as allowing certifying authorities to consider state or Tribal laws regarding water quality that are not part of the enumerated list of CWA sections and that address water quality protections that are different from those covered by the enumerated list. See also *PUD No. 1*, 511 U.S. at 713 (declining to speculate on the scope of state laws that would be included in the phrase "any other appropriate requirement of state law" but finding that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law").

Application of the maxim *ejusdem generis* ("of the same kind") to limit "appropriate requirement of State law"

to only those state law provisions that impose discharge-related or point source-related restrictions is misplaced. The list of CWA provisions referenced in sections 401(a)(1) and 401(d) includes section 303,⁶⁷ which is *not* limited to regulating point-source discharges. Section 303 concerns establishment of water quality standards, identification of waters that do not meet those standards, and establishment of daily maximum pollutant loads for such waters, all of which go well beyond regulation of point source discharges.⁶⁸ Considering the breadth of section 303, using *ejusdem generis* to interpret "any other appropriate requirement of State law" to only apply to point sources is not consistent with congressional intent as expressed through the statutory text.

The legislative history also supports a definition of "water quality requirements" not limited to requirements for point source discharges. As described earlier, even

⁶⁷ See H.R. Rep. No. 95–830, 96 (Dec. 6, 1977) ("The inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306, and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402, and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed."); see also *PUD No. 1*, 511 U.S. at 712–13 ("Although § 303 is not one of the statutory provisions listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U.S.C. 1311. Section 301 in turn incorporates § 303 by reference.")

⁶⁸ A primary objective of section 303 is the establishment of water quality standards. Establishment of water quality standards is required for waters regardless of whether they receive point source discharges. 33 U.S.C. 1313(c). Non-attainment of standards may be due to point sources, nonpoint sources, or both. As explained in EPA's regulations, water quality standards "serve the dual purposes" of serving as the regulatory basis for establishing water quality based treatment controls for point source discharges and the broader purpose of establishing the water quality goals for a specific water body. 40 CFR 130.3. Section 303(d) specifically directs the identification of waters that do not meet water quality standards, considering both point sources and nonpoint sources of pollution. 33 U.S.C. 1313(d)(1)(A); see also 40 CFR 130.7(b)(1)(iii). Section 303(d) also addresses the establishment of a "total maximum daily load" for each water that does not meet standards, set at a level necessary to implement applicable water quality standards—again, considering both point sources and nonpoint sources. 33 U.S.C. 1313(d)(1)(C); see also 40 CFR 130.1(i) (defining total maximum daily load as the sum of loads from both point sources and nonpoint sources plus natural background).

though in 1972 Congress modified the language of then-section 21(b), the legislative history shows that Congress intended new section 401 to be substantially the same as section 21(b), which did not limit certifying authorities to considering only point source discharges. In 1972, Congress understood it was making only "minor," insubstantial changes to section 21(b). The Senate Report stated that section 401 was "substantially section 21(b) of the existing law." S. Rep. No. 92–414, at 69 (1971). See also remarks of Sen. Baker: "Section 21(b), with minor changes, appears as section 401 of the pending bill S.2770." 117 Cong. Rec. 38857 (1971). A comparison of section 21(b) and section 401 reveals that the two sections are, indeed, substantially the same. Congress's revisions to section 401(a) in the 1977 CWA amendments also suggests continued support for certifying authority consideration of water quality impacts not limited to point sources. In 1977, Congress added section 303 to the various lists of CWA sections in section 401. Legislative history from 1977 states that Congress intended for "[t]he inserting of section 303 into the series of sections listed in section 401 [] to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303." H.R. Rep. No. 95–830, at 96 (1977). As discussed above, section 303 requires states to adopt water quality standards for its waters and applies to waters regardless of the presence of point or nonpoint sources of pollution or pollutants.

The legislative history also indicates that Congress intended the phrase "any other appropriate requirement of state law" to be read broadly. In earlier pre-adoption versions of section 401(d), Congress proposed to limit section 401(d) to the enumerated provisions from section 401(a)(1) and either "any more stringent water quality requirements under State law provided in section 510 of [the Act]," S. 2770, 92nd Cong. (1972), or "any regulation under section 316 of this Act." H.R. 11896, 92nd Cong. (1972). Ultimately, Congress did not adopt either of those formulations. Instead, consistent with Congress's objective to empower states to protect their waters from pollution, Congress "expanded" beyond these earlier proposals the scope of section 401(d) "to also require compliance with any other appropriate requirement of State law which is set forth in the certification." S. Rep. No. 92–1236, at 138 (1972) (Conf. Rep.).

A definition of “water quality requirements” that is not limited to point sources also is consistent with the underlying purposes of the CWA. Congress provided states and authorized Tribes with the primary role in protecting the nation’s waters from pollution, including pollution from federally licensed or permitted projects, and the phrase “water quality requirements” should be interpreted broadly to preserve state and Tribal authority and further the water quality protective goal of section 401. *See S.D. Warren*, 547 U.S. at 386 (“State certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . .”); *see also* S. Rep. 91–414, at 1487 (1971) (“The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”).

Finally, prior judicial interpretation also supports EPA’s definition of “water quality requirements” as finalized here. EPA recognizes that, as noted by the Supreme Court in *PUD No. 1*, the authority granted to certifying authorities in section 401(d) “is not unbounded.” 511 U.S. at 712. Rather, the scope is limited to “ensur[ing] that the project complies with ‘any applicable effluent limitations or other limitations under [33 U.S.C. 1311, 1312] or other provisions of the Act,’ and with any other appropriate requirement of State law.” *Id.* Although the Court declined “to speculate on what additional state laws, if any, might be incorporated by this language,” the Court found that “at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303 are ‘appropriate’ requirements of state law.” *Id.* at 713. As described earlier in this section, EPA’s longstanding position is that the scope of certification decisions and conditions are limited to water quality-related considerations. EPA’s definition of the term “water quality requirements” in the final rule is not intended to alter this interpretation.

EPA is not offering an opinion in this rulemaking about what constitutes a “State law” as that term is used in section 401(d). In the spirit of cooperative federalism, EPA defers to the relevant state and Tribe to define which of their state or Tribal provisions qualify as appropriate “State law” or Tribal law for purposes of implementing section 401.

d. Waters Considered in Acting on a Request for Certification

The Agency also is finalizing an interpretation regarding which waters a certifying authority considers when acting on a request for certification, with an important clarification in response to commenters. At proposal, EPA advanced an approach where a certifying authority would consider water quality-related impacts to waters within its jurisdiction beyond “navigable waters” as defined by the CWA (at 33 U.S.C. 1362). *See* 87 FR 35348 (“EPA does not believe that the scope of a state’s or tribe’s certification review is limited only to water quality effects in bodies of water meeting the definition of ‘navigable waters’ or ‘waters of the United States’ . . .”). Some commenters expressed concern with allowing certifying authorities to use the certification process to impose conditions relating to waters that are not “waters of the United States” and disagreed with the Agency’s proposed position that section 401 could extend to non-“navigable waters” once the threshold discharge into waters of the United States is met. A few commenters also noted that states could regulate state waters under their own laws.

The Agency concludes that while a certifying authority is limited to considering impacts to “navigable waters” when certifying compliance with the enumerated provisions of the CWA, a certifying authority is not so limited when certifying compliance with requirements of state or Tribal law that otherwise apply to waters of the state or Tribe beyond navigable waters. As discussed below, this interpretation best reflects the text of section 401. EPA recognizes that some states regulate waters beyond CWA “navigable waters,” while other states do not. EPA’s interpretation best supports principles of cooperative federalism by allowing those states that do have laws applicable beyond “navigable waters” to apply those laws to those state waters in the certification context, and by not requiring other states to do so. An examination of the interpretation asserted in the 2020 Rule and the interpretation offered at proposal reveals that the interpretation as clarified in this final rule is the most consistent with the statute and best balances the cooperative federalism framework of section 401—by not applying provisions of the CWA to state waters that Congress otherwise limited to Federal waters, while still authorizing states and Tribes to protect those state or Tribal waters from federally licensed

or permitted projects.⁶⁹ It also realigns with the Agency’s position prior to the 2020 Rule. 2010 Handbook at 5 (“Note, however, that once § 401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it is an aquatic resource addressed by “other appropriate provisions of state [] law.”) (rescinded in 2019, *see supra*).

When a certifying authority considers whether an activity will comply with CWA sections 301, 302, 303, 306, and 307, the certifying authority is limited to considering impacts to “navigable waters.” 33 U.S.C. 1341(a)(1). These sections of the CWA apply only to navigable waters as defined by the CWA. *Id.* at 1362(7). EPA concludes that the best interpretation of section 401 is that it does not allow a certifying authority to apply these CWA provisions beyond the waters that Congress intended for them to apply. However, a certifying authority must also consider whether the activity will comply with “any other appropriate requirement of State law.” *Id.* at 1341(d). EPA concludes that other appropriate requirements of state or Tribal law include requirements that apply to state or Tribal waters beyond those waters covered by CWA section 402 and 404 permits. EPA further concludes that certifying authorities may consider the application of these laws to all waters impacted by the activity to which these laws otherwise apply.

In contrast to the section 402 and section 404 permit programs established in the 1972 version of the Act, the Act does not directly address what waters are considered for section 401. Section 402 and section 404 permits unambiguously cover impacts of discharges to navigable waters.⁷⁰

⁶⁹ The Agency notes that this final interpretation is not reflected in the final regulatory text, including at § 121.3 regarding the scope of certification. The issue of what aspects of the activity are considered is distinct from the issue of what waters are considered.

⁷⁰ One way Congress expressly limited the application of section 402 permits to discharges to navigable waters is through the definition of “discharge of a pollutant,” a term that is not used in section 401. Section 402 authorizes EPA to issue permits “for the discharge of any pollutant,” 33 U.S.C. 1342(a)(1), which is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* at 1362(12) (emphasis added). EPA may issue such a permit upon the condition that the discharge will meet the requirements of sections 301, 302, 306, 307, and 308. *Id.* at 1342(a)(1), all sections of the CWA that do not apply beyond navigable waters. Section 402 also authorizes states to apply for their “own permit program for discharges into navigable waters within its jurisdiction.” *Id.* at 1342(b) (emphasis added). Section 404 authorizes the Corps to issue permits

Conversely, while the text of section 401 states that the need for a certification is triggered by a potential discharge into “the navigable waters,” it does not state that, once the need for certification is triggered, a certifying authority must confine its review to potential water quality impacts to such “navigable waters” even when considering requirements of state law that apply beyond navigable waters. 33 U.S.C. 1341(a)(1). Instead, in enacting section 401(d), Congress required a certifying authority to consider whether the “applicant” will comply with “any other appropriate requirement of State law.” *Id.* When Congress enacted section 401(d), it explained that this provision “assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements.” S. Rep. No. 92–414, at 69 (1971).

State laws governing state water quality can of course apply to waters other than those directly regulated under the CWA. *See* 87 FR 35348 (recognizing at proposal that “states may, under state law, protect state waters beyond those that are” covered by CWA permitting). About half of the states have state laws covering at least some surface waters beyond CWA navigable waters. EPA and Department of Army, Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule, section II.A (December 2022). When Congress required states to consider state laws when acting on a request for certification, Congress declined to expressly limit this authorization to state laws that apply to waters regulated under the CWA. While Congress did include the limiting principle of “appropriate,” the text and legislative history of section 401 do not suggest that Congress considered state laws that apply to waters beyond those directly regulated under the CWA to be “inappropriate” state laws. Nor does the text and legislative history of section 401 suggest that Congress intended to limit the applicability of such laws to only a subset of waters to which they normally apply (namely, “navigable waters”). Had Congress desired to prohibit states from considering water quality impacts to state waters, it could easily have done so. It did not.

This interpretation is reinforced by the fact that Congress intended section 401 to afford states and authorized Tribes broad power to protect their

waters from harm caused by federally licensed or permitted projects. That intent is best realized by interpreting section 401 as allowing states and authorized Tribes to apply state law or Tribal law to *all* impacted state or Tribal waters when acting on a request for certification. While the section 401 certification requirement is triggered by a potential discharge into “navigable waters,” water quality impacts from the activity could occur in state or Tribal waters beyond those navigable waters. Allowing states or authorized Tribes to apply state or Tribal law to all potentially affected state or Tribal waters is supported by CWA section 510, which—“[e]xcept as expressly provided” in the CWA—preserves a state’s or authorized Tribe’s authority and jurisdiction to protect its waters from pollution.

The best reading of section 401 is that it authorizes a state or Tribe to apply state law or Tribal law to *all* impacted state or Tribal waters, rather than limiting states and Tribes to considering only a subset of impacted waters. EPA acknowledges it articulated a different position on those issues in the 2020 Rule. 85 FR 42234–35. Upon reconsideration, EPA believes there are good reasons for changing its position now. EPA disagrees with and finds unpersuasive the 2020 Rule preamble’s attempt to conflate section 401 with sections 402 and 404 by saying that “similar to the section 402 and 404 permit programs, section 401 is a core regulatory provision of the CWA.” *Id.* While section 401 is certainly a critical element of the Act—indeed, it pre-dated the 1972 CWA amendments and was deemed so important that Congress carried it over—section 401 is a direct congressional grant of authority for states and authorized Tribes to protect their water resources from impacts caused by federally licensed or permitted projects, and is significantly different in character from the Act’s other Federal “regulatory” provisions. Section 401, although a neighbor to sections 402 and 404 in the CWA’s organizational framework, is a fundamentally different provision and need not be interpreted according to those other provisions’ strictures. The preamble to the 2020 Rule, with little supporting analysis, asserted incorrectly that any application of section 401 to non-Federal waters “would effectively broaden the scope of the Federal regulatory programs enacted by the 1972 CWA amendments [*e.g.*, sections 402 and 404] beyond the limits that Congress intended.” 85 FR 42234–35. However, the interpretation taken in

this final rule in no way broadens the scope of sections 402 and 404. Finally, the reasons articulated above in support of a broad scope of certification (*e.g.*, Congress intended for section 401 to be a powerful tool for states to protect state waters from federally licensed or permitted projects) also support a state or authorized Tribe applying state or Tribal law to protect state or Tribal waters when acting on a request for certification.

e. Scope of Conditions

The Agency is adding text at § 121.3(b) to clarify that the scope of review for a certification decision is the same as the scope of permissible conditions that may be added to that certification. This is consistent with the proposed rule, which would have required a grant of certification with conditions to include “[a]ny conditions necessary to assure that the activity as a whole will comply with water quality requirements,” 87 FR 35378—the same standard as the proposed scope of review for a certification decision. Moreover, the preamble to the proposed rule was clear that EPA “interpret[ed] the scope of certification review under sections 401(a)(1) and (d) to be the same. . . .” 87 FR 35346. To clearly convey the Agency’s intent, EPA is adding regulatory text at § 121.3(b) stating that “consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.”

Because the scope of review applies when the certifying authority is determining whether to grant certification, the same “activity” standard should apply to a grant of certification, a grant of certification with conditions, and a denial of certification. That is, the outcome of the certifying authority’s analysis should not dictate the scope of review. Logically, the same scope applies to a certifying authority’s evaluation of potential water quality effects under both sections 401(a)(1) and 401(d). This is because the two sections are inextricably linked. Section 401(d) requires a certifying authority to determine whether “the applicant” will—without additional conditions—comply with the same CWA provisions identified in section 401(a)(1) and “any other appropriate” requirement of state or Tribal law. Only if the certifying authority determines pursuant to section 401(d) that adding “any effluent limitations and other limitations, and monitoring requirements” to the Federal license or permit will assure that water

“for the discharge of dredged or fill material into the navigable waters” and authorizes any state to apply for their own “permit program for the discharge of dredged or fill material into the navigable waters.” *Id.* at 1344 (emphasis added).

quality requirements will be met, may the certifying authority grant the certification contemplated by section 401(a)(1). In other words, when a certifying authority determines that it must add conditions under section 401(d) to the certification, that is equivalent to deciding that, without those conditions, it must deny certification. The certifying authority's evaluations and determinations under sections 401(a)(1) and 401(d) do not work together in a harmonious fashion if the statute is interpreted to apply a different scope of review to each section. EPA has never taken the opposite position. In the 2020 Rule, EPA also concluded that the scope of sections 401(a)(1) and (d) should be the same. 85 FR 42252.⁷¹

3. Implementation

At proposal, the Agency identified examples of certification conditions possibly falling inside and outside of the water quality-related scope of section 401 review. Some commenters provided input on these examples. Some of those commenters explicitly supported the listed examples, whereas other commenters disagreed that the examples listed were appropriately within the scope of certification. A few commenters argued that the scope of certification should be limited to protection of water quality sufficient to support designated uses, as opposed to direct protection of those uses, and argued that some examples in the proposal constituted the latter. A few commenters focused specifically on the examples regarding public fishing access and recreation facilities, arguing that they are not linked to preserving the water quality necessary for the designated use and should not be in the scope of a certifying authority's review. A few other commenters asserted that EPA was equating ensuring people can enjoy the benefits of water quality with actually ensuring water quality and argued that certifications should not include impacts that are not directly related to improving or maintaining water quality. Some commenters provided their own examples of conditions they considered to be related or unrelated to water quality and asked for EPA to explicitly state which conditions would be within or outside the scope of section 401 certification.

The Agency declines to explicitly identify which conditions would be within or outside the scope of section 401 certification because, subject to a case-by-case review of the particular facts presented by each certification, a wide variety of conditions could be appropriate as necessary to prevent adverse impacts to a state's or Tribe's water quality. The appropriateness of any given condition will depend on an analysis of all relevant facts, including the certifying authority's applicable water quality requirements. For potentially qualifying conditions, it is appropriate for the certifying authority to consider all potential adverse water quality impacts.

To be clear, a certifying authority could condition an activity to ensure its compliance with *any and all* components of applicable water quality standards (water quality criteria, designated uses, and antidegradation requirements). Therefore, certifying authorities could include conditions to ensure a project will comply with, in addition to water quality criteria, a designated use of a water, *see PUD No. 1*, 511 U.S. at 714–15 (emphasis in original) (“We think the language of [section] 303 is most naturally read to require that a project be consistent with *both* components, namely the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.”), or antidegradation requirements, *see id.* at 718–19 (recognizing the state appropriately justified its minimum flow rate as necessary to implement its antidegradation policy). This means conditions, such as those to ensure compliance with minimum flow rates to protect fisheries (*see, e.g., PUD No. 1*, 511 U.S. 700); and scheduled releases to accommodate existing recreational uses (*see, e.g., In re Morrisville Hydroelectric Project Water Quality*, 2019 VT 84, 224 A.3d 473 (2019)), may be appropriate certification conditions depending on the certifying authority's water quality standards or other aspects of state or Tribal law and the activity's impact on achieving compliance with such requirements.

The preamble to the final 2020 Rule identified examples of certification conditions possibly falling outside the water quality-related scope of section 401 review because they did not address water quality impacts, including conditions requiring one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally

licensed or permitted project; conditions to address potential non-water quality-related environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity; and conditions related only to non-water quality-related impacts associated with air emissions and transportation effects. *See* 85 FR 42230. Subject to a case-by-case review of the particular facts presented by each certification, it is reasonable to assume that such non-water quality-related conditions would generally be beyond the scope of section 401.

Several commenters asserted that the proposed activity-based scope of certification was too ambiguous and would lead to various implementation challenges, such as regulatory uncertainty, increased litigation risk, increased project costs, and project delays. As discussed above, the Agency disagrees that its approach in the final rule will lead to implementation challenges. Rather, the final rule's approach to the scope of certification simply returns to the longstanding practice. Ultimately, the “activity” subject to the Federal license or permit will depend on the specific facts of a given situation. For example, the activity may be the construction and operation of a hydroelectric dam, *see, e.g., PUD No. 1*, 511 U.S. at 708–09, the construction and operation of a liquefied natural gas marine import terminal and a pipeline connecting the terminal to an interstate natural gas pipeline, *see, e.g., AES Sparrows*, 589 F.3d at 723–24, or the construction and operation of a marina, *see, e.g., Winer Memorandum* at 1.

While the specific “activity” subject to certification will be fact specific, the final rule clarifies certain limiting principles that apply to all certifications. A certifying authority's analysis is limited to evaluating the adverse water quality-related impacts from the activity when it evaluates whether the activity will comply with applicable water quality requirements. As discussed above, both the terms “will comply” and “applicable water quality requirements” limit what a certifying authority may consider and ultimately, the decisions that a certifying authority can make on a given request for certification.

F. Certification Decisions

1. What is the Agency finalizing?

In § 121.7(a), the Agency is finalizing that “a certifying authority may act on a request for certification in one of four ways: grant certification, grant

⁷¹ *See also* 2010 Handbook at 18 (rescinded in 2019, *see supra*) (“In order to obtain certification of any proposed activity that may result in a discharge to waters of the U.S., an applicant must demonstrate that the proposed activity and discharge will not violate or interfere with the attainment of any limitations or standards identified in [section] 401(a) and (d).”)

certification with conditions, deny certification, or expressly waive certification.” To provide further clarity on how a certifying authority may “act on a request for certification,” EPA is defining recommended minimum contents of a certification decision at § 121.7(c) through (f) and finalizing that certification decisions must be in writing. In a change from proposal and in support of the cooperative federalism balance central to section 401, the Agency is not requiring certifying authorities to include the components listed at § 121.7(c) through (f) in their certification decisions. Instead, the final rule defines recommended contents for a grant of certification (§ 121.7(c)), a grant of certification with conditions (§ 121.7(d)), a denial of certification (§ 121.7(e)), and an express waiver (§ 121.7(f)).

2. Summary of Final Rule Rationale and Public Comment

a. Decisions on a Request for Certification

Consistent with the CWA, EPA is finalizing the proposed approach that a certifying authority must make one of four decisions on a request for certification pursuant to its section 401 authority: it may grant certification, grant certification with conditions, deny certification, or it may expressly waive certification. 40 CFR 121.7(a). This section briefly describes each of the four decisions a certifying authority may make, including what each decision means and its impact on the Federal licensing or permitting process. This final rule’s interpretation of the four decisions a certifying authority may make is consistent with the 2020 Rule and longstanding interpretation of the 1971 Rule. *See* 40 CFR 121.7 (2020); 2010 Handbook at 1 (rescinded in 2019, *see supra*) (“The central feature of CWA § 401 is the state or tribe’s ability to grant, grant with conditions, deny or waive certification.”).

First, a certifying authority may grant certification. A grant of certification means that the certifying authority has determined that the activity will comply with water quality requirements. *See* section IV.E in this preamble for further discussion of the scope of certification and the term “water quality requirements.” Granting certification means that the Federal license or permit may be issued. *See* 33 U.S.C. 1341(a)(1). Section 401(a)(1) provides that where there are no applicable water quality requirements for an activity, the certifying authority “shall so certify.” *Id.* EPA is finalizing minor revisions to the regulatory language located at

§ 121.7(f) of the 2020 Rule that describes this scenario, with minor edits to reflect the final rule scope of certification. *See* 40 CFR 121.7(g).

Second, a certifying authority may grant certification with conditions. A grant of certification with conditions means that the certifying authority has determined that the activity will comply with water quality requirements, but only if certain conditions are met. Pursuant to section 401(d), if a grant of certification includes conditions, those conditions must be incorporated into the Federal license or permit. 33 U.S.C. 1341(d) (“Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [sections 301, 302, 306, and 307], and with any other appropriate requirement of State law set forth in such certification, and *shall become a condition on any Federal license or permit . . .*”) (emphasis added). As discussed later in section IV.G in this preamble, Federal circuit courts have routinely held that Federal agencies may not question or reject a state’s certification conditions. *See, e.g., American Rivers*, 129 F.3d at 107 (“[Section 401(d)] is unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be ultra vires.”). Granting certification with conditions means the Federal license or permit may be issued, provided the conditions are incorporated into that Federal license or permit.

In this final rule, the Agency is not retaining any regulatory text on the incorporation of certification conditions as was included in the 2020 Rule. *See* 40 CFR 121.10 (2020). First, the 2020 Rule limited incorporation of certification conditions to only those that satisfy the content requirements at § 121.7(d) of the 2020 Rule.⁷² 40 CFR 121.10 (2020). Section 401(d) requires all certification conditions to become conditions on a Federal license or permit and does not limit incorporation to only those conditions that include certain regulatorily defined components. As discussed in section IV.G of this preamble, EPA does not interpret the statute as allowing a

Federal agency to review whether a certifying authority included certain regulatorily defined elements in its certification decisions, nor reject certifying authority conditions. Second, while the 2020 Rule required Federal agencies to clearly identify certification conditions in their Federal license or permit, section 401 does not require Federal agencies to distinguish among certification conditions in their licenses or permits. If the Federal agency finds it useful to distinguish certification conditions for implementation purposes, the Federal agency may structure its license or permit in such a manner, but EPA does not find it necessary to require such a distinction.

Third, a certifying authority may deny certification. A denial of certification means that the certifying authority is not able to certify that the activity will comply with water quality requirements. If a certifying authority denies certification, the Federal license or permit cannot be issued. 33 U.S.C. 1341(a)(1). The 2020 Rule included regulatory text that discussed the effects of a denial of certification. *See* 40 CFR 121.8 (2020). Section 121.8(a) of the 2020 Rule provided that a certification denial would not preclude a project proponent from submitting a new certification request. Section 121.8(b) provided that if the Federal agency determined that the certifying authority’s denial satisfied the content requirements at § 121.7(e) of the 2020 Rule,⁷³ then the Federal agency would provide notice to the certifying authority and project proponent and the Federal license or permit would not be granted. As discussed below, the Agency is not retaining any regulatory text that speaks to the effects of a denial of certification because it is unnecessary.

A few commenters discussed whether the proposal would prevent a project proponent from resubmitting a request for certification following a denial. One commenter noted that while the 2020 Rule provided that a certification denial would not preclude a project proponent from submitting a new certification request, the proposal did not include a similar provision. The commenter

⁷² For example, the 2020 Rule required certifying authorities to include a statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements and a citation to Federal, state, or Tribal law that authorizes the condition for each certification condition on an individual license or permit. 40 CFR 121.7(d)(1) (2020).

⁷³ For example, the 2020 Rule required certifying authorities to include three components on all denials of certification for individual Federal licenses or permits, including the specific water quality requirements with which the discharge will not comply, a statement explaining why the discharge will not comply with the identified water quality requirements, and description of the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements if the denial was due to insufficient information. 40 CFR 121.7(e)(1) (2020).

suggested that EPA is taking the position that a certification denial is always a permanent final action that is taken with prejudice and asserted that if this is EPA's position, it would be a significant change from its previous longstanding position affirmed by the 2020 Rule.

EPA's removal of regulatory text regarding the effects of a denial of certification has no impact on denials without prejudice. EPA continues to interpret section 401 as allowing denials without prejudice.⁷⁴ Section 401(a)(1) provides that a Federal license or permit may not be granted if certification is denied, but it does not speak to new requests for certification following a denial of certification. Nothing in section 401, nor this final rule, prohibits a project proponent from re-applying for certification if a certifying authority denies its initial request.

EPA does not find it necessary to add any additional direction or process for certification denials, beyond providing recommended contents of a certification denial (as discussed below). If a project proponent disagrees with a certifying authority's denial, the project proponent may challenge the certifying authority's decision in the appropriate court. *See* S. Rep. 92–414 at 69 (1971) (“Should such an affirmative denial occur no license or permit could be issued by such Federal agencies . . . unless the State action was overturned in the appropriate courts of jurisdiction.”). The 2020 Rule also provided that a Federal license or permit may not be issued if a certifying authority denies certification in the manner prescribed by the 2020 Rule (*i.e.*, contains the contents defined at § 121.7(e) of the 2020 Rule). Under this final rule, Federal agencies may not review whether a certifying authority's certification denial contains the contents recommended at final rule § 121.7(e).

Fourth, a certifying authority may expressly waive certification. The statute explicitly provides for a constructive waiver if the certifying authority fails or refuses to act on a

request for certification within the reasonable period of time. The statute does not explicitly state that a certifying authority may expressly waive certification. A few commenters suggested that the final rule should remove the term “expressly” from the waiver provisions because the CWA does not provide any circumstances in which certification can be waived before the reasonable period of time expires, and EPA does not have the authority to add provisions in which a certifying authority can expressly waive certification. However, EPA has determined that providing this opportunity in this final rule is consistent with a certifying authority's ability to waive through failure or refusal to act. *See EDF v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) (“We do not interpret [the Act] to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation.”). This interpretation is also consistent with the Agency's longstanding interpretation of the waiver provision. *See* 40 CFR 121.9(a)(1) (2020) (allowing a certifying authority to expressly waive certification via written notification); 40 CFR 121.16(a) (2019) (same). Additionally, continuing to allow express waivers may create efficiencies where the certifying authority knows early in the process that it will waive. An express waiver does not mean that the certifying authority has determined that the activity will comply with water quality requirements. Instead, an express waiver indicates only that the certifying authority has chosen not to act on a request for certification. Consistent with the statutory text, an express waiver enables the Federal agency to issue a Federal license or permit without a certification. 33 U.S.C. 1341(a)(1).

b. Defining What It Means “To Act on a Request for Certification”

The Agency is finalizing the definition of what it means “to act on a request for certification” as proposed at § 121.7(a). Once a certifying authority receives a request, the certifying authority must “act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.” 33 U.S.C. 1341(a)(1). The phrase “to act on a request for certification” is not defined in the statute; nor did EPA define it in the 1971 or 2020 Rules. To provide greater clarity regarding how a certifying authority “act[s] on a request for certification” within the reasonable period of time, EPA is defining the

phrase to mean that a certifying authority is making one of the four certification decisions discussed above: granting certification, granting certification with conditions, denying certification, or expressly waiving certification.

The Agency is providing clarification regarding what it means to “act on a request for certification” in light of commenter input on this topic and recent case law. For example, would other actions beyond the four just discussed qualify as “acting” on a request for certification? The Fourth Circuit recently held that it was permissible for a project proponent to withdraw its application to avoid a certification denial as long as the certifying authority and project proponent were not in a “coordinated withdrawal and resubmission scheme.” *NCDEQ v. FERC*, 3 F.4th 655, 672, 676 (4th Cir. 2021). However, the court, in dicta, also suggested that the section 401 phrase “to act” could be interpreted to mean something different than a final action on a request for certification. According to the court, a certifying authority that “takes significant and meaningful action” and “in good faith takes timely action to review and process a certification request likely would not lose its authority to ensure that federally licensed projects comply with the State's water quality standards, even if it takes the State longer than a year to make its final certification decision.” *Id.* at 670.

EPA proposed to interpret the phrase “to act on a request for certification” to mean that a certifying authority makes one of the four above-described certification decisions: grant, grant with conditions, deny, or expressly waive. However, the Agency requested comment on this interpretation, as well as any alternative interpretations, such as the *NCDEQ* approach. A few commenters did not support the proposed approach and stated that defining “act” as “decide” violates the presumption that Congress could have included language that it did not. One commenter stated that Congress deliberately used the language “fails or refuses to act” instead of “grant or deny” when crafting the statutory text of section 401. A few other commenters stated that a certifying authority acting in “good faith” to make a final decision on a certification request should not be deemed a failure to act even if that decision takes longer than one year. Conversely, some commenters supported the proposed approach noting it provided much needed clarity and correctly rejected the *NCDEQ* approach.

⁷⁴ *See e.g., New York State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 450 at n.11 (2d Cir. 2021) (noting that if a state finds that a “particular application requires supplementation,” the state “can deny an application without prejudice within the one-year deadline, which will presumably prompt the applicant to resubmit the application with additional material”) (citing *New York State Dep't of Env't Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018)); *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179, 1183–84 (D.C. Cir. 2022) (rejecting arguments that, if the court upheld the denials without prejudice at issue before it, “State agencies could extend the time for decision indefinitely by denying one certification request after another without prejudice, thus nullifying section 401's one-year limit”).

The Agency finds that defining “to act on a request for certification” as making one of the four above-described certification decisions is reasonable, consistent with congressional intent, is consistent with longstanding Agency position and case law, and allows for greater certainty and transparency in the certification process. First, while Congress did not use the words “grant or deny” or “decide” in place of “act on a request for certification,” in context it seems evident that these are the actions Congress had in mind. After all, section 401(a)(1) is about the effects of granting or denying certification. Moreover, while Congress did not use the words “grant or deny,” it likewise did not use a term that clearly indicated that Congress had in mind something short of a final “action” on a request for certification. Congress clearly intended to balance state water quality concerns with the need to guard against unreasonable delays in the Federal licensing or permitting process. *See, e.g.,* 115 Cong. Rec. 9257, 9264 (April 16, 1969) (“The failure by the State to act in one way or the other within the prescribed time would constitute a waiver of the certification required as to that State.”); H.R. Rep. No. 91–940, at 54–55 (March 24, 1970) (Conf. Rep.) (“In order to insure that sheer inactivity by the State . . . will not frustrate the Federal application, a requirement, similar to that contained in the House bill is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, after it has received a request to certify, the State . . . fails or refuses to act on the request for certification, then the certification requirement is waived.”). If a certifying authority could merely act in a “significant and meaningful” way to avoid waiver at the expiration of the reasonable period of time, it could delay the Federal licensing or permitting process well beyond the statutory one-year timeframe and have the same practical effect as denying certification without going on the record to do so. While Congress provided states and Tribes with a powerful tool to prevent federally licensed or permitted activities that will not comply with water quality requirements, Congress clearly intended states and Tribes to take an affirmative action to prevent such activities. 33 U.S.C. 1341(a)(1) (“No license or permit shall be granted if certification *has been denied* . . .”) (emphasis added). The Agency finds that defining “to act” as taking one of the four decisions contemplated in section 401 best effectuates congressional intent and

respects the cooperative federalism balance central to section 401.

Further, although the Agency has never explicitly defined “to act on a request for certification,” the interpretation taken in this final rule is consistent with prior Agency guidance and the 2020 Rule preamble. In the 2020 Rule, the Agency noted that “[i]f a certifying authority fails or refuses to [grant certification, grant certification with conditions, deny certification, or expressly waive certification] within the reasonable period of time, the CWA provides that the certifying authority will be deemed to have waived the certification requirement.” 85 FR 42262 (July 13, 2020). One implication of this language is that the Agency thought that “to act on a request for certification” means to make a final decision on the request (*i.e.*, grant, grant with conditions, deny, or expressly waive certification). Courts appear to agree. *See, e.g., Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (noting that “[i]n imposing a one-year time limit on States to ‘act,’ Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request”); *NYSDEC*, 884 F.3d at 455–56 (noting that a state must act after receiving a certification request and that denial “would constitute ‘acting’ on the request under the language of Section 401”); *New York State Dep’t of Environmental Cons. v. FERC*, 991 F.3d 439, 443, 450 (2d Cir. 2021) (State agency could not “extend[] the deadline . . . to issue or deny water quality certification” beyond “one year of the actual receipt of the application” for certification); *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, (D.C. Cir. 2017) (“To prevent state agencies from indefinitely delaying issuance of a federal permit, . . . a State [must] grant or deny the certificate” within one year from the receipt of a request for certification).

Lastly, the Agency finds that the final rule’s approach best supports a clear, consistent, and transparent certification process. As noted at proposal, EPA shared similar concerns as stakeholders with the *NCDEQ* approach, noting that it may make the section 401 certification process less predictable and transparent. 87 FR 35350 (June 9, 2022). The Agency remains concerned that interpreting “to act on a request for certification” as any “significant and meaningful action” might inject significant uncertainty and subjectivity into the certification process (*e.g.*, what is a “significant and meaningful action?”) causing significant confusion for stakeholders. *Id.* EPA

finds that the final rule approach will provide stakeholders with a clear and predictable endpoint for knowing when the certifying authority has failed or refused to act, resulting in a waiver. *See* 33 U.S.C. 1341(a)(1).

c. Failing or Refusing To Act on a Request for Certification

Similar to the proposed rule, the Agency is finalizing at § 121.9(a) that “the certification requirement shall be waived only if a certifying authority fails or refuses to act on a request for certification within the reasonable period of time.” 40 CFR 121.9(a). EPA proposed at § 121.8 that “the certification requirement shall be waived if a certifying authority fails or refuses to act on a request for certification in accordance with § 121.7(a) within the reasonable period of time, as defined at § 121.6.” EPA has reorganized the regulatory text by moving the text proposed at § 121.8 (“Failure or refusal to act”) to § 121.9 and made several revisions. First, EPA made minor non-substantive revisions at § 121.9(a) to remove unnecessary and redundant internal references to §§ 121.6 (reasonable period of time) and 121.7(a) (possible actions on a request for certification). Second, the Agency has moved proposed § 121.9(c), which described the process that occurred once a certifying authority failed or refused to act, to § 121.9(b) to pair the process that occurs once a certifying authority fails or refuses to act with the final rule’s express statement on constructive waiver. The Agency intends such restructuring to clearly convey that a constructive waiver of certification may only occur where a certifying authority fails or refuses to act, as defined in this final rule, within the reasonable period of time. *See* section IV.G in this preamble for further discussion on Federal agency review for failure or refusal to act within the reasonable period of time.

The plain language of section 401(a)(1) provides that the certification requirement is waived if a certifying authority “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year).” *Id.* As discussed in section IV.D of this preamble, a certifying authority and Federal agency may jointly agree to set the reasonable period of time up to one year. 40 CFR 121.6(b). However, if they are unable to reach agreement, it will default to six months. 40 CFR 121.6(c). Accordingly, if the certifying authority fails or refuses to act in the agreed-upon or default reasonable period of time, the certifying authority will constructively waive.

Section 401(a)(1) clearly indicates Congress's intent to limit constructive waivers to situations where a certifying authority did not act within the reasonable period of time. *See id.* ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence.").

The legislative history of this provision also suggests that constructive waivers were intended to prevent delays in the Federal licensing or permitting process due to the certifying authority's failure to grant or deny certification. *See* H. Rep. No 92–911, at 122 (1972) ("In order to insure that sheer inactivity by the State, interstate agency or Administrator as the case may be, will not frustrate the Federal application, a requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on the request for certification, then the certification requirement is waived."). Similarly, the 1971 Rule and subsequent Agency guidance recognized that constructive waivers could occur due to certifying authority inaction. *See* 40 CFR 121.16(b) (2019) (providing that constructive waiver occurred upon the "failure of the State . . . concerned to act on such a request for certification within a reasonable period of time after receipt of such request"); 2010 Handbook at 11 (rescinded in 2019, *see supra*) ("State and tribes are authorized to waive [section] 401 certification . . . by the certification agency not taking action.").

The 2020 Rule's interpretation of what it means for a certifying authority to fail or refuse to act departed from the longstanding Agency position on constructive waivers. The 2020 Rule allowed a Federal agency to determine that a certifying authority had failed or refused to act, and thereby waived certification—even when the certifying authority *did* in fact act on a request for certification within the reasonable period of time—if the Federal agency found that the action was somehow procedurally deficient (*e.g.*, did not follow the 2020 Rule's procedural requirements for a denial of certification). 40 CFR 121.9(a)(2) (2020); 85 FR 42266. Similarly, a Federal agency could determine that a certification condition was waived if the condition did not comply with procedural requirements of the 2020 Rule. *Id.* at 42250. This aspect of the 2020 Rule drew considerable pre-proposal input and public comment to the effect that this interpretation could

result in a Federal agency "veto" of a section 401 certification, and that it was contrary to the statute, the legislative history, and case law. EPA similarly expressed concern in its **Federal Register** document announcing its intent to revise the 2020 Rule, noting that "a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency." 86 FR 29543 (June 2, 2021).

The 2020 Rule's interpretation of waiver of a certification decision is not consistent with the plain language of the statute and its legislative history. The mere failure of a certifying authority to include certain regulatorily defined elements in its certification decision or comply with other procedural requirements of section 401, such as following public notice procedures on a request for certification, do not qualify as the kind of "sheer inactivity" that Congress contemplated would result in a constructive waiver. This interpretation also resulted in Federal agencies rejecting certification decisions intended to prevent adverse water quality impacts because of fixable procedural concerns. For example, some commenters noted that use of the 2020 Rule's procedural requirements on certifications for the Corps' Nationwide General Permits resulted in certifications with conditions or denials being treated as constructive waivers. As discussed in section IV.G.2 of this preamble, a constructive waiver is a severe consequence because a waiver means that a Federal license or permit which could adversely impact the certifying authority's water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed without any input from the certifying authority. Accordingly, consistent with the statutory language, legislative history, and prior Agency interpretation, EPA is finalizing regulatory text to clarify that constructive waivers may occur only if a certifying authority fails or refuses to take one of the four actions described in this section within the reasonable period of time.

Consistent with this approach, EPA is also finalizing targeted conforming revisions to its part 124 and part 122 regulations, where these regulations previously allowed EPA to find that a certifying authority waived its right to certify or waived a certification condition for reasons other than those specified in final rule § 121.9 (failure to act on a request for certification within the reasonable period of time). EPA is deleting the majority of the language in

40 CFR 124.53(e)(2) and (3), which allowed EPA to waive certification conditions that did not meet certain requirements.⁷⁵ *See* discussion *infra* for further discussion on the revisions to § 124.53.

EPA is also finalizing revisions to 40 CFR 124.55(c), which allowed EPA to waive certification conditions or denials that were based on state law allowing a less stringent permit condition. Specifically, EPA is deleting the second sentence of § 124.55(c), which allowed EPA to waive a certification denial or condition. The first sentence of § 124.55(c) will remain because it is not affected by this final rule. Finally, EPA is finalizing revisions to 40 CFR 122.44(d)(3), which allowed EPA to waive certifications that were stayed by a court or state board under certain circumstances. EPA is deleting the second and third sentences, which concerned certification waiver. As a result of these deletions and revisions in EPA's part 124 and part 122 regulations, certification waivers for EPA-issued NPDES permits will be governed solely by the certification waiver requirements in § 121.9 of the final rule.

d. Contents of a Certification Decision

To further clarify how a certifying authority may "act on a request for certification," EPA is finalizing recommended contents of a certification decision at § 121.7(c) through (f) and finalizing a requirement that all certification decisions be in writing. In a change from proposal and in support of the cooperative federalism balance central to section 401, the Agency is not mandating the contents that certifying authorities must include in their certification decisions. Instead, the final rule includes recommended contents for a grant of certification (§ 121.7(c)), a grant of certification with conditions (§ 121.7(d)), a denial of certification (§ 121.7(e)), and an express waiver of certification (§ 121.7(f)). As discussed in more detail below, these recommended contents are similar to those proposed (as requirements) with modifications in light of commenter input. The Agency is also finalizing revisions to the regulatory text located at § 121.7(a) of the 2020 Rule with minor, non-substantive revisions to clarify that all certification decisions should be within the scope of certification and taken within the reasonable period of time. 40 CFR 121.7(b).

⁷⁵ EPA is also deleting provisions in § 124.53(e) because its approach to the contents of a certification decision differed from final rule § 121.7, as explained in preamble section IV.F.2.d of this preamble.

EPA is finalizing removal of the regulatory text located at § 121.7(b) of the 2020 Rule, which characterized what actions a certifying authority may take based on its evaluation of the request for certification. EPA believes it is redundant to retain separate regulatory text restating the same ideas as final rule § 121.7(a) and (c) through (f).

While the statute provides that certifying authorities may make one of four decisions when processing a request for certification, the CWA does not explicitly describe the contents or elements of a certification decision. EPA's 1971 Rule defined the contents of a certification and express waiver decision for all certifying authorities. The 1971 Rule's enumeration of the contents of a certification decision was simple but effective and included the name and address of the applicant, a statement that the certifying authority examined the application, a statement that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," and other information deemed appropriate by the certifying authority. 40 CFR 121.2(a) (2019). In addition, the 1971 Rule provided that a certification could be waived upon either (1) written notification from the certifying authority that it expressly waived its authority to act on a request, or (2) written notification from the Federal licensing or permitting agency regarding the failure of the certifying authority to act on a request for certification within the reasonable period of time. 40 CFR 121.16 (2019). The 1971 Rule did not define the contents of a certification denial or provide specific requirements for how to articulate and incorporate a certification condition.

In the 2020 Rule, EPA updated those requirements for each type of certification decision and more fully addressed the effects of those decisions. First, it provided that, when a certifying authority granted certification under the 2020 Rule, the certification must be in writing and include a written statement that the discharge from the proposed project would comply with water quality requirements. 40 CFR 121.7(c) (2020); 85 FR 42286.

Second, when a certifying authority granted certification with conditions, the 2020 Rule required that the certifying authority explain the necessity of each condition and provide a citation to an applicable Federal, state, or Tribal law. 40 CFR 121.7(d) (2020); 85 FR 42286. This was a change from the 1971 Rule, which broadly provided for certifying authorities to include

conditions as they "deem[ed] necessary or desirable." 40 CFR 121.2(a)(4) (2019). The 2020 Rule preamble stated that the requirements were "intended to increase transparency and ensure that any limitation or requirement added to a certification . . . is within the scope of certification." 85 FR 42256. EPA observes that this provision was similar to EPA's current NPDES program-specific section 401 regulations. *See* 40 CFR 124.53(e)(2) (2023) (requiring a citation for any conditions more stringent than those in the draft permit).⁷⁶

Third, unlike the 1971 Rule, under which certification denials were undefined, the 2020 Rule defined the contents of a denial decision. Specifically, the 2020 Rule required certification denials to be made in writing and to identify any water quality requirements with which the discharge will not comply, include a statement explaining why the discharge would not comply with those requirements, and provide any specific water quality data or information that would help explain a denial based on insufficient information. 40 CFR 121.7(e) (2020); 85 FR 42286.

Fourth, the 2020 Rule included similar language to the 1971 Rule for express waivers and required written notification from the certifying authority indicating an express waiver of its authority to act on a request for certification. 40 CFR 121.9(a)(1) (2020); 85 FR 42286. Lastly, under the 2020 Rule, EPA defined constructive waiver as a certifying authority's "failure or refusal to act on a certification request" which included failing or refusing to (1) act within the reasonable period of time, (2) satisfy the procedural requirements for a grant or denial of certification imposed by the 2020 Rule, or (3) comply with other procedural requirements of section 401 (e.g., provide public notice on a certification request). 40 CFR 121.9(a)(2) (2020); 85 FR 42286. The 2020 Rule also provided that condition-specific waivers could occur if the certifying authority failed to satisfy the procedural requirements imposed by the 2020 Rule for certification conditions. 40 CFR 121.9(b) (2020); 85 FR 42286. *See* section IV.G in this preamble for further discussion on constructive waivers and the role of Federal agencies.

The stated purpose of the 2020 Rule requirements was to promote transparency and consistency in certification decisions and to help

streamline the Federal licensing and permitting processes. 85 FR 42220. However, in pre-proposal input, several certifying authorities said that the 2020 Rule's requirements for the contents of certification decisions delayed rather than streamlined the certification process. Conversely, in pre-proposal outreach, project proponents expressed interest in keeping the 2020 Rule requirements for the added transparency and argued that it is helpful when certifying authorities explain their final certification decisions (especially denials). In response to this mixed input, the Agency proposed to include some requirements for each of the four types of certification decisions. The Agency intended for this approach to address both the workload concerns expressed by certifying authorities, and the desire of project proponents for increased transparency and consistency in the certification process.

Some commenters supported the proposed rule's approach, including the removal of the 2020 Rule requirements to include specific statutory or regulatory citations for each certification condition and denial, and retaining the inclusion of a statement explaining why each of the included conditions is necessary to assure that the activity as a whole will comply with water quality requirements. Commenters argued that the explanation requirement would provide transparency and regulatory certainty. However, some commenters asserted that any content requirements imposed by EPA would place an undue burden on the certifying authority and recommended that the Agency remove all content requirements. Conversely, some other commenters expressed interest in keeping the 2020 Rule requirements, including a few commenters who argued that citations are necessary for legally defensible certification decisions, to provide transparency, and to enable the project proponent and the public to understand the rationale for a condition.

After reviewing public comments, the Agency is not finalizing any requirements for certification decisions. Before the 2020 Rule, EPA did not impose requirements on certifying authorities regarding what information they must include in a denial or what information they must include to support a certification condition. EPA is not aware of any major issues regarding clarity or information in certification denials or conditions. Instead of mandating detailed requirements for certifying authorities, the final rule identifies recommended contents for a grant of certification, a grant of certification with conditions, a denial of

⁷⁶ The Agency is finalizing revisions to the part 124 regulations where such provisions are inconsistent with this final rule, including deleting 40 CFR 124.53(e)(2). *See* discussion *infra*.

certification, and an express waiver of certification. This approach addresses workload concerns expressed by certifying authorities and, in support of the cooperative federalism balance central to section 401, provides certifying authorities with the flexibility to determine how best to communicate certification decisions to project proponents and Federal agencies. It also will eliminate unnecessary potential disputes about whether a certifying authority complied with EPA-issued requirements for certification decision documents (in addition to whatever requirements the certifying authority imposes on itself). EPA expects certifying authorities understand the importance of clear, transparent communication with project proponents and Federal agencies. Indeed, it is in the certifying authority's own interests to clearly convey the reasoning and rationale behind its action. To encourage development of clear certification decisions, the Agency is identifying recommended—but not required—contents for each certification decision type at final rule § 121.7(c) through (f). These contents are similar to the contents proposed (to be required) at § 121.7(c) through (f), with modifications based on stakeholder input. *See discussion infra.* The recommended contents should provide transparency and consistency in the certification process, particularly where a certifying authority does not have a standard approach for the contents of a certification decision. For its part, the Agency intends to include these contents in certification decisions when it acts as a certifying authority and encourages other certifying authorities to include similar contents in their certification decisions. However, the final rule approach provides certifying authorities with the flexibility to add different or additional elements or information requirements to any of these four certification decisions to provide stakeholders with additional clarity and transparency. For example, a certifying authority may choose to require a citation to applicable Federal or state or Tribal water quality requirements to support a certification condition.

As discussed above, the Agency is recommending, as opposed to requiring, additional contents for each type of certification decision. Before discussing the specific contents of each certification decision in more detail, the Agency would like to address the recommended contents that are the same or similar in all four certification decisions. First, consistent with the

2020 Rule, the Agency has opted to retain language in the recommended contents of a certification decision consistent with the 1972 statutory language. Unlike the 2020 Rule, the 1971 Rule included language that reflected the predecessor statute. As discussed in section III in this preamble, the 1972 CWA revised the predecessor version of section 401 that the 1971 Rule relied upon. To continue to account for this change to the statutory text, the Agency is retaining a similar provision as the 2020 Rule that certification decisions to grant, grant with conditions, or deny certification should indicate whether the certifying authority has determined that an activity will comply with the water quality requirements identified in the CWA, not just water quality standards.⁷⁷ Unlike the 2020 Rule, EPA is finalizing that certification decisions should indicate whether the activity, as opposed to the discharge, will comply with water quality requirements. *See* section IV.E of this preamble for further discussion on the scope of certification.

Similar to the Agency's position in the 2020 Rule, the Agency does not think that retaining the 1972 statutory language "will comply" in the regulations requires certifying authorities to provide absolute certainty that applicants for a Federal license or permit will never violate water quality requirements. *See* 85 FR 42278. This is not EPA's intention, and EPA does not think such a stringent interpretation is required by the statutory or final regulatory language. The use of language comparable to "will comply" is not uncommon in CWA regulatory programs. For example, CWA section 402 contemplates that NPDES permits will only be issued upon a showing that a discharge "will meet" various enumerated provisions of the CWA. 33 U.S.C. 1342(a). This standard has not precluded states, Tribes, or EPA from routinely issuing CWA compliant NPDES permits to allow pollutant discharges, nor has it resulted in permits that are impossible for permittees to comply with.

Nor does EPA expect that the use of "will comply" will impede or limit a certifying authority's ability to act on a request for certification or prevent a certifying authority from relying on modeling information, which provides an informed projection of potential impacts, to make a certification

decision. When a certifying authority makes a certification decision, it would be certifying that the activity will comply with water quality requirements for the life of the Federal license or permit and not just at the moment the Federal license or permit is issued. The lifespan of FERC licenses can be decades, whereas CWA section 402 or 404 permits usually last five years. Given the possible lifespan of a Federal license or permit, and the possibility that water quality-related changes or impacts may occur, for example, due to climate change or other factors during that time, it is reasonable (and perhaps essential in some cases) for certifying authorities to rely on modeling to inform certification decisions. EPA does not intend or expect the use of the term "will comply" to limit or impact a certifying authority's ability to rely on such modeling to support its certification decisions.

Second, the Agency continues to require all certification decisions to be in writing. While the Agency is not aware of any certification decisions being provided in a different manner (*e.g.*, verbally), EPA is finalizing the requirement that all certification decisions be in writing to ensure the project proponent and Federal agency can clearly understand the certification decision and, for a certification with conditions, any conditions that must be included in the Federal license or permit.

Third, the Agency is removing the inclusion of the name and address of the project proponent from the list of recommended contents of each certification decision. The Agency finds this component unnecessary since the certification will be included with the Federal license or permit that will identify the appropriate project proponent. However, the Agency is retaining the identification of the applicable Federal license or permit as one of the recommended components for all certification decisions. A few commenters suggested that the final rule should remove any requirements to include the identification of the Federal license or permit. While this final rule is only recommending the identification of the Federal license or permit, the Agency observes that there must be a Federal license or permit to trigger the section 401 process. As such, the Agency intends for this component to help clarify which Federal license or permit the certification decision applies to.

Fourth, the Agency is adding regulatory text that encourages certifying authorities to clearly identify the certification decision type (*i.e.*,

⁷⁷ The 1971 Rule required a certification issued by any certifying authority to include, "A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 CFR 121.2(a)(3) (2019) (*emphasis added*).

grant, grant with conditions, denial, or waiver) to ensure project proponents and Federal agencies can easily understand the nature of the certification decision. This is particularly important for Federal agencies who need to look at a certification decision to determine how it should act in response. For example, if a certifying authority denies certification, the Federal agency cannot issue the Federal license or permit. Similarly, if a certifying authority grants certification with conditions, the Federal agency must include those conditions in its Federal license or permit.

Lastly, the Agency is adding regulatory text that encourages a certifying authority to indicate that it complied with its public notice procedures established pursuant to CWA section 401(a)(1). As discussed in section IV.G in this preamble, Federal agency review is limited to verifying compliance with the requirements of CWA section 401, including whether the certifying authority confirmed it complied with its public notice procedures established pursuant to CWA section 401(a)(1). *See* 40 CFR 121.8. The language added throughout § 121.7 is intended to aid this aspect of Federal agency review. EPA is not defining how exactly a certifying authority must indicate in its certification decision that it complied with public notice procedures. Instead, a certifying authority may choose to demonstrate that it complied with its public notice procedures as it sees fit, including but not limited to, by including a copy of the public notice in its certification decision, by including a description of the public notice process it undertook in the certification decision, or by simply including an attestation statement in the certification decision that the certifying authority complied with its public notice procedures.

While the above paragraphs address aspects of the recommended components that are the same for all certification decisions, the following paragraphs describe the individual requirements EPA is recommending for each of the four kinds of certification decisions.

First, any grant of certification should (1) identify the decision as a grant of certification, (2) identify the applicable Federal license or permit, (3) include a statement that the activity “will comply” with water quality requirements, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1).

While the 1971 Rule required a statement that there was “reasonable assurance,” 40 CFR 121.2(a) (2019), as explained above, the 2020 Rule and this final rule use the term “will comply” which is more consistent with the 1972 statutory language used in sections 401(a)(1) and 401(d).

Second, EPA is finalizing that any grant of certification with conditions should (1) identify the decision as a grant of certification with conditions, (2) identify the applicable Federal license or permit, (3) include a statement explaining why each condition is necessary to assure that the activity will comply with water quality requirements, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). The Agency proposed that a grant of certification must include any conditions necessary to assure that the activity as a whole will comply with applicable water quality requirements. Due to the change in approach to include recommended components, as opposed to required components, for certification decisions, the Agency is removing the proposed text at § 121.7(d)(2) and instead adding text at final rule § 121.3(b) that requires certifying authorities to include any conditions necessary to assure that the activity will comply with applicable water quality requirements. The text at final rule § 121.3(b) reflects the language used in section 401(d).

The Agency recommends that certifying authorities include a statement explaining why each of the included conditions is necessary in a certification with conditions, consistent with proposed § 121.7(d)(3).⁷⁸ A few commenters expressed concern over how such justifications should be included in a certification decision, including arguing that it would interfere with readability or suggesting grouping explanations instead of requiring an explanation for each condition. Although the Agency is not requiring the inclusion of a statement explaining why a condition is necessary, EPA finds that including such a statement will

⁷⁸ The Agency recommends including at least a succinct explanation for the certification condition(s) to provide necessary transparency and clarity for project proponents and Federal agencies. As a practical matter, certifying authorities will likely already have developed and considered such information as part of their decision-making process and included it in the record to substantiate their decision. Aside from borrowing from their decision-making record, EPA expects that certifying authorities may be able to satisfy this requirement in a number of ways. For example, certifying authorities could identify specific water quality requirements with which the activity will not comply without the condition.

help project proponents and Federal agencies understand the reason for the condition and assist in its implementation. As discussed in the implementation section below, there are several ways a certifying authority can include this information in a certification decision to aid readability for ease of implementation, such as including justifications in an addendum to the certification. *See infra*. EPA anticipates that such information is readily available to the certifying authority as part of its decision-making process.

Consistent with the final rule’s shift to recommended contents of a certification decision, the Agency is not requiring certifying authorities to include a specific statutory or regulatory citation in support of a certification condition. Rather, the Agency will let certifying authorities decide what relevant information to provide in support of any conditions. EPA encourages certifying authorities to work with project proponents and Federal agencies to determine what information would be most useful (e.g., statutory or regulatory citations). Additionally, EPA is not distinguishing between certification decisions based on an individual or a general Federal license or permit. Although EPA made such a distinction in the 2020 Rule, EPA finds it unnecessary here because it is no longer defining required certification decision contents and the recommended contents would apply to a certification with conditions regardless of the nature of the Federal license or permit.

Third, EPA is finalizing that any denial of certification should (1) identify the decision as a denial of certification, (2) identify the applicable Federal license or permit, (3) include a statement explaining why the certifying authority cannot certify that the proposed activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). Although the 1971 Rule did not define the elements of a decision to deny certification, this concept was introduced in the 2020 Rule. The recommended contents for a denial of certification are similar to the requirements in the 2020 Rule. The Agency did not propose to retain the regulatory text located at § 121.7(e)(2)(iii) of the 2020 Rule, which required a certifying authority to describe specific water quality data or

information that would be needed if the denial is due to insufficient information. As discussed in the preamble to the proposed rule, the Agency noted that certifying authorities could provide this sort of information to satisfy the regulatory requirement at § 121.7(e)(2) to include a statement explaining why the certifying authority cannot certify that the activity as whole will comply with water quality requirements. 87 FR 35353. However, some commenters argued that denials due to insufficient information should, as in the 2020 Rule, include an explanation of what information was missing. Although the Agency is not requiring any specific information for denials of certification, the Agency is adding language at final rule § 121.7(e)(3) to clarify that statements explaining why a certifying authority cannot certify that the activity will comply with water quality requirements may include, but are not limited to, a description of any missing water quality-related information if the denial is based on insufficient information.

The Agency recommends including at least a succinct explanation for the certification denial to provide necessary transparency and clarity for project proponents and Federal agencies. As a practical matter, certifying authorities will likely already have developed and considered such information as part of their decision-making process and included it in the record to substantiate their decision. Aside from borrowing from their decision-making record, EPA expects that certifying authorities may be able to satisfy this requirement in several ways. For example, certifying authorities could identify specific water quality requirements with which the activity will not comply, or identify what information about the project or potential water quality effects is missing or incomplete that led the certifying authority to not be able to determine whether the activity will comply with water quality requirements. EPA anticipates that certifying authorities will work with project proponents and Federal agencies to determine what information would be most useful. Additionally, EPA is not distinguishing between certification decisions based on an individual or a general Federal license or permit. Although EPA took this approach in the 2020 Rule, EPA is no longer defining required certification decision-specific contents and the recommended contents would apply to a denial of certification regardless of the nature of the Federal license or permit.

Lastly, EPA is finalizing that any express waiver made by a certifying authority should (1) identify the

decision as an express waiver of certification, (2) identify the applicable Federal license or permit, (3) include a statement that the certifying authority expressly waives its authority to act on the request for certification, and (4) indicate that the certifying authority complied with its public notice procedures established pursuant to CWA section 401(a)(1). This approach is consistent with the 1971 Rule and 2020 Rule, except the final rule merely recommends inclusion of such a statement of express waiver instead of requiring it. As noted above, an express waiver indicates only that the certifying authority has chosen not to act on a request for section 401 certification. Accordingly, the certifying authority would only need to state that it is waiving certification and would not need to make any statement about why it has decided to waive or its assessment of the project's impact on its water quality.

In this final rule, EPA is also, in large part, finalizing removal of 40 CFR 124.53(e)(1) through (3), which address the contents of a certification for an EPA-issued NPDES permit. EPA proposed to delete of the entirety of § 124.53. See 87 FR 35357. Most of the contents identified at § 124.53(e) are not consistent with the contents identified at § 121.7(d) and (e). For example, § 124.53(e)(2) required a citation (but not an explanation) for each condition of certification, whereas final rule § 121.7(e) recommends including an explanation (but not a citation) for each condition. Further, § 124.53(e)(1) identified what conditions must be included in a certification but did not match the conditions identified at final rule § 121.3(b). Final rule § 121.3(b) incorporates the final rule's concepts of the entire "activity" scope of review and "water quality requirements" while § 124.53(e)(1) did not. To be clear, all certification decisions, including those on EPA-issued NPDES permits, must comply with this final rule § 121.3(b). As discussed above, certifying authorities may work with EPA and/or project proponents to determine what information would be most useful to include in a certification with conditions on an EPA-issued NPDES permit (e.g., a citation to the CWA or state law for conditions more stringent than those in the draft permit).

EPA is finalizing revisions to § 124.53(e)(3), now § 124.53(e), which allows, but does not require, certifying authorities to include a statement in a grant of certification regarding the extent to which each condition of the draft permit can be made less stringent without violating the requirements of

state law, including water quality standards. EPA has concluded that this provision, as finalized, is not inconsistent with the Agency's approach to certification decisions in the final rule because it is a recommended and not required component of a certification decision. This provision will assist the NPDES program in its implementation by ensuring that permit conditions in final NPDES permits are consistent with state law. However, any statement included pursuant to § 124.53(e) would be informational, for the benefit of EPA permit writers, and would not be a condition of certification. Section 124.53(e) would not allow the Agency to reject or modify certification conditions; rather, this provision allows certifying authorities to provide EPA with input on draft permit conditions. This is not the only opportunity for a certifying authority to provide input on draft NPDES permit conditions. Certifying authorities could also provide input on draft NPDES permit conditions through the public notice process or upon review of a draft NPDES permit.

3. Implementation

A few commenters suggested that the definition of "to act" needed additional clarity to state that the four actions proposed are the only ways in which a certifying authority may "act" on a request for certification. EPA finds that the regulatory text at final rule § 121.7(a) clearly provides that the four decisions (grant, grant with conditions, denial, express waiver) are the only ways in which a certifying authority may act. However, EPA wishes to clarify that any attempt at a "hybrid" version of those four decisions does not meet the standard of "acting" on a request for certification (e.g., a waiver with conditions, a conditional denial). See *Waterkeepers Chesapeake, et al. v. FERC*, 56 F.4th 45, 49 (D.C. Cir. 2022) (holding that FERC could not issue a license "[i]f a state has neither granted a certification nor failed or refused to act on a certification request" and finding that "Maryland's subsequent backtracking in the settlement agreement, in which it 'conditionally waiv[ed]' its authority to issue a water quality certification after the fact, is neither a 'fail[ure]' nor a 'refus[al]' to act" and therefore could not "qualify as a section 401(a)(1) waiver."). To further clarify how a certifying authority may act on a request for certification, the Agency is finalizing regulatory text that encourages certifying authorities to clearly identify whether a decision is a grant, grant with conditions, denial, or express waiver.

As discussed above, EPA is not defining how exactly a certifying authority must indicate in its certification decision that it complied with public notice procedures. Instead, a certifying authority may choose how it wishes to demonstrate that it complied with its public notice procedures. Possible options include, but are not limited to, providing a copy of the public notice in its certification decision, describing in the certification decision the public notice process it undertook, checking a checkbox that indicates that the certifying authority complied with public notice procedures, or including an attestation statement that the certifying authority complied with its public notice procedures.

Although the Agency is no longer requiring certifying authorities to include decision-specific contents in each of the four certification decisions, the Agency strongly encourages certifying authorities to include the recommended contents located at final rule § 121.7(c) through (f). EPA finds these recommended contents best reflect the types of information project proponents and Federal agencies may need to clearly understand and easily implement a certification decision. Specifically, clearly identifying the nature of the certification decision (*i.e.*, a grant, grant with conditions, denial, or waiver) is an important way to promote transparency and to avoid misunderstandings. The Agency believes all recommended contents should be readily available to the certifying authority as part of its decision-making process, and therefore easily incorporated into a certification decision.

The Agency received comments expressing concern over providing a justification statement for each certification condition because of readability concerns. To be clear, the Agency is not requiring these contents to be included in certification decisions, nor prescribing how they should be incorporated into a certification decision. Nevertheless, EPA believes there are several options to address such readability concerns and still provide the recommended information. For example, a certifying authority may choose to include explanations (*e.g.*, statement, citations, etc.) immediately following the certification condition it supports. Alternatively, a certifying authority could organize those explanations in the form of a table and reference them in the document. Either of those methods is an acceptable way to provide the support for why the conditions are necessary.

The recommended contents for certification decisions found at final rule § 121.7(c) through (f) do not represent the totality of information that a certifying authority may find useful to share with project proponents and Federal agencies.⁷⁹ Certification decisions can act as important implementation tools for certifying authorities to convey best practices, rationales, and other pertinent information to both project proponents and Federal agencies. However, for certifications with conditions, it is important to clearly indicate what information is merely background or supplementary information as opposed to the actual conditions that must be incorporated into the Federal license or permit. For example, when EPA acts as the certifying authority it clearly denotes which aspects of the certification with conditions are general information versus the actual certification conditions. Clearly parsing out this information in the decision document ensures project proponents are best positioned to understand and comply with certification conditions.

Related to the importance of clearly communicating certification decisions to project proponents and Federal agencies is the importance of drafting clear certification conditions. EPA recognizes that certification conditions are an important tool that enable certifying authorities to ensure that projects needing Federal licenses or permits will be able to move forward without adverse impacts to water quality. EPA encourages certifying authorities to develop certification conditions in a way that enables projects to adapt to future water quality-related changes, *i.e.*, so-called “adaptive management conditions.” For example, if a certifying authority is concerned about future downstream, climate change-related impacts on aquatic species due to increased reservoir temperatures during the lifespan of a hydropower dam license, the certifying authority might develop a condition that would require a project proponent to take subsequent, remedial action in response to reservoir temperature increases (*e.g.*, conditions that might require monitoring and, as necessary, a change in reservoir withdrawal location in the water column, a change in the timing of releases, etc.).

The Agency wishes to clarify the nature and effect of adaptive management conditions. A few

commenters asserted that adaptive management conditions are the same as “reopener” clauses and that they are important to ensure water quality resources will be protected throughout the life of the project if the project changes or conditions of the waters impacted by the project change. Conversely, one commenter asserted that certifying authorities should not be able to add adaptive management conditions to certifications because such conditions are reopener conditions that could lead to new conditions being incorporated into the Federal permit long after the certification is issued. EPA agrees that adaptive management conditions are an important tool to enable a certification to assure that the project will comply with water quality activities over the life of the project. However, the Agency disagrees that these conditions are the same as “reopener” clauses.⁸⁰ Reopener clauses purport to authorize a certifying authority to “reopen” and modify a certification at a later date, sometimes due to the occurrence of a specific event. As discussed at section IV.I of this preamble, certifying authorities cannot “bootstrap” themselves greater authority to modify a certification beyond what is authorized in this final rule at § 121.10. On the other hand, adaptive management conditions are set at the time the certification is granted and provide a concrete action that must occur in the event certain criteria are met. The text of an adaptive management condition does not change after certification is granted. This promotes regulatory certainty, in contrast with a unilateral modification pursuant to a “reopener” clause. For example, a condition may require a project proponent to increase monitoring efforts or conduct remediation if the baseline, routine monitoring established in the certification reveals an increase in a specific pollutant due to the activity. To ensure project proponents and Federal agencies understand and are able to implement any such adaptive management conditions, EPA recommends that certifying authorities clearly define and explain in the certification document the basis for these conditions and the circumstances in which adaptive management conditions would require action by the project proponent (*e.g.*, expectations for undertaking additional planning and

⁷⁹ As discussed above, the Agency intends to include the recommended contents in certification decisions when it acts as a certifying authority and encourages other certifying authorities to include similar contents in their certification decisions.

⁸⁰ See discussion in section IV.I of this preamble about “reopener” clauses or conditions and the Agency’s position on a certifying authority’s ability to unilaterally modify a certification after the reasonable period of time.

monitoring; thresholds triggering adaptive responses; requirements for ongoing compliance). EPA has previously acknowledged the use of “adaptive management” conditions in prior guidance, *see, e.g.*, 2010 Handbook at 32 (rescinded in 2019, *see supra*).

Once a certifying authority acts on a request for certification, the certifying authority should send the certification decision to the project proponent requesting certification. Ultimately, section 401(a)(1) requires the project proponent to provide the Federal agency with the certification from a certifying authority. However, EPA encourages certifying authorities to include Federal agencies on any certification decision transmittal to the project proponent to ensure all parties have a clear, consistent understanding of the status of the decision (*e.g.*, copy the Federal agency point of contact on email correspondence).

G. Federal Agency Review

1. What is the Agency finalizing?

The Agency is finalizing regulatory text at § 121.8 to clarify that Federal agency review is limited to verifying compliance with the requirements of CWA section 401. Specifically, the final rule provides that to the extent a Federal agency verifies compliance with the requirements of CWA section 401, its review is limited to (1) whether the appropriate certifying authority issued the certification decision; (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1); and (3) whether the certifying authority acted on the request for certification within the reasonable period of time. 40 CFR 121.8. EPA proposed at § 121.9 that Federal agency review of a certification decision is limited to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority complied with its own public notice procedures for a request for certification, and that the decision was issued in the reasonable period of time. As discussed in more detail below, the Agency removed the first factor (the nature of the decision) and modified the third factor to clarify that Federal agency review is limited to verifying that the certifying authority confirmed compliance with its public notice procedures. Aside from the three elements listed at § 121.8, EPA concludes that Federal agencies lack the authority to review other aspects of a certification decision for purposes of determining whether a “certification

required by [section 401] has been obtained or has been waived.” 33 U.S.C. 1341(a)(1).

As proposed, the Agency is declining to define how a certifying authority must demonstrate its compliance with the three CWA section 401 requirements listed above. *See* 87 FR 35356 (June 9, 2022). The Agency proposed at § 121.9(b) to define a process that a Federal agency must follow if it determined that a certification decision did not indicate the nature of the certification decision or the certifying authority did not provide public notice on the request for certification. As discussed below, the Agency is not finalizing Federal agency review for whether the certification decision indicates the nature of the decision, and therefore EPA need not finalize a subsequent process. Although the final rule allows Federal agencies to verify that a certifying authority confirmed compliance with its public notice procedures, the Agency is returning to its pre-2020 Rule posture and declining to define a process that Federal agencies must follow if they are unable to verify compliance. The Agency is finalizing as proposed a process for the Federal agency to follow if it determines that a certifying authority failed or refused to act within the reasonable period of time at final rule § 121.9(b). Specifically, § 121.9(b) requires the Federal agency to promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived and that such notice from the Federal agency shall satisfy the project proponent’s obligation under CWA section 401.

The Agency has also reorganized the regulatory text to move the Federal agency review provision to § 121.8, before the provision in the final rule regarding what it means to fail or refuse to act. The Agency believes this reorganization will more clearly communicate that a Federal agency may only determine that a certifying authority inadvertently waived where a certifying authority fails or refused to act within the reasonable period of time. The text as finalized represents the best reading of the text of section 401, congressional intent, and relevant case law, and incorporates recommendations from public comments received on the proposed rule.

2. Summary of Final Rule Rationale and Public Comment

Section 401 does not explicitly provide a defined role for Federal licensing or permitting agencies to review certifications. However, the Agency has long recognized, both in

regulation and guidance, that some degree of Federal agency review of certification decisions is appropriate. The 1971 Rule provided Federal agencies with the ability to determine whether a certifying authority acted within the reasonable period of time. *See* 40 CFR 121.16(b) (2019) (“The certification requirement with respect to an application for a license or permit shall be waived upon . . . Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request . . .”). Prior EPA guidance acknowledged that the Federal licensing or permitting agency may review the procedural requirements of a certification decision. 2010 Handbook at 32 (rescinded in 2019, *see supra*) (“For example, the federal permitting or licensing authority may review the procedural requirements of [section] 401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.”) (citing *American Rivers*, 129 F.3d at 110–111; *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006)). However, this prior guidance also acknowledged the limitations of Federal agency review and stated that Federal agencies cannot pick and choose among a certifying authority’s certification conditions. *Id.* at 10 (citing *American Rivers*, 129 F.3d at 110–111).

A number of courts have acknowledged a limited role for Federal agencies to ensure that a certifying authority meets certain statutory requirements of section 401. The D.C. Circuit has held that section 401(a)(1) authorized FERC, as the relevant Federal licensing agency, “to determine that the specific certification ‘required by [section 401] has been obtained,’ ” because otherwise, “without that certification, FERC lack[ed] authority to issue a license.” *City of Tacoma*, 460 F.3d at 67–68 (“If the question [raised to FERC] regarding the state’s section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then FERC must address it.”). The court did not define what a “certification required by this section” included, but suggested it included at a minimum, “explicit requirement[s] of section 401,” including that the certifying authority provide public notice, which was the section 401 requirement at issue in the case before

the court. *Id.* at 68. It is important to note that, while the court found that FERC had an obligation under the facts of that case to confirm the public notice requirement was satisfied, the court did not frame this requirement as a prerequisite in every instance where the agency is presented with a certification decision. Rather, the court found that FERC had to confirm compliance in the case before it because public notice had been “called into question.” *See id.*

In an earlier case, the Second Circuit ruled that FERC did not have authority to substantively review certification conditions to “decide which conditions are within the confines of [section] 401(d) and which are not.” *American Rivers*, 129 F.3d at 107. In reaching this conclusion, the court noted that FERC nonetheless did have authority to determine whether the appropriate certifying authority issued the certification decision and whether the certification decision was issued within the reasonable period of time. The court explained that “[w]hile [FERC] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, [FERC] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401.” *Id.* at 110–11.

In a more recent case, the D.C. Circuit upheld a FERC order declining to weigh in on the validity of a certifying authority’s denials of certification. *Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022). At issue in the case was the re-licensing of two hydroelectric facilities. *Id.* at 1181. The hydroelectric facilities argued that the denials were invalid under the facts of the case.⁸¹ FERC found that no party disputed that the certifying authority denied the requests (without prejudice). *Turlock Irrigation Dist. Modesto Irrigation Dist.*, 174 FERC ¶ 61,042, 61,175 (2021). “FERC reasoned that the [certifying authority], ‘by denying the applications without prejudice, indeed

acted on [] them. . . .’” *Turlock*, 36 F.4th at 1182. FERC declined the facilities’ invitation to decide whether the denials were nonetheless somehow “invalid” under Federal law “because they were ‘on non-substantive grounds’ and not ‘on the technical merits of the certification requests.’” *Id.* at 1182–83. FERC “conclude[d] that it is not the [FERC] Commission’s role to review the appropriateness of a state’s decision to deny certification.” 174 FERC at ¶ 61,176. The Court of Appeals upheld FERC’s order.⁸² *Turlock*, 36 F.4th at 1184.

The 2020 Rule went a step further than the Federal agency review recognized by courts. The 2020 Rule required Federal agencies to review, in every instance, a certification decision to confirm that several requirements are met, including non-statutory requirements imposed by the 2020 Rule, as a prerequisite to accepting the certification decision. 85 FR 42267 (July 13, 2020). The 2020 Rule required the Federal licensing agency to ensure (1) compliance with “other procedural requirements of section 401” (which included public notice requirements), (2) compliance with the reasonable period of time, and (3) compliance with the rule’s requirements related to providing a legal and technical basis within the certification document for the action taken. The 2020 Rule preamble explained that “[i]f a federal agency, in its review, determines that a certifying authority failed or refused to comply with the procedural requirements of the Act, including the procedural requirements of this final rule, the certification action, whether it is a grant, grant with conditions, or denial, will be waived.” *Id.* at 42266. The 2020 Rule took the same approach with review of individual conditions, *i.e.*, if a condition does not meet procedural requirements, it is waived (even though the certification itself stands). *Id.* at 42263. The 2020 Rule did not extend Federal agency review to more substantive requirements of the Act (*e.g.*, whether a certification decision was within the scope of certification). *Id.* at 42267.

The 2020 Rule contained little direction to Federal agencies about how to conduct the required review (*e.g.*, how to confirm public notice took place), other than noting in the preamble that the Federal agency’s review role does not require the agency

to “make a substantive inquiry into the sufficiency of the information provided in support of a certification, condition, or a denial.” *Id.* at 42268. This lack of clarity in the 2020 Rule led to stakeholder confusion and misunderstanding about the nature of the Federal agency’s review (*e.g.*, assertions from both Federal agencies and states and Tribes in implementation, pre-proposal input, and public comment that the review was to be “substantive” in nature). Additionally, although the 2020 Rule limited Federal agency review to certain procedural components, Federal agency stakeholders expressed concerns about being required by the 2020 Rule to undertake even this responsibility.

Certifying authorities have expressed concern over the potential consequences of Federal agency review required by the 2020 Rule. A few commenters discussed their experience with the 2020 Rule and Federal agency review, including specific examples where Federal agencies deemed certification decisions waived. Most commenters who discussed Federal agency review critiqued the 2020 Rule’s approach and argued that allowing, even requiring, Federal agencies to deem non-compliant certification decisions waived was inconsistent with the CWA and relevant case law (citing *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 645 (4th Cir. 2018); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 101 (1st Cir. 1989)). A few commenters asserted that the 2020 Rule provided Federal agencies with improper authority to “veto” or “override” certifying authorities’ decisions under the 2020 Rule. As discussed below, EPA generally agrees with these commenters. EPA continues to agree with the concerns it expressed in its Notice of Intent to revise the 2020 Rule, stating that “EPA is concerned that a federal agency’s review may result in a state or tribe’s certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency.” 86 FR 29543 (June 2, 2021).

The following subsections discuss the extent of Federal agency review, how certifying authorities might demonstrate compliance with the facial requirements of section 401, and the Federal agency review process under this final rule.

a. Extent of Federal Agency Review

The final rule confirms that Federal agencies may review a certification decision only for the limited purpose of verifying compliance with the requirements of CWA section 401. EPA

⁸¹ For the certification requests of both hydropower facilities, the certifying authority denied certification without prejudice to re-request certification within days of the expiration of the one year reasonable period of time. *Id.* The facilities re-requested certification and, about one year later, the certifying authority did so again. The certifying authority gave as the reason for denial that the project proponents had not completed the state environmental review process, which the certifying authority was required by law to consider in making its certification decision. *Id.* The Agency takes no position here regarding repeated denials without prejudice, generally for the same reasons as it is not taking a position regarding repeated withdrawal and resubmittals (*e.g.*, the inquiry is highly fact specific and the caselaw is in flux). *See* section IV.D.2.c of this preamble.

⁸² The petitioners in the D.C. Circuit case petitioned the Supreme Court for certiorari but the Supreme Court denied the petition on April 17, 2023. *Turlock Irrigation District and Modesto Irrigation District v. FERC, et al.*, Docket No. 22–616.

proposed at § 121.9 that Federal agency review of a certification decision is limited to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority provided public notice on the request for certification, and that the decision was issued in the reasonable period of time. As discussed in more detail below, the Agency removed the first factor (the nature of the decision) and modified the third factor to clarify that Federal agency review is limited to verifying that the certifying authority confirmed compliance with its public notice procedures.

As a result, the final rule provides that Federal agencies may verify (1) whether the appropriate certifying authority issued the certification decision, (2) whether the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1), and (3) whether the certifying authority acted on the request for certification within the reasonable period of time. 40 CFR 121.8. Federal agencies may find that a certifying authority waived its ability to act on a request for certification *only* for failures to act within the reasonable period of time. The Agency finds this Federal agency review role is reasonable and consistent with the text of section 401, prior Agency guidance, and case law.

A Federal agency's review of a certifying authority's action (to ensure that the certification decision meets certain statutory requirements) does not require a Federal agency to inquire as to whether the certification is consistent with the substantive elements of state or Tribal law concerning certification or whether the certification action is within the proper "scope of certification." As recognized by prior Agency guidance and the 2020 Rule, section 401 does not authorize Federal agencies to review or change the substance of a certification (*e.g.*, determine whether the certification or its conditions are within section 401's scope). *See* 85 FR 42268; 2010 Handbook at 10 (rescinded in 2019, *see supra*). As discussed below, the Agency has revised the proposed regulatory text to better emphasize the limited extent of Federal agency review.

Several commenters noted that section 401 does not give Federal agencies the authority to nullify or reject a certifying authority's water quality certification or conditions. Some of these commenters asserted that courts have affirmed that Federal agencies do not have the authority to ignore conditions of certification. EPA agrees.

Federal circuit courts have routinely held that Federal agencies may not question or criticize the substance of a state's water quality certification or conditions, *see, e.g., City of Tacoma*, 460 F.3d at 67 ("[The Federal agency's] role is limited to awaiting, and then deferring to, the initial decision of the state."); *American Rivers*, 129 F.3d at 111 ("[The Federal agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401."); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates."). Courts have also cautioned Federal agencies against imposing conditions in a Federal license or permit they believe are more stringent than the certifying authority's conditions. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018) ("the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality"); *see also Lake Carriers' Ass'n. v. EPA*, 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that additional notice and comment on state certification conditions would have been futile because "the petitioners have failed to establish that EPA can alter or reject state certification conditions . . .").

Rather, courts have generally found that Federal agencies may review certification decisions only to see whether the decision satisfies the facial statutory requirements of section 401, including whether the decision was issued within the reasonable period of time, whether public notice procedures were followed, and whether the appropriate certifying authority issued the decision. The court in *City of Tacoma* found that if the facial public notice requirement of section 401 is "called into question" before the Federal agency, the Federal agency must determine if it was met. 460 F.3d at 68 (requiring the Federal agency "to obtain some minimal confirmation of such compliance, at least in a case where compliance has been called into question.").

EPA proposed to expressly limit Federal agency review at § 121.9 to confirming four factors: the nature of the decision, that the proper certifying authority issued the decision, that the certifying authority provided public notice on the request for certification, and that the decision was issued in the

reasonable period of time. Several commenters agreed with limiting the 2020 Rule's breadth of Federal agency review, with some of these commenters supporting all four of the proposed review provisions. A few commenters wrote in favor of the proposed rule's limited "ministerial" role for Federal agencies. EPA agrees that Federal agency review is limited in nature. As discussed below, the Agency is finalizing regulatory text at § 121.8 to affirmatively limit Federal agency review to verifying compliance with the facial requirements of CWA section 401. However, the Agency is revising the proposed list of factors that a Federal agency may review, including removing the first factor (the nature of the decision) from the final regulatory text.

Conversely, a few commenters recommended prohibiting Federal agency review of any certification decisions in the final rule, with one commenter arguing that Federal agency review erodes cooperative federalism principles, and another noting that Federal agency review is unwarranted by the statutory text. A few commenters noted that section 401 does not define a role for Federal agency review of certification decisions. A couple of commenters argued that the additional oversight provided by Federal agency review of certification decisions is inefficient and ineffective for routine projects with minimal impacts. EPA acknowledges that the text of section 401 does not explicitly define a role for Federal licensing or permitting agencies to review certification decisions. However, the Agency has long recognized, both in regulation and guidance, some degree of appropriate Federal agency review of certification decisions. Additionally, as discussed above, a few courts have acknowledged a limited role for Federal agencies to ensure that a certifying authority meets certain requirements of section 401. The Agency disagrees that this final rule's approach to Federal agency review would erode cooperative federalism principles or prove inefficient for projects. Rather, the final rule recognizes a Federal agency's legitimate interest in receiving a certification in accordance with section 401 to lawfully proceed with its licensing and permitting process.

On the other hand, other commenters wrote in support of the 2020 Rule's approach to Federal agency review, arguing that Federal agencies are obligated to determine if procedural requirements have been met and warned that without Federal oversight, certifying authorities would have little incentive—and might be

disincentivized—to provide information supporting their certification actions. A few commenters argued that the 2020 Rule’s approach to Federal agency review was a less costly and more efficient mechanism than judicial review.

EPA declines to impose in this final rule a requirement that Federal agencies review every certification decision for compliance with the statutory requirements of section 401. EPA recognizes that the preamble to the 2020 Rule indicated that Federal agency review is mandatory in every instance. 85 FR 42267–69 (“the Agency has concluded that under the final rule, federal agencies have an affirmative obligation to review certifications to ensure that certifying authorities have complied with procedural requirements and have included the required information for certifications, conditions, and denials . . .”). However, most case law on this topic focuses on the extent of Federal agency review, not the issue of if or when section 401 imposes a duty on the Federal agency to confirm compliance. The exception to courts not addressing this issue is *City of Tacoma*, where the court found that if the public notice requirement of section 401 is “called into question” before the Federal agency, the agency must determine if it was met. 460 F.3d at 68.⁸³ This final rule does not address what circumstances might compel a Federal agency to review certification decisions, nor does it require Federal agencies to review every certification decision. Instead, this final rule allows Federal agencies to review specified aspects of a certification decision, recognizing that Federal agencies have an interest in ensuring certifications relating to their permits are facially compliant with CWA section 401.

The Agency also disagrees with commenter assertions that the Agency is removing Federal oversight. The Agency is still authorizing Federal agencies to review much of what they could under the 2020 Rule. In fact, the Agency is clarifying in regulatory text that Federal agency review includes verification that the certifying authority confirmed that it complied with its public notice procedures and that the correct certifying authority acted on the request

for certification (aspects that were not directly addressed in the 2020 Rule). The one aspect of the 2020 Rule that the Agency is removing is Federal agency review of the procedural and informational requirements (e.g., citation requirements) of the 2020 Rule (as opposed to the facial requirements of section 401). The Agency disagrees with commenters who argued that this will lead to a lack of supporting information in certification decisions or create a structure for misuse. EPA encourages certifying authorities to include supporting information with certification decisions and is finalizing this recommendation at § 121.7. Furthermore, it is in the certifying authority’s interest to include such information to ensure project proponents and Federal agencies—not to mention any court reviewing the certification decision—understand why a condition is placed on a certification or why a certification is being denied. *See supra* section IV.F of this preamble for further discussion of the contents of a certification decision.

It is unclear why some commenters concluded that the 2020 Rule’s Federal agency review process would reduce litigation or create any efficiencies when compared to direct judicial review. Those commenters did not provide any data or information to substantiate a time or cost differential between the 2020 Rule’s Federal agency review process and any possible judicial review associated with certification decision. Nothing about the 2020 Rule’s approach to Federal agency review removed or reduced the opportunity or potential for judicial review on a certification decision. In fact, the 2020 Rule’s mandate that Federal agencies review for compliance with the rule’s own procedural and informational requirements (e.g., citation requirements) added another possible avenue for judicial review. Federal courts could be called upon to decide whether a Federal agency properly found that a certifying authority waived certification for its failure to fully comply with the 2020 Rule’s informational requirements. In fact, one such case was recently filed in the D.C. Circuit Court of Appeals. *Brookfield White Pine Hydro LLC v. FERC*, No. 23–1075 (D.C. Cir.) (petition for review filed March 20, 2023, regarding FERC determination that a denial of certification satisfied the procedural requirements of the 2020 Rule).

Furthermore, Federal agency review of the substance of certification decisions in lieu of judicial review is inconsistent with the legislative history of section 401. Indeed, Congress

recognized that state courts were the proper venue for any issues or concerns surrounding the substance of a certification decision. *See, e.g.*, H.R. Rep. No. 91–940, at 55–56 (March 24, 1970) (“If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge that refusal if the applicant wishes to do so.”); S. Rep. 92–414, at 1487 (October 28, 1971) (“Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, Federal Power Commission, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.”); H.R. Rep. 92–911, at 122 (March 11, 1972) (“If a State refuses to give a certification, the courts of that State are the forum in which the applicant must challenge the refusal if the applicant wishes to do so.”).

The Agency is finalizing regulatory text substantively similar to proposed § 121.9(a)(2) that allows a Federal agency to verify whether the appropriate certifying authority—meaning the entity responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate—issued the certification decision. 40 CFR 121.8. EPA made one non-substantive change to proposed text to verify whether the “appropriate”, as opposed to “proper”, certifying authority issued the certification decision. Section 401 requires a project proponent to provide the Federal licensing or permitting agency a certification from the state or authorized Tribe “in which the discharge originates or will originate.” 33 U.S.C. 1341(a)(1). If the project proponent provides the Federal agency with a certification from the wrong certifying authority, then the Federal agency cannot issue its license or permit. Allowing a Federal agency to confirm that the appropriate certifying authority has issued certification is consistent with case law, *American Rivers*, 129 F.3d at 110–11, and prior Agency regulations and guidance, 85 FR 42267; 2010 Handbook at 10 (rescinded in 2019, *see supra*).

The Agency is finalizing regulatory text that allows a Federal agency to verify that the certifying authority confirmed it complied with its public notice procedures established pursuant to section 401(a)(1). 40 CFR 121.8. EPA proposed that a Federal agency may review a certification decision to determine whether the certifying authority “provided public notice” on the request for certification at § 121.9(a)(3). Some commenters noted

⁸³ In *Keating v. FERC*, the court required FERC to consider the application of section 401(a)(3) to a certifying authority’s purported revocation of a certification. 927 F.2d 616 (D.C. Cir. 1991) (“FERC must at least decide whether the state’s assertion of revocation satisfies section 401(a)(3)’s predicate requirements—i.e., whether it is timely and motivated by some change in circumstances after the certification was issued.”).

that public notice procedures vary amongst certifying authorities, including one commenter that noted that establishing generally applicable procedures for public notice is not necessarily the same as providing public notice on every application. EPA agrees with these commenters. Section 401(a)(1) requires a certifying authority to establish procedures for public notice, and a public hearing where necessary, on a request for certification. 33 U.S.C. 1341(a)(1). Accordingly, EPA has revised the regulatory text, now located at § 121.8, to better reflect the statutory text and to clarify that a Federal agency may review whether the certifying authority confirmed it complied with its public notice procedures.

One commenter stated that Federal agencies have little knowledge of the public notice procedures of certifying authorities, and that any issues with the procedural process would be addressed in state court. While EPA agrees that questions regarding compliance with specific state public notice laws and regulations would be addressed in state proceedings, EPA disagrees that it is therefore inappropriate for a Federal agency to seek verification from the certifying authority that it complied with its public notice procedures, a Federal statutory requirement. The Agency appreciates commenter concerns regarding a Federal agency's lack of substantive knowledge about a certifying authority's public notice procedures. Therefore, the Agency is limiting Federal agency review regarding public notice to simply verifying that the certifying authority confirmed it complied with its public notice procedures. This should not require the Federal agency to delve into any specifics regarding a state or authorized Tribe's public notice procedures, but rather should entail merely asking the certifying authority to provide confirmation of its compliance. To aid in this review, EPA recommends that certifying authorities indicate compliance with their public notice procedures in its certification decision. See section IV.F of this preamble for further discussion on ways a certifying authority can indicate its compliance; see also *infra*.

The Agency is also finalizing regulatory text substantively similar to proposed § 121.9(a)(4) that allows a Federal agency to verify whether a certifying authority acted on a request for certification within the reasonable period of time. 40 CFR 121.8. Section 401 provides that certification "shall be waived" if the certifying authority fails or refuses to act within the reasonable

period of time. A Federal agency cannot issue its license or permit until certification "has been obtained or has been waived." 33 U.S.C. 1341(a)(1). It is thus reasonable for the Federal agency to determine whether a certifying authority acted within the reasonable period of time, and this has been the Agency's longstanding position in regulation and guidance. See 40 CFR 121.16(b) (2019); 85 FR 42267; 2010 Handbook at 10 (rescinded in 2019, see *supra*). Additionally, as discussed above, this is also consistent with case law on Federal agency review. See *American Rivers*, 129 F.3d at 110–11 (explaining that FERC "may determine . . . whether a state has issued a certification within the prescribed period"); see also *Alcoa Power Generating*, 643 F.3d at 972–73 (holding that, like the public notice requirements at issue in *City of Tacoma*, the issue of whether a certifying authority acted upon a certification request within the statutory one-year period was an issue properly before FERC).

The Agency is not finalizing the regulatory text proposed at § 121.9(a)(1), which provided that a Federal agency may also review a certification decision to confirm the nature of the decision (*i.e.*, whether the certification decision is a grant, grant with conditions, denial, or express waiver). The Agency does not disagree with this aspect of the proposal, but the Agency finds the regulatory text unnecessary and somewhat confusing when listed among the other components of Federal agency review. Certainly, a Federal agency needs to look at the certification decision to determine how it should act in response. For instance, the Federal agency cannot issue the relevant license or permit if the certification decision is a denial. If the decision is a grant with conditions, the Federal agency must include those conditions in its license or permit. However, looking at the certification document to see how the certifying authority decided to act represents a different sort of "review" than the other components of Federal agency review identified in § 121.8. The other components all concern verifying compliance with the statutory requirements of section 401. EPA concludes that it is best to remove this provision to avoid confusion. Further, as one commenter noted, the decision should generally be apparent on its face. Certifying authorities and Federal agencies have over 50 years of experience with developing and receiving certification decisions, respectively. Additionally, the Agency is finalizing regulatory text at § 121.7(a)

that clearly defines the four possible ways a certifying authority may act on a request for certification, as well as regulatory text at § 121.7(c) through (f) that clearly outlines recommended contents for a certification decision. These final rule provisions should provide certifying authorities with sufficient clarity regarding possible actions they may take and how to develop clear certification decisions.

b. Demonstrating Compliance With the Facial Requirements of Section 401

Consistent with the proposed rule, EPA is declining to define the specific information a certifying authority must include in a certification decision to demonstrate compliance with the facial requirements of section 401. Section 401 does not expressly address what specific information certifying authorities must include in a certification decision, nor does it address the process of Federal agency review. While the statute does contain important information about the identity of the appropriate certifying authority, the length of the reasonable period of time, and a requirement for public notice procedures, it does not prescribe how a certifying authority must demonstrate compliance with those requirements.

At proposal, EPA did not define the specific information a certifying authority must include in its certification decision to demonstrate that it has met the facial requirements of section 401. However, EPA requested comment on whether the Agency should identify in regulation different elements of a certification decision that might be appropriate for Federal agency review, or whether EPA should defer to Federal agencies to define those elements.

In the final rule, the Agency is declining to define the specific information a certifying authority must include in a certification decision to demonstrate that it has met the facial requirements of section 401. Certifying authorities are the entities most familiar with their certification process, and certifying authorities, and not EPA or other Federal agencies, are in the best position to determine how to demonstrate compliance. EPA expects that it should only take minimal effort by a certifying authority to demonstrate compliance for Federal agency verification. However, as discussed below, the Agency is providing recommendations for how certifying authorities can demonstrate compliance with these requirements.

To support a streamlined review of whether a certifying authority complied with its public notice procedures, EPA is finalizing a recommendation for a

certifying authority to indicate such compliance in its certification decision.⁸⁴ By doing so, the Federal agency should be able to simply look at the certification decision and quickly and easily determine whether the certifying authority indicated that it followed its public notice procedures.

A few commenters discussed how certifying authorities currently, or could, demonstrate compliance with their public notice procedures, including providing a copy of the public notice in the certification decision or including a description of the public notice process it undertook in its certification decision. EPA finds that these and other approaches to demonstrating compliance with public notice procedures would be sufficient to satisfy Federal agency review. In fact, it would be sufficient for the certifying authority to simply state in its certification decision that the certifying authority complied with its public notice procedures. This inquiry does not require the Federal agency to research or inquire about the particulars of a state or Tribal laws and regulations regarding public notice, but rather merely verify that the certifying authority confirmed it complied with its public notice procedures. EPA is not defining how a certifying authority must communicate such confirmation, but EPA does not anticipate that such demonstrations will be burdensome. As the court noted in *City of Tacoma*, Federal agencies only need “to obtain some minimal confirmation of such compliance.” 460 F.3d at 68.

The Agency is also not defining how a certifying authority must demonstrate that it provided a certification decision within the reasonable period of time. However, EPA finds that other provisions in this final rule should aid in making such a demonstration. For example, final rule § 121.6(a) requires a certifying authority to send the project proponent and the Federal agency a written confirmation of the date that the request for certification was received, while § 121.6(b) requires the Federal agency and certifying authority to jointly agree on the reasonable period of time in writing. Using this documentation, the Federal agency should be able to verify whether the certifying authority acted on the request for certification within the reasonable period of time. If the Federal agency needs further information to verify that the certification decision was issued within the reasonable period of time, the certifying authority could satisfy

this inquiry by providing documentation of the date it furnished the project proponent with a decision.

The Agency is also not defining how to demonstrate that the certification is from the appropriate certifying authority, meaning the state or authorized Tribe responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate.⁸⁵ EPA finds that the project proponent bears the burden of demonstrating that it has obtained a certification from the appropriate certifying authority. See 33 U.S.C. 1341(a)(1) (“Any applicant . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . .”). Accordingly, if a Federal agency chooses to verify that the appropriate certifying authority issued the certification decision, it should work with the project proponent to obtain location information, such as a map, indicating where the discharge originates or will originate. The Federal agency and project proponent may also discuss any questions regarding jurisdiction with the certifying authority, or as needed, EPA in its technical assistance capacity under section 401(b).

c. Federal Agency Review Process

Consistent with the 1971 Rule and 2020 Rule, the Agency is finalizing regulatory text to reaffirm that a waiver of certification occurs only if the certifying authority fails to act within the reasonable period of time. See 40 CFR 121.9(a)(2)(i) (2020); 40 CFR 121.16(b) (2019). If the Federal agency reviews for timeliness and determines that the reasonable period of time has passed without the certifying authority acting on the request for certification, then the Federal agency may determine that a constructive waiver has occurred. 40 CFR 121.9(b). Similar to the approach in the 2020 Rule, the Agency is finalizing regulatory text describing how the Federal agency must communicate its waiver determination to the project proponent and certifying authority. See *id.* Specifically, if a Federal agency determines that the certification decision was not issued within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that a waiver has occurred. *Id.* Similar to the 2020 Rule, see § 121.9(b) of the 2020 Rule, the

Agency is also finalizing regulatory text that clarifies that such notification from the Federal agency satisfies the project proponent’s requirement to obtain certification. 40 CFR 121.9(b). The Agency made minor revisions to the text proposed at § 121.9(c) to clarify that a waiver only satisfies the project proponent’s obligation to obtain a certification and does not satisfy any other obligations under section 401 (e.g., need to provide the Federal agency supplemental information pursuant to § 121.12). However, as discussed in more detail below, the Agency is declining to finalize regulatory text on the process that Federal agencies and certifying authorities must follow for non-compliance with other facial requirements of CWA section 401 including potential consequences and remedy procedures. This is consistent with the Agency’s approach to Federal agency review prior to the 2020 Rule and avoids unnecessarily encumbering the certification process with additional procedures.

Many commenters agreed with the proposal’s characterization of constructive waiver as a “severe consequence.” Some commenters expressed support for the position in the proposal that constructive waiver may only occur when the certifying authority fails or refuses to act (*i.e.*, to grant, grant with conditions, deny, or expressly waive) within the reasonable period of time. A few commenters stated that procedural technicalities should not be a basis for an involuntary or implicit waiver of certification.

EPA agrees with commenters that a constructive waiver occurs only where a certifying authority fails to act on a request for certification (*i.e.*, grant, deny, expressly waive) within the reasonable period of time. The Agency recognizes that a constructive waiver is a severe consequence; as discussed in section IV.F in this preamble, a waiver means that a Federal license or permit which could adversely impact the certifying authority’s water quality (*i.e.*, cause noncompliance with water quality requirements) may proceed without any input from the certifying authority. EPA encourages Federal agencies, project proponents, and certifying authorities to communicate early and often to prevent inadvertent waivers due to passage of time. For example, a Federal agency could set up an MOA or other agreement with certifying authorities to establish notification protocols prior to finding a waiver of certification (*e.g.*, where a certifying authority has not acted by 30 days prior to the end of the reasonable period of time, the Federal agency will notify the certifying

⁸⁴ See section IV.F of this preamble regarding contents of certification decisions.

⁸⁵ But see section IV.H of this preamble for further discussion on instances where EPA acts as the certifying authority instead of a state or authorized Tribe.

authority that a waiver will occur if it does not receive a certification decision or a request to extend the reasonable period of time in that 30 day period).⁸⁶

A couple of commenters suggested that EPA require the Federal agency to extend the reasonable period of time in instances where the certifying authority failed to act and extending the reasonable period of time would not exceed the one-year statutory time period from receipt of the request for certification. These commenters asserted that allowing constructive waiver before one year would be inconsistent with cooperative federalism principles, and one of these commenters asserted that section 401(a)(1) prohibited a finding of a constructive waiver until after one year. Conversely, one commenter expressed concern over the proposal's preamble language encouraging Federal agencies to extend the reasonable period of time where a certifying authority inadvertently waives certification, asserting that section 401 clearly provides that if a reasonable period of time is established and the certifying authority does not act within that reasonable period of time then waiver has occurred, and EPA cannot create a regulatory override over clear statutory language.

Aside from providing that a waiver occurs if the certifying authority does not act within the reasonable period of time, the statute does not provide direction on what should occur if a certifying authority fails to meet the other statutory requirements in section 401. As discussed earlier, the legislative history indicates that Congress added the waiver provision to prevent "sheer inactivity" by a certifying authority from holding up the licensing or permitting process. *See* H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Report). Consistent with the statutory language and legislative history, EPA believes that Congress intended such an extreme outcome only in situations where certifying authorities fail or refuse to make a decision, and not where a certifying authority, otherwise attempting to make

a timely decision, fails to comply with other requirements of section 401. Case law also provides support for the Federal agency allowing the certifying authority to either demonstrate that its decision meets section 401's requirements or remedy the situation, as opposed to the Federal agency having authority to deem any failure an automatic waiver of certification. *See City of Tacoma*, 460 F.3d at 68-69 ("FERC should seek an affirmation from Ecology that it complied with state law notice requirements when it issued its water quality certification or, if it did not, that it has done so in response to this decision.").

The Agency is declining to define the process that a Federal agency and certifying authority must follow if the Federal agency's review reveals that the wrong certifying authority issued the certification decision, or the Federal agency was unable to obtain confirmation that the certifying authority complied with its public notice procedures. Most commenters providing input on this topic expressed support for proposed § 121.9(b) that if the Federal licensing or permitting agency determines that certain statutory requirements (*e.g.*, public notice) have not been met, it must provide the certifying authority with an opportunity to remedy the situation. However, a few commenters expressed concern with the proposed automatic extensions for certifying authorities that failed to comply with public notice procedures, suggesting that it might incentivize certifying authorities to ignore procedures and improperly extend the time for certification. Upon further reconsideration, the Agency is declining to include regulatory text addressing the potential consequences and remedies to deficient certification decisions, aside from failure or refusal to act within the reasonable period of time. As discussed in further detail below, this restores the Agency's pre-2020 Rule approach to Federal agency review and avoids unnecessarily encumbering the certification process with more procedure.

The Agency proposed at § 121.9(b) that if a Federal agency determines that a section 401 certification decision does not clearly indicate whether it is a grant, grant with conditions, denial, or express waiver, the Federal agency must notify the certifying authority of the deficiency and provide the certifying authority with an opportunity to remedy it. As discussed above, the Agency is not finalizing regulatory text regarding Federal agency review of the nature of the certification decision, so the

proposed text regarding next steps is no longer needed.

The Agency did not propose any regulatory text explicitly discussing the consequences or next steps where Federal agency review reveals that the wrong certifying authority provided the certification decision. However, the proposed rule preamble provided that if Federal agency discovers that the wrong certifying authority issued the certification, then the Federal agency should notify the project proponent that it must seek certification from the appropriate certifying authority before the Federal license or permit may be issued. The Agency is not including regulatory text regarding next steps for this aspect of Federal agency review, but continues to encourage the Federal agency to promptly notify the project proponent where the Federal agency determines that the certification decision was not issued by the appropriate certifying authority. As noted above, section 401 requires a project proponent to seek certification from the jurisdiction in which the discharge originates or will originate. 33 U.S.C. 1341(a)(1). Therefore, it is incumbent on the project proponent to identify and obtain certification (or waiver) from the proper certifying authority—the entity responsible for certifying compliance with applicable water quality requirements where the discharge originates or will originate—before it can obtain a Federal license or permit. *See* 40 CFR 121.1(b).

The Agency is not finalizing the process proposed at § 121.9(b) for the Federal agency to follow if it is unable to obtain confirmation from the certifying authority that the certifying authority complied with its public notice procedures. The Agency proposed that the Federal agency must notify the certifying authority if it determined that the certifying authority did not provide public notice on the request for certification and provide the certifying authority with an opportunity to remedy the noted deficiency. 87 FR 35357. The proposal further provided that, if necessary, the Federal agency must extend the reasonable period of time to provide the certifying authority with an opportunity to remedy the deficiency, but the reasonable period of time may not exceed one year from the receipt of the certification request. *Id.*

Most commenters providing input on this aspect of the proposed rule expressed support for Federal agencies extending the reasonable period of time to allow for correction of deficiencies up to the statutory one-year limit. A few commenters suggested that the final rule should allow certifying authorities to

⁸⁶ Nothing in section 401 precludes a Federal licensing or permitting agency from considering input provided by a state or authorized Tribe in a late certification decision. But that consideration would occur outside the context of section 401 and would be akin to consideration of input provided by the state or Tribe in any other context (*e.g.*, a public comment period). For example, if a certifying authority included conditions in a late certification, nothing in section 401 precludes the Federal licensing or permitting agency from considering including similar conditions in its Federal license or permit, even though section 401 would not compel the Federal agency to do so.

correct errors even after the reasonable period of time has ended, including one commenter who suggested it should extend beyond the one-year timeframe. Conversely, one commenter urged EPA to reconsider requiring automatic extensions of the reasonable period of time as necessary to allow the certifying authority with an opportunity to remedy any deficiency. The commenter explained that it does not oppose small extensions of time for certifying authorities to provide additional detail or make minor changes necessary to satisfy the elements. However, the commenter expressed concern that certifying authorities may abuse this extension process by submitting purposely incomplete decisions. According to the commenter, if a certifying authority submits a clearly deficient certification decision, the certifying authority should not be entitled to more time; instead, the certification should be waived. Another commenter suggested that corrections should be made within the reasonable period of time and be limited to “errors made in good faith.” This commenter cautioned that this provision should not allow or incentivize certifying authorities to ignore procedures or take more time.

The Agency is declining to define any specific process to remedy any deficiencies identified through Federal agency review. As an initial matter, the Agency did not provide a regulatory process for Federal agency review prior to the 2020 Rule (aside from failure or refusal to act within the reasonable period of time). Rather, prior EPA guidance merely acknowledged that the Federal licensing or permitting agency may review the procedural requirements of a certification decision. *See* 2010 Handbook at 32 (rescinded in 2019, *see supra*) (“For example, the federal permitting or licensing authority may review the procedural requirements of [section] 401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely.”) (citing *American Rivers*, 129 F.3d at 110–111; *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006)). The Agency is not aware of any issues, procedural or otherwise, with Federal agencies and certifying authorities managing this process pre-2020 Rule. Because this final rule returns the Agency to its pre-2020 Rule posture on Federal agency review, the Agency is accordingly declining to define a process to address deficiencies

identified through Federal agency review. The Agency expects this will provide certifying authorities and Federal agencies with the flexibility to address such procedural deficiencies in accordance with pre-2020 Rule practices.

The Agency emphasizes that other aspects of this final rule should prevent the need for specific EPA-mandated process to remedy deficiencies identified through Federal agency review. First, as discussed in section IV.D of this preamble, certifying authorities have an active role in setting the reasonable period of time with the Federal agency. *See* 40 CFR 121.6(b). This approach provides certifying authorities with an opportunity to ensure the length of the reasonable period of time considers their specific timing needs and concerns. Second, the final rule provides certifying authorities and Federal agencies with the ability to extend the reasonable period of time as needed, or automatically in limited cases. *See* 40 CFR 121.6(d) and (e). Together, these components of the final rule should provide certifying authorities with ample opportunities to ensure they have the appropriate amount of time to act on a request for certification and comply with the facial components of section 401. EPA notes that its proposed automatic extensions for curing deficiencies (at proposed § 121.9(b)) would have applied only for failure to indicate the nature of the decision and failure to provide public notice. In this final rule, EPA has removed Federal agency review of the nature of the decision and expressly limited review of public notice to simply verifying that the certifying authority confirmed that it complied with its public notice procedures. Additionally, as discussed in section IV.F of this preamble, the Agency encourages certifying authorities to include an indication that they complied with their public notice procedures established in all certification decisions. This serves two purposes. First, it ensures the certifying authority remains cognizant of satisfying all statutory requirements in section 401, including the need to establish and comply with public notice procedures. Second, it clearly communicates the certifying authority’s compliance with this requirement of section 401 so that in the event the Federal agency chooses to review for such compliance it may easily determine that the certifying authority confirmed compliance with its public notice procedures.

3. Implementation

As discussed throughout this preamble, EPA emphasizes the importance of communication between certifying authorities, Federal agencies, and project proponents early and often through the certification process. Consistent communication can ensure that stakeholders develop a common understanding around timing and information needs to complete the certification process and comply with the facial requirements of section 401. Ideally, such communication minimizes the need for Federal agency review. However, in the event a Federal agency reviews a certifying authority’s action, it is limited to reviewing whether the action complies with the requirements of section 401 as explicitly defined at final rule § 121.8. Federal agency review does not require, nor allow, a Federal agency to review the substance of a certification decision or specific certification condition (*e.g.*, determine whether the certification or its conditions is within the scope of section 401).

In the proposal, EPA requested comment on whether the Agency should develop procedures regarding how a certifying authority should respond to a Federal agency’s notice regarding deficiencies in its certification decision. Several commenters provided various recommendations on the procedural aspects of the Federal agency review process, including recommending that the final rule should require the Federal agency to immediately notify the certifying authority after a deficiency was identified, recommending that Federal agencies develop procedures providing how a certifying authority should respond to a Federal agency’s notice regarding deficiencies, and suggesting that the final rule include a requirement that the Federal agency notify the certifying authority that the certification has been received within the reasonable period of time, and the certification conditions have been incorporated into the relevant Federal license or permit.

Under this final rule, if the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, then the final rule requires the Federal agency to promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived. 40 CFR 121.9(b). This final rule does not require a Federal agency to notify the certifying authority an impending deadline to act on a certification request prior to finding

waiver for failing or refusing to act. Certifying authorities are ultimately responsible for managing resources and ensuring that they act on a request for certification within the reasonable period of time. However, the Agency encourages Federal agencies to reach out to certifying authorities to remind them of impending deadlines to act prior to finding constructive waiver, or setting up MOAs or other agreements to establish notification protocols prior to finding a waiver of certification.

EPA encourages Federal agencies to promptly notify certifying authorities if they are seeking confirmation of certifying authority compliance with public notice procedures, and to promptly notify project proponents if they determine the certification decision was not issued by the appropriate certifying authority. In either event, the final rule does not define the contents of such notification, but EPA encourages Federal agencies to provide notification in writing so the certifying authority and/or project proponent can respond accordingly.

EPA does not find it necessary to impose a regulatory requirement for the Federal agency to notify the certifying authority that the certification has been received within the reasonable period of time, and that the certification conditions have been incorporated into the relevant Federal license or permit. As discussed above, Federal agency review is not a mandatory requirement under this final rule. The certifying authority should know whether it has issued its decision in the reasonable period of time due to its involvement in setting the reasonable period of time. As long as the certifying authority provides its certification decision within the reasonable period of time, the Federal licensing or permitting agency is required to incorporate any certification conditions into its license or permit. *See* 33 U.S.C 1341(d).

H. EPA's Roles Under Section 401

1. What is the Agency finalizing?

Under section 401, EPA serves three different roles. First, EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). Second, EPA is also responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id.* at 1341(b). Lastly, EPA is responsible for notifying other states or authorized Tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required,

for providing an evaluation and recommendations on such notified state or authorized Tribe's objections. *Id.* at 1341(a)(2). This section focuses on EPA's role as a certifying authority and in providing technical assistance. The Agency's third role under section 401(a)(2), or the neighboring jurisdictions process, is discussed in section IV.K in this preamble.

Consistent with the proposal, the Agency is finalizing revisions to the regulatory text at §§ 121.16 and 121.17 to clarify EPA's process when it acts as the certifying authority, such as updating its public notice and hearing provisions. More specifically, the Agency is finalizing that when EPA is the certifying authority, it must provide public notice within 20 days of the date the request for certification is received. 40 CFR 121.17(a). The final rule also states that when EPA acts as the certifying authority, it is subject to the same requirements as other certifying authorities. EPA is also finalizing the regulatory text on EPA's technical assistance role at § 121.18 which reflects the statutory text at section 401(b) more directly.

2. Summary of Final Rule Rationale and Public Comment

a. EPA's Role as a Certifying Authority

EPA is finalizing revisions to the part 121 regulations to provide greater clarity about EPA's process when it acts as the certifying authority. Pursuant to section 401 of the CWA, EPA acts as the certifying authority on behalf of states or Tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). The 1971 Rule required EPA to provide certification in two scenarios: first, where EPA promulgated standards pursuant to section 10(c)(2) of the 1970 Water Quality Improvement Act; and second, where water quality standards had been established, but no state or interstate agency had authority to provide certification. 40 CFR 121.21 (2019). As discussed in section III in this preamble, the 1971 Rule was promulgated prior to the enactment of the 1972 CWA amendments; as a result, the language in the 1971 Rule regarding EPA as a certifying authority did not reflect the amended text of section 401. In the 2020 Rule, EPA updated this provision with new regulatory text that indicated that EPA provides certification consistent with the 1972 statutory text and noted that EPA was required to comply with part 121 when it acted as a certifying authority. 40 CFR 121.13 (2020).

EPA is finalizing minor, conforming modifications to § 121.13(a) and (b) of

the 2020 Rule. Specifically, consistent with the language in section 401(a)(1), the Agency is reaffirming that EPA is required to provide certification or waiver where no state, Tribe, or interstate agency has the authority to provide certification. 40 CFR 121.16(a). The Agency is also reaffirming that, when it acts as a certifying authority, EPA must comply with both section 401 and the requirements in part 121. *See* 40 CFR 121.16(b).

Currently, EPA acts as the certifying authority in two scenarios: (1) on behalf of Tribes without "treatment in a similar manner as a state" (TAS) and (2) on lands of exclusive Federal jurisdiction in relevant respects. In the first scenario, if a Tribe does not obtain TAS for section 401, EPA acts as the certifying authority for any federally licensed or permitted activity that may result in any discharge that originates in Indian country lands. As discussed in section IV.L in this preamble, a Tribe may obtain TAS for section 401 for the purpose of issuing water quality certifications. When EPA certifies on behalf of Tribes without TAS, its actions as a certifying authority are informed by its Tribal policies and the Federal trust responsibility to federally recognized Tribes. EPA's 1984 Indian Policy, recently reaffirmed by EPA Administrator Regan, recognizes the importance of coordinating and working with Tribes when EPA makes decisions and manages environmental programs that affect Indian country. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984), available at <https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf>; *see also* Memorandum from Michael S. Regan to All EPA Employees, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy (September 30, 2021), available at <https://www.epa.gov/system/files/documents/2021-09/oita-21-000-6427.pdf>. This includes coordinating and working with Tribes on whose behalf EPA reviews and acts upon requests for certification on federally licensed or permitted projects.

In the second scenario, EPA acts as the certifying authority in situations where any discharge from any activity subject to section 401 certification originates where the Federal Government has exclusive jurisdiction in relevant respects. Some commenters said they had concerns with EPA acting as the certifying authority for all national parks. One commenter more broadly argued that section 401 does not authorize EPA to issue certifications for lands subject to exclusive Federal

jurisdiction and that it would be contrary to the statutory language and intent for EPA to act as a certifying authority over such lands. This commenter asserted that this approach would remove authority from states to protect water quality under section 401 in large areas within their borders.

As an initial matter, EPA wishes to emphasize that not all Federal lands or national parks are lands of exclusive Federal jurisdiction. Rather, exclusive Federal jurisdiction is established only under limited circumstances pursuant to the Enclave Clause of the U.S. Constitution, article 1, section 8, clause 17. These circumstances include (1) where the Federal Government purchases land with state consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; (2) where a state chooses to cede jurisdiction to the Federal Government; and (3) where the Federal Government reserved jurisdiction upon granting statehood. *See Paul v. United States*, 371 U.S. 245, 263–65 (1963); *Collins v. Yosemite Park Co.*, 304 U.S. 518, 529–30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141–42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650–52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895).

EPA disagrees with the commenter asserting that section 401 does not authorize EPA to issue certifications for lands subject to exclusive Federal jurisdiction in relevant respects and that it would be contrary to the statutory language and intent for EPA to act as a certifying authority over such lands. Section 401(a)(1) specifically anticipates circumstances in which no state or interstate agency has authority to provide certification, directing that “[i]n any such case *where a State or interstate agency has no authority to give such a certification*, such certification shall be from the Administrator.” 33 U.S.C. 1341(a)(1) (emphasis added). Lands of exclusive Federal jurisdiction in relevant respects present a case where states lack authority for certification pursuant to section 401, as states lack legislative jurisdiction in these areas absent specific congressional action. *See Paul*, 371 U.S. at 263 (finding precedent establishes “that the grant of ‘exclusive’ legislative power to Congress over enclaves that meet the requirements of Art. I, s 8, cl. 17, by its own weight, bars state regulation without specific congressional action.”). In section 401, Congress did not take specific action to grant authority to states to issue certification over lands of exclusive jurisdiction. On the contrary, Congress provided in section 401(a)(1) that the

EPA Administrator shall issue certification “in any such case” where no state or interstate agency has authority to give certification, and otherwise recognized the Administrator as a certifying authority. In addition to the statutory text, the legislative history further supports that Congress did not grant authority to states to issue certification where states otherwise lack authority, such as lands of exclusive Federal jurisdiction in relevant respects. *See* 116 Cong. Rep. 9316, 9328 (March 25, 1970) (statement of Rep. Harsha) (emphasis added) (“Another area of great complexity is that covered by section 21—certification by the States to Federal agencies in cases where application has been made for Federal licenses or permits. That certification must come from the States *unless, of course, the waters involved are under the direct supervision of the Federal Government or there is no State certifying authority.*”). As a result, EPA finds that section 401 directs the Administrator to issue certification in lands of exclusive Federal jurisdiction in relevant respects. The Agency further disagrees that the Administrator issuing certification for lands of exclusive Federal jurisdiction in relevant respects removes authority from states, as states under section 401 and the U.S. Constitution do not have a jurisdictional basis providing authority to issue certification for lands of exclusive Federal jurisdiction in relevant respects.

Under this final rule, consistent with the 2020 Rule, when EPA acts as the certifying authority, it is subject to the same requirements as other certifying authorities (e.g., reasonable period of time to act on a request for certification) under section 401 and 40 CFR part 121. In contrast to the 2020 Rule, this final rule does not retain the request for additional information provisions included in § 121.14 of the 2020 Rule when EPA is the certifying authority. EPA proposed to remove § 121.14 of the 2020 Rule which introduced limits on EPA’s ability, as a certifying authority, to request additional information from a project proponent once the reasonable period of time began. *See* 87 FR 35359 (June 9, 2022). These provisions included a requirement that EPA must initially request additional information within 30 days of receiving a request for certification and limitations on the type and scope of additional information EPA may request. 40 CFR 121.14(a) through (c) (2020). Additionally, the 2020 Rule required EPA to provide the project proponent with a deadline to respond to requests for additional information and acknowledged that a

project proponent’s failure to provide additional information would neither extend the reasonable period of time, nor prevent EPA from acting on the request for certification. *Id.* at § 121.14(d) and (e).

Consistent with the proposal, EPA is removing § 121.14 of the 2020 Rule in its entirety because it finds these provisions not conducive to an efficient certification process for several reasons. The preamble to the 2020 Rule stated that it was “reasonable to assume that Congress intended some appropriate limits be placed on the timing and nature of such requests [for additional information]” because of the overarching statutory timeline. 85 FR 42271 (July 13, 2020). Yet, neither the 2020 Rule preamble nor its regulatory text articulated how a 30-day limitation on EPA’s initial request for additional information is compelled or even consistent with the statutory limitation that a certifying authority must act within a reasonable period of time. Although it is ideal for EPA to have relevant information to inform its analysis early in the reasonable period of time, various questions or needs may arise later in the review process that are critical to EPA acting on a request for certification. There is nothing in the statutory language that compels or even suggests that EPA should have a limited ability to use the reasonable period of time to request additional information to evaluate a request for certification and make a fully informed decision. If the Agency is limited in its ability to request additional information to inform its decision, it may need to deny a request for certification instead of utilizing the additional information to possibly grant certification. Such an outcome would unnecessarily impede the Federal license or permitting process.

The 2020 Rule also unnecessarily injected ambiguity into the certification process. Section 121.14(b) of the 2020 Rule limited requests for additional information to that which is “directly related to the discharge,” while § 121.14(c) of the 2020 Rule limited requests only to information that can be “collected or generated within the reasonable period of time.” Yet neither the phrase “directly related to the discharge” nor “collected or generated within the reasonable period of time” was defined nor explained in the preamble or regulatory text to the 2020 Rule which introduced uncertainty into what kind of information EPA could actually request. For example, how would the Agency determine if the information was directly related to the discharge or that the information could

be collected or generated within the reasonable period of time? Furthermore, the statutory language and this final rule already place a number of limitations on all certifying authority decisions. As finalized in § 121.7(b), all certifying authorities, including EPA, must act within the reasonable period of time and within the scope of certification. EPA finds that these regulatory requirements are sufficient to ensure the Agency will act on requests for certification in a timely and appropriate manner. Consistent with the Agency's removal of the limitations on EPA's ability to request additional information, EPA is also finalizing the removal of the provisions at § 121.14(d) and (e) of the 2020 Rule, which discussed how EPA and project proponents must respond to requests for additional information or lack thereof.

Consistent with the proposal, § 121.17 provides that when EPA acts as the certifying authority, it "shall provide public notice of the request for certification." 40 CFR 121.17(a). The Agency revised proposed § 121.17 to clarify that EPA will provide public notice on the request for certification itself, as opposed to merely providing public notice on the receipt of the request for certification. As proposed, this final rule does not limit or specify the particular manner(s) in which the public notice will occur to support broader public participation. The Agency is also finalizing as proposed that if a public hearing is determined appropriate when EPA acts as the certifying authority, the hearing should be scheduled "at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means." 40 CFR 121.17(b).

The statutory language of section 401(a)(1) requires states and interstate agencies to establish procedures for public notice and hearings. The 1971 Rule stated that EPA could provide public notice either by mailing notice to state and local authorities, state agencies responsible for water quality improvement, and "other parties known to be interested in the matter" (including adjacent property owners and conservation organizations), or, if mailed notice is deemed "impracticable," by publishing notice in a newspaper of general circulation in the area where the activity is proposed. 40 CFR 121.23 (2019). With regard to hearings, the 1971 Rule provided that the Regional Administrator with oversight for the area of the proposed project has discretion to determine that a hearing is "necessary or appropriate,"

and that "[a]ll interested and affected parties" would have reasonable opportunity to present evidence and testimony at such hearings. *Id.* EPA updated this provision in the 2020 Rule to expand the scope of possible parties that may receive notice to avoid unintentionally narrowing the list of potentially interested parties. 85 FR 42271. Additionally, under the 2020 Rule, EPA placed a timeframe on when the Agency had to provide public notice following receipt of a certification request and retained discretion to provide for a public hearing as necessary or appropriate. *Id.*; see 40 CFR 121.15 (2020).

EPA is finalizing § 121.17 as proposed, with minor, non-substantive revisions, to facilitate participation by the broadest number of potentially interested stakeholders and clarify that following such public notice, the Administrator shall provide an opportunity for public comment. Consistent with the Federal Government's commitment to empower communities, protect public health and the environment, and advance environmental justice in Executive Orders 14096, 14008, 13990, and 12898, the final rule allows for outreach designed to reach all potentially interested stakeholders, including communities with environmental justice concerns. The Agency encourages doing so by using all appropriate communication and outreach means and methods (e.g., through local newspapers, online or electronic media, or other appropriate media). This approach will allow EPA greater flexibility to address on a case-by-case basis specific issues regarding notice, such as broadband access issues and requirements for regional publications, to provide notice in the most appropriate way to allow for broad participation. Additionally, EPA is not providing an exhaustive list or examples of potentially interested parties to avoid unintentionally excluding some interested stakeholders on that list. EPA generally believes those stakeholders to whom it is appropriate to provide public notice may include state, Tribal, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations.

EPA is also finalizing as proposed to provide public notice within 20 days following the date the request for certification is received. The 1971 Rule did not set a time frame for EPA's public notice after receiving a request for certification. In contrast, the 2020 Rule stated that EPA would provide public notice 20 days from receipt of a

certification request. In EPA's view, continuing to provide a timeframe for EPA's issuance of public notice after receiving a request for certification will contribute to better accountability, transparency, and certainty with respect to EPA's handling of requests for certification. Generally, EPA finds it will be able to provide public notice within the final rule's timeframe. EPA finalized an identical timeframe under the 2020 Rule, which it has been able to meet without difficulty in most instances.

EPA is also finalizing as proposed that once the Administrator provides public notice on a request for certification, the Administrator must provide an opportunity for public comment. EPA is not defining the length of the public comment period. Rather, EPA's view is that the appropriate timeframe for comment is more appropriately determined on a case-by-case basis, considering project-specific characteristics. In general, EPA anticipates a 30-day comment period; however, comment periods as short as 15 days or as long as 60 days may be warranted in some cases, based on the nature of the project.

EPA may also hold a public hearing after it provides public notice on a request for certification. EPA is finalizing the public hearing provision at § 121.17(b) as proposed, with minor revisions to remove superfluous language. For context, the 1971 Rule provided that the Regional Administrator may hold a public hearing at their discretion. 40 CFR 121.23 (2019). Although "[a]ll interested and affected parties" have the opportunity to present evidence and testimony at a public hearing, the scope of the hearing is limited to the question of "whether to grant or deny certification." *Id.* The 2020 Rule carried forward the position that the Agency has discretion to determine whether a public hearing is necessary or appropriate; however, the 2020 Rule removed the limitation on the subject matter of the public hearing. Consistent with the 2020 Rule, under § 121.17(b) of this final rule, stakeholder input at public hearings may cover any relevant subject matter on the proposed project to best inform EPA as it makes its certification decision.

Commenters generally supported EPA's clarifications around the process when it acts as the certifying authority, including the public notice and hearing provision updates and procedural revisions. These commenters said the revisions will help EPA act on requests in a timely manner. EPA agrees that clarifications in the final rule regarding

the process when EPA acts as the certifying authority should support timely actions and streamline the process. EPA finds that the provisions at §§ 121.16 and 121.17 will provide stakeholders with greater certainty and predictability around the section 401 certification process where EPA acts as the certifying authority.

b. EPA's Role as a Technical Advisor

Section 401(b) provides certifying authorities, project proponents, and Federal agencies with the ability to ask EPA for technical advice on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and any methods to comply with such limitations, standards, regulations, requirements, or criteria. *See also* H.R. Rep. No. 92–911, at 124 (1972) (“The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements, or criteria, but only upon the request of a State, interstate agency, or Federal agency.”). The 1971 Rule acknowledged this role but limited it to provision of technical advice on water quality standards. 40 CFR 121.30 (2019). In the 2020 Rule, the Agency modified this provision to expand the scope of technical advice and assistance EPA might provide to better align with the statutory text. 85 FR 42274–75.

Consistent with the scope of section 401(b), EPA is finalizing the proposed revisions to the regulatory text at § 121.18 to reflect the statutory text more directly. Under this final rule, EPA shall provide technical advice, upon request by a Federal agency, certifying authority, or project proponent, on (1) applicable effluent limitations, or other limitations, standards (including water quality standards such as water quality criteria), regulations, or requirements, and (2) any methods to comply with such limitations, standards, regulations, or requirements. *See* 40 CFR 121.18. Federal agencies, certifying authorities, and project proponents may request EPA's technical assistance at any point in the certification process.

3. Implementation

The Agency has made revisions throughout this final rule to clarify and help in the implementation of EPA's roles under section 401. With respect to EPA's technical advisor role, EPA does not intend this final rule to give EPA the authority to make certification decisions for states and authorized Tribes, or to independently review state or Tribal certifications or certification requests.

See H.R. Rep. 92–911, at 124 (1972) (“The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency.”). Nor does the Agency consider its role under section 401(b) to include providing monetary or financial support to certifying authorities in implementing their section 401 programs. The Agency observes that there are other means for certifying authorities to seek financial assistance for their water quality certification programs (e.g., CWA section 106 grants).

Regarding identifying lands subject to exclusive Federal jurisdiction, a commenter supported the approach taken in the proposal to not provide an exclusive list of such areas. While supporting the approach of not providing an exclusive list, the commenter recommended the development of guidance to identify areas where EPA acts as a certifying authority to assist stakeholders and ensure effective participation in proceedings in these circumstances. While 16 U.S.C. Chapter 1 identifies multiple national parks as having lands of exclusive Federal jurisdiction,⁸⁷ EPA does not maintain a map or list delineating all lands of exclusive Federal jurisdiction. In the preamble to the 2020 Rule, EPA noted that the number and extent of lands under exclusive Federal jurisdiction are subject to change and stated that it is the obligation of the project proponent to determine the identity of the appropriate certifying authority when seeking section 401 certification. 85 FR 42270. EPA is maintaining this position in the final rule. Because such jurisdictional status is subject to change, EPA is not providing an exclusive list of lands subject to exclusive Federal jurisdiction. However, EPA is able to offer technical assistance to stakeholders if questions arise regarding the appropriate certifying authority on a

given federally licensed or permitted project.

The Agency is also providing further insight on its plans to incorporate environmental justice into its role as a certifying authority. As discussed in section III in this preamble, the Agency intends for this final rule to address essential water quality protection policies identified in Executive Order 13990, including environmental justice. In addition to the policy directive from Executive Order 13990, other executive orders emphasize the importance of advancing environmental justice in Federal agency actions. *See* E.O. 12898, 59 FR 7629 (February 11, 1994) (directing agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations in the United States), E.O. 14008, 85 FR 7619 (January 27, 2021) (expanding on the policy objectives established in E.O. 12898 and directing Federal agencies to develop programs, policies, and activities to address the disproportionately high and adverse human health environmental, climate-related and other cumulative impacts on vulnerable, historically marginalized, and overburdened communities, as well as the accompanying economic challenges of such impacts); E.O. 14096, 88 FR 25251 (Apr. 21, 2023) (expanding on the policy objectives of E.O. 12898 and E.O. 14008 by further embedding environmental justice for all through a whole-of-government approach to environmental justice and directing Federal agencies to consider measures to address and prevent disproportionate and adverse environmental and health impacts on communities, to actively facilitate meaningful public participation and just treatment for all people in agency decision-making, to identify and address gaps in science, data, and research related to environmental justice, and to increase accountability and transparency in Federal environmental justice policy).⁸⁸

Consistent with these directives and EPA technical guidance, when EPA acts as a certifying authority, the Agency should consider impacts on communities with environmental justice concerns who disproportionately bear the burdens of environmental pollution

⁸⁷ These include lands within Denali National Park, Mount Rainier National Park, Olympic National Park, Hot Springs National Park, Hawai'i Volcanoes National Park, Yellowstone National Park, Yosemite National Park, Sequoia National Park, Crater Lake National Park, Glacier National Park, Rocky Mountain National Park, Mesa Verde National Park, Lassen Volcanic National Park, Great Smoky Mountains National Park, Mammoth Cave National Park, and Isle Royale National Park.

⁸⁸ The Agency also finalized and published the FY 2022–2026 EPA Strategic Plan in March 2022, which includes new environmental justice strategic goals and emphasis to be embedded in all EPA work. *See* <https://www.epa.gov/planandbudget/strategicplan>.

and hazards, including Tribal Nations. In considering impacts from a federally licensed or permitted project, water quality-related impacts on communities with environmental justice concerns are issues that fall within the relevant scope of analysis and should inform decision-making on requests for certification. Specifically, the Agency intends to consider the extent to which the “activity” or any discharge associated with the activity may cause water quality-related effects with the potential to impact communities with environmental justice concerns. Additionally, as discussed above, the Agency finds that broadening the public notice provision will provide communities seeking to advance environmental justice with greater opportunities to inform the certification process.

I. Modifications

1. What is the Agency finalizing?

The Agency is finalizing the proposed modification provision at § 121.10 with revisions to further clarify the process based on public comments. Consistent with the proposed approach, EPA is finalizing a modification provision that only concerns modifications to a grant of certification (with or without conditions) and does not apply to a denial of certification or a waiver of certification. The Agency has revised the regulatory text of the proposed rule to explicitly provide in the final rule that the certifying authority is not required to obtain the Federal agency’s agreement on the actual language of the modification after reaching an agreement to modify the certification. Based on commenter feedback and recommendations, EPA is finalizing a provision for modifications to a grant of certification that balances the certifying authorities’ need for flexibility to protect water quality and the potential reliance interests of project proponents and Federal agencies once the certifying authority has issued a grant of certification.

2. Summary of Final Rule Rationale and Public Comment

Prior to the 2020 Rule, the Agency’s longstanding 1971 Rule allowed certification modifications to occur after a certification was issued, provided the certifying authority, Federal agency, and the EPA Regional Administrator agreed to the modification. 40 CFR 121.2(b) (2019). When the Agency revised the section 401 regulations in 2020, the rule did not provide a process for modification of certification decisions after the certifying authority had acted

within the reasonable period of time; instead, the 2020 Rule preamble acknowledged that certification modifications could occur through other mechanisms (*e.g.*, as provided in other Federal regulations) and encouraged Federal agencies to establish procedures in regulation “to clarify how modifications would be handled in these specific scenarios.” 85 FR 42279 (July 13, 2020).

The Agency acknowledges that the absence of a modification provision in the 2020 Rule caused significant confusion during implementation regarding whether and under what circumstances modifications to certification conditions were allowed. Stakeholders also expressed significant support for the ability to modify certification conditions, noting that minor changes may occur in the project that may not rise to a level that requires a new certification (*e.g.*, needing to extend the certification’s “expiration” date to match a permit extension, or shifting the certified “work window” to reduce the amount of work occurring during high-flow periods), but may be significant enough to warrant a modification of the certification.

To introduce more clarity and balance the appropriate amount of flexibility and certainty for all stakeholders, EPA proposed that a certifying authority may modify a previously granted certification (with or without conditions) after reaching an agreement to do so with the Federal licensing or permitting agency. This final rule is consistent with the Agency’s proposed intent, with minor changes to the regulatory text to better support implementation. Specifically, the final rule provides additional clarity regarding the agreement between the Federal agency and the certifying authority. The Agency also removed proposed references to revoking or modifying a denial or waiver of certification and clarified the title of the provision to explicitly reflect the final provision’s focus on modifications to grants of certification.

Although this provision addresses a potential modification to a certification, after the certification modification is complete, EPA expects the Federal agency to follow the appropriate Federal license or permit modification process when incorporating any certification modifications into a previously issued Federal license or permit.

This final rule remains consistent with the proposal and the position in the 2020 Rule that CWA section 401 does not provide the authority for unilateral modifications to a certification decision—either by the

certifying authority or by the Federal licensing or permitting agency—after the statutory reasonable period of time in which a certifying authority has to act on a request for certification. To be clear, the Agency does not intend for modifications to be used to avoid or extend the reasonable period of time because § 121.10 in the final rule only applies to previously granted certifications.

a. Returning to a Modification Process

CWA section 401 does not expressly authorize or prohibit modifications of certifications. Some commenters recommended that the final rule not include a provision for certification modifications because it conflicts with the one-year limit for certifying authority action. A few commenters argued that Congress defined and precisely time-limited the ability of certifying authorities to review the potential impacts of federally licensed or permitted projects. These commenters argued that the ability to modify or “reopen” a certification decision renders the express time limits Congress imposed in section 401(a)(1) meaningless. EPA disagrees and concludes that the best interpretation of section 401 is one that allows for modifications with reasonable guardrails like the ones in this final rule. This interpretation is supported by the text of section 401, which envisions the certifying authority participating in the Federal licensing or permitting process after the issuance of a certification. *See* 33 U.S.C. 1341(a)(3)–(4).⁸⁹

The Agency does not view modifications as contrary to the text of, or congressional intent supporting, the reasonable period of time limitation. First, on its face, the reasonable period of time limitation only applies to the certifying authority’s original action on the request for certification. *See* 33 U.S.C. 1341(a)(1) (requiring a certifying authority to act on a request for certification within a reasonable period of time not to exceed one year); *see also* 40 CFR 121.7(a) and (b) (interpreting the term “to act on a request for certification” to mean the certifying authority must make a decision to grant, grant with conditions, deny, or expressly waive certification within the reasonable period of time). The statute

⁸⁹ *See Keating v. FERC*, 927 F.2d 616, 621–22 (D.C. Cir.1991) (summarizing section 401(a)(3)); *see also* 115 Cong. Rec. 9257, 9268–9269 (April 16, 1969) (discussing a hypothetical need for a state to take another look at a previously certified federally licensed or permitted activity where circumstances change between the issuance of the construction permit and the issuance of the operation permit).

is silent regarding subsequent modifications. Second, in imposing the reasonable period of time limitation, Congress was concerned by the potential for the certifying authority's "sheer inactivity" to delay the project. *See* H.R. Rep. 92–911, at 122 (1972). That concern is not present with modifications to a grant of certification because the certifying authority will have already acted on the request.

EPA requested comment on whether it should place a time limit on when a certifying authority can modify its grant of certification in relation to the issuance of the Federal license or permit. While a few commenters argued that a certification should not be modified after the Federal license or permit is issued, several commenters asserted that certification modifications may be necessary to account for unforeseen water quality impacts during the life of the Federal license or permit, particularly for projects that can last decades. To balance stakeholder interests, EPA is not imposing such a time limit on when modifications to a grant of certification can occur in relation to the issuance of the Federal license or permit. The final rule's modification provision provides project proponents, certifying authorities, and Federal agencies with the flexibility to address project changes and avoid the burden of having to seek a new certification where the certifying authority and the Federal agency agree.

EPA also requested comment on whether EPA should identify a list of scenarios that may warrant certification modification. The preamble to the proposed rule provided examples of minor changes that may not rise to the level of requiring a new request for certification, but may be significant enough to warrant a modification of the granted certification (e.g., needing to extend the certification's "expiration" date to match a permit extension, or shifting the certified "work window" to reduce the amount of work occurring during high-flow periods). 87 FR 35361 (June 9, 2022). However, EPA did not propose an exclusive list of scenarios that may warrant modification. EPA received a wide range of comments on whether to list such scenarios, with most commenters requesting flexibility to address new information or project changes without providing specific details about what they meant by "new information" or "project changes." A couple of commenters recommended that EPA develop a list of scenarios where modifications are appropriate, whereas a few commenters expressed support for the modification process precisely because the proposal did not

define all circumstances in which modification is appropriate.

After reviewing public comment, EPA is not finalizing such a list because the certifying authority and Federal agency are in the best position to work together to determine whether a new certification or a certification modification is appropriate in a given situation. Although EPA understands the perspective of most commenters that it may be helpful to have examples of circumstances where a modification to a certification may be appropriate, EPA is declining to include a non-exhaustive list in the regulatory text so that certifying authorities and Federal agencies retain the flexibility to determine their certification modification needs after considering the local water quality and project-specific context. Even without a list in the regulation, EPA still expects that the Federal agency will not unreasonably withhold its agreement to modifications, especially for administrative edits, such as correcting typographical errors, changing a point of contact, or adjusting a certification's expiration date to reflect an updated license or permit expiration date.

In contrast to identifying scenarios warranting certification modifications, a few commenters recommended that EPA develop guidance regarding scenarios where a new request for certification is necessary, instead of a certification modification, to provide clarity on the outer limits of modifications. As noted above, EPA is declining to finalize any bright line scenarios (e.g., specific new information or changed circumstances) for when a modification is appropriate versus when a new certification request is required. The Agency cannot anticipate all the scenarios in which one path may be appropriate over the other, nor can the Agency predict how state, territorial, and Tribal certification modification processes will determine which path to take. Beyond modifications to existing certifications, there may be circumstances that warrant the submission of a new request for certification, such as if certain elements of the activity (e.g., the location or size of the activity) change materially in a manner that could impact water quality after a project proponent submits a request for certification. If the activity changes so materially after the request for certification as to constitute a different activity, this may warrant a new request for certification. The 2020 Rule preamble also recognized this possibility. *See* 85 FR 42247 ("[I]f certain elements of the proposed project (e.g., the location of the project or the

nature of any potential discharge that may result) change materially after a project proponent submits a certification request, it may be reasonable for the project proponent to submit a new certification request.").

b. Limits to Modification of Certification Decisions

In § 121.10 of the final rule, EPA is finalizing limits to certification modifications. The Agency made small changes to the proposed regulatory text to clarify these limits, including an adjustment of the provision title from "Modifications" to "Modification to a grant of certification" to clarify that modifications are limited to grants of certification. 40 CFR 121.10. Another adjustment was to flip the substance of proposed § 121.10(a) and (b) in the final rule so that the text first identifies the modification process and then its limitations. Furthermore, the Agency removed references to modifying denials or waivers of certification from proposed § 121.10(a) and revised the term "modify" in proposed § 121.10(a)(4) to "change" in § 121.10(b)(2) of the final rule.

As noted above, EPA intends that a modification to a grant of certification means a change to an element or portion of a certification or its conditions—it does not mean a wholesale change in the type of certification decision or a reconsideration of the decision whether to certify (e.g., changing a grant of certification to a denial of certification). Section 121.10(b) of the final rule makes this clear by providing that a certifying authority may not—through the final rule's modification provision—revoke a grant of certification or change it into a denial or waiver. Constraining certifying authorities from fundamentally changing their certification action through a modification process recognizes reliance interests and promotes regulatory certainty. Further, EPA has concerns that changing the fundamental nature of the certification action (e.g., change a grant, denial, or waiver to something entirely different) may be inconsistent with the congressional admonition to act on a certification request within the statutory reasonable period of time. In addition, commenters indicated much greater interest regarding modification to grants of certification, and very little interest regarding modifications to a denial or waiver. Commenters also expressed confusion regarding EPA's proposed language regarding modifications to a denial or waiver.

While the final rule text does not address modifications to denials or waivers for the reasons discussed above,

EPA nonetheless concludes for the reasons mentioned above that section 401 does not authorize a certifying authority to “modify” a denial or waiver into a fundamentally different decision such as a grant of certification. As discussed in the proposed rule preamble, if a certifying authority has previously waived certification, that waiver may not be modified because there would be no “certification” to modify. 87 FR 35361–62. Thus, a certifying authority may not “modify” a waiver by changing it into a grant, a grant with conditions, or a denial. And finally, a denial of certification cannot be modified into a grant (with or without conditions) of certification or a waiver of certification.⁹⁰

In contrast to this position, some commenters stated that EPA should allow for certification revocations. A few of these commenters recommended allowing revocations when done in accordance with the certifying authority’s laws or regulations. One commenter suggested that EPA change the modification provision to allow for a denial of certification to be modified or revoked prior to the finalization of a Federal license or permit denial. Another commenter recommended allowing a granted certification to be revoked or modified into a denial of certification when new information is received pertaining to a project, which may substantively change the scope of work that may result in a discharge. Another commenter suggested that EPA should add language to clarify that the certifying authority retains the right to revoke the certification in circumstances where the project proponent provided false or misleading information on which the certification decision was based.

The Agency recognizes the ongoing need to adapt to new and changing information about water quality impacts of a project after a certification decision has been issued, but the Agency is declining to broaden the final rule’s modification provision to be a mechanism to revoke or reverse a certification decision. As discussed above, while the statutory language and legislative history appear to countenance a role for certifying authorities after a certification is issued, EPA concludes that this role does not include unilateral action to revoke or

reverse the decision.⁹¹ EPA reiterates that if the activity changes significantly after a certification decision has been issued (e.g., material change in the breadth or location of the activity), this may warrant a new request for certification.

i. Timing of Modifications to a Grant of Certification

Under this final rule, a certification modification could occur only if the certifying authority had granted certification (with or without conditions) within the reasonable period of time. The Agency maintains this position from the proposal in the final rule because the reasonable period of time limitation in the statute concerns the certifying authority’s action on a request for certification. Accordingly, the Agency is finalizing a modification provision where a modification to an element or a portion of a granted certification occurs after the reasonable period of time in which the certifying authority acted. *See* 87 FR 35361 (“Under this proposed rulemaking, a certification modification could occur after the reasonable period of time in which the original certification decision was made.”).

EPA requested comment on whether the certification modification process should account for (1) whether there is a Federal license or permit modification process already in place and (2) the point in time at which a modification may be made (e.g., if new information supporting a modification arises either before or after issuance of the license or permit). The Agency is not including a time limit on when modifications can occur so that modifications can happen at any time after the reasonable period of time ends, including prior to and after the issuance of a Federal license or permit until the expiration of the license or permit.

Many commenters supported there being no time limit for modifications. These commenters expressed the view that modifications are necessary to reflect changing conditions, scientific understanding of water quality effects, and changes to the project. Multiple commenters explained that placing a

time limit on modifications may impede the project proponent’s ability to remain in compliance on projects with unanticipated or unpredictable project scope and schedule changes and that restarting the certification process because of a project change during construction could result in significant impacts to project costs and public safety and would not be efficient, effective, or predictable. A few commenters highlighted the need for certification modifications, especially for projects with longer lifespans, such as large pipelines and hydropower projects with FERC licenses for 30–50 years. These commenters argued that there should not be a limit on the period when certification modifications can be addressed because some projects are ongoing for a long time, during which time water quality concerns may arise. Conversely, one commenter argued that EPA should not finalize a modification provision; however, the commenter recommended that if a modification provision is finalized, no modifications to certifications should occur after the Federal license or permit is issued.

After considering public comment, the Agency is promulgating a final rule at § 121.10 that provides the opportunity for certification modification at any point after certification issuance (until the expiration of the Federal license or permit), provided the Federal agency and the certifying authority agree in writing prior to modifying the grant of certification. As commenters noted, changes to an activity with implications for water quality can occur at any point in time after a certification is granted. Accordingly, the Agency finds this approach best reflects the reality that projects change over time and provides flexibility for project proponents, certifying authorities, and Federal agencies to adapt to changing circumstances without needing to reinstate the certification process.

ii. Agreement for a Modification to a Grant of Certification

Consistent with the Agency’s longstanding approach to certification modifications, EPA is finalizing the ability for a certifying authority to modify a grant of certification (with or without conditions) provided that the Federal agency and certifying authority agree in writing that the certifying authority may modify the certification. However, such agreement does not require the certifying authority and Federal agency to agree to the substance of such a modification. Although EPA recommends that the modification process be collaborative, EPA is not

⁹⁰ Of course, nothing in section 401 or this final rule would preclude a project proponent from requesting certification again after a denial without prejudice and then the certifying authority could act in a different manner upon the second request if circumstances have changed. *See* section IV.F in this preamble.

⁹¹ This statement and more broadly § 121.10 of this final rule are not meant to address certifying authority action on a request for certification upon remand from a court or administrative tribunal of the certifying authority’s initial action on the request. Section 121.10 is also not intended to address or govern court vacatur of certification decisions, or action by a certifying authority after a court vacatur (although the Agency notes that it is unclear how a vacated certification decision could be “modified”). This final rule does not address the situations of vacatur or remand by a court or administrative tribunal.

suggesting that Federal agencies and certifying authorities must collaborate on the specific language of the certification modification, as discussed more below. Additionally, the certifying authority may modify only those portions of the certification that the two parties agreed upon.

Similar to the 1971 Rule, EPA is finalizing that a modification may only occur where a Federal agency and certifying authority agree in writing that the certification may be modified. While the parties must agree that one or another part of the certification can be modified, the certifying authority is not required to obtain the Federal agency's agreement on the specific language of such modification. Simply put, EPA expects that the certifying authority and the Federal agency's agreement would identify those portions of the certification decision that the certifying authority could modify, and then the certifying authority would be responsible for drafting the modification language. Because of commenter requests for greater clarity regarding what the Federal agency gets to review prior to agreeing to a modification, EPA is finalizing additional text in § 121.10(a) to clarify that the certifying authority is not required to obtain the Federal agency's agreement on the language of the modification.

Some of the commenters who supported the proposed process for Federal agency and certifying authority agreement to a modification asserted that the Federal agency should not have a role in determining the specific language of a modification for various reasons, including concern that adding a new conferencing and agreement process could lead to delays and the fact that the Federal agency does not review certification content during the original certification issuance.

EPA agrees with these commenters. Congress recognized certifying authorities as the "most qualified" to make decisions about impacts to their water quality, and not Federal agencies. *See* 115 Cong. Rec. 29035, 29053 (Oct. 8, 1969) (Mr. Muskie: "By requiring compliance certification from the water pollution control agency, [the certification provision] would assign policing responsibility to those agencies most qualified to make an environmental decision and not to those committed to carrying out some other function at minimum cost."). The Agency finds that certifying authorities are best equipped to both determine the language of a certification decision and the language of any subsequent modification to that decision. Accordingly, EPA is finalizing a process

where the certifying authority only needs Federal agency agreement over the portions of the certification to be modified rather than the modified language itself. The Agency notes that certifying authorities are free to discuss the substance of a modification with a Federal agency but are not compelled to do so under this final rule.

Additionally, EPA requested comment on whether the final rule should provide project proponents with an explicit role in the modification process. A few commenters recommended that the project proponent should have a role in the process, for various reasons: because section 401 is framed around the role of the applicant, because the Federal agency and certifying authority may lack the technical knowledge for the modification; because often the project proponent is the party initiating the project modification; and because including the project proponent in the modification decision or at least providing an opportunity for public notice is a more transparent and legally defensible approach that considers the project proponent's reliance interests.

Consistent with the 1971 Rule, § 121.10 as finalized does not provide the project proponent with a formal role in the modification process. However, the Agency does not expect the process described in § 121.10 to prevent engagement with the project proponent before or after the certifying authority and Federal agency have agreed that the certifying authority may modify the previously granted certification. EPA recommends that certifying authorities engage with the stakeholders who will be impacted by a modification to the certification; some certifying authorities may even be required under their regulations to make any proposed modifications to their certification decisions available for public notice and comment.

Unlike the 1971 Rule, the Agency is not finalizing a role for EPA in the certification modification process where the Agency is neither the certifying authority nor the Federal licensing or permitting agency. As noted in the 2020 Rule preamble, the statute does not expressly provide EPA with a role in the certification modification process, unlike the Agency's other roles under section 401.⁹² *See* 85 FR 42278. Additionally, although the 1971 Rule

⁹² *See* section IV.H in this preamble discussing EPA's specific roles identified in section 401, including acting as a certifying authority on behalf of jurisdictions lacking authority, notifying other jurisdictions where their water may be affected by a discharge from another jurisdiction, and providing technical assistance upon request.

provided the Agency with an oversight role in the modification process, the preamble to the 1971 Rule did not explain why. *See* 36 FR 8563–65 (May 8, 1971). The Agency does not see the need to reintroduce such a role now, especially where EPA was not involved in the original certification decision and is not the relevant Federal permitting agency. EPA concludes that it should not have an oversight role in the certification modification process.

The cooperative approach in the final rule does not allow for unilateral modifications by certifying authorities, which includes through any "reopener" clauses included in a grant of certification. Reopener clauses purport to authorize a certifying authority to "reopen" and modify a certification at a later date. The final rule's position on unilateral modification is consistent with the position taken in the 2020 Rule. *See* 85 FR 42279. The Agency continues to disagree with commenters who stated that certifying authorities should be allowed to unilaterally modify or revoke a section 401 certification decision if they have asserted this ability through a "reopener" condition incorporated into the original certification decision.

Some commenters recommended that EPA allow reopener clauses and discussed their prevalence in certifications. For example, one commenter asserted that certifications often include "reopener" or similar conditions and cited to a few state regulations that the commenter viewed as authorizing reopeners or unilateral modifications. Another commenter asserted that virtually every condition of one certifying authority is subject to further modification and provided an example of one such certification where the certifying authority reserved the right to add or modify the conditions of certification under various specified circumstances. Another commenter recommended that the final rule make clear that certifying authorities can reopen certification based on a showing of changed circumstances and ongoing effects of project operations failing to meet water quality standards.

Other commenters recommended that the final rule prohibit "reopener" and similar certification conditions that purport to allow certifying authorities to unilaterally add or revise certification requirements after the reasonable period of time ends or after the issuance of the Federal license or permit. A few commenters asserted that reopener conditions are plainly inconsistent with section 401 because they allow certifying authorities to make certification decisions after the

maximum one-year period allowed by the statute and after the Federal license or permit had been issued. The commenters continued that reopeners transform section 401's limited grant of authority to states to certify Federal license and permit applications into an ongoing regulatory role. Another commenter asserted that "reopeners" are contrary to the express and prescriptive provisions for post-certification authority that Congress provided in CWA section 401(a)(3) and 401(a)(4).

As discussed above, EPA's final rule does not authorize certifying authorities to unilaterally (*i.e.*, without Federal agency agreement) "reopen" or modify a certification decision. This holds true regardless of whether a certifying authority has inserted language into its grant of certification asserting this extra power.⁹³ EPA is the Federal agency tasked with administering and interpreting the CWA, *see* 33 U.S.C. 1351(d), 1361(a), including section 401, *see Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296–97 (D.C. Cir. 2003); *NYSDEC*, 884 F.3d at 453, n.33, and EPA's interpretation supersedes any contrary interpretation taken by a certifying authority. Certifying authorities cannot bootstrap themselves greater authority to modify a certification beyond what is authorized in this final rule at § 121.10. However, EPA wishes to emphasize the distinction between reopener clauses and adaptive management conditions, the latter of which are permissible under the final rule. *See* section IV.F of this preamble for further discussion of adaptive management conditions.

c. Changes to the NPDES Regulations for Certification Modifications

EPA is also finalizing deletion of 40 CFR 124.55(b), which described the circumstances under which a modification may be made to a certification on an EPA-issued NPDES permit. The approach to modifications in § 124.55(b) differed from the approach EPA is finalizing at § 121.10. First, it addressed a subset of situations in which a modification would be permissible (*i.e.*, a change in state law or a stay, vacatur, or remand of a certification), while staying silent regarding whether modifications would be appropriate in other situations. Second, it suggested that in the identified situations, such as a change

in state law or regulation, a previously issued grant of certification could be converted to a waiver, while this final rule takes the general position that a certifying authority cannot change a grant of certification into a fundamentally different certification action through a modification pursuant to § 121.10. Third, it did not require EPA as the Federal permitting agency to agree to the modification. Forth, it arguably suggested that in the identified situations, a modification was more appropriate than a new request for certification, an issue that EPA intentionally does not address in this final rule. Finally, it expressly precluded EPA from incorporating modified conditions into the NPDES permit except in one narrow circumstance: to delete a NPDES permit condition based on a condition in a certification invalidated by a state court or board, and only upon the request of the permittee. However, as discussed *supra* at section IV.G of this preamble, section 401(d) requires a Federal permitting agency to incorporate certification conditions into the Federal permit as conditions of that permit. EPA sees no reason why this fundamental principal should not apply to conditions of a modified certification. For this reason, EPA expects Federal agencies will agree to allow a modification only when the agency is willing to modify its license or permit or otherwise incorporate the modified certification conditions into its license or permit. EPA is finalizing deletion of § 124.55(b) because of these differences in approach between this final rule and § 124.55(b). As a result of the deletion of § 124.55(b), all certification modifications, including those for EPA-issued NPDES permits, must follow the approach finalized at § 121.10. A corresponding technical edit was made to 40 CFR 122.62(a)(3)(iii) to remove the reference to § 124.55(b).

EPA requested comment on whether the final rule should allow a certifying authority to unilaterally modify a certification in the circumstances identified in former § 124.55(b) such as a change in state law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate state board or agency stays, remands, or vacates a certification after Federal license or permit issuance. A few commenters recommended retaining 40 CFR 124.55(b) instead of the proposed § 121.10. To support their recommendation to retain 40 CFR 124.55(b), one commenter stated that EPA failed to describe any confusion, regulatory uncertainty, or other problems attributed to the certification

modification provisions in the NPDES program.

In response to these commenters, EPA notes that the modification provision previously located at 40 CFR 124.55(b) only applied to modifications to certifications for NPDES permits issued by EPA and did not extend to licenses and permits issued by other Federal agencies. Therefore, retaining 40 CFR 124.55(b) *instead of* the provision proposed at 40 CFR 121.10 would not have provided additional clarity for stakeholders interested in modifying a certification for those licenses and permits issued by other Federal agencies. Furthermore, EPA intends for § 121.10 to apply to all certification modifications, including those on certifications for EPA-issued NPDES permits. Finally, EPA was concerned that leaving § 124.55(b) in place could introduce stakeholder confusion when read with final rule § 121.10 because it may have wrongly indicated that the circumstances in § 124.55(b) are the only circumstances in which EPA might agree to modify a certification on an EPA-issued NPDES permit, and as discussed above, § 124.55(b) conflicted with several key features of this final rule's approach to modifications. However, nothing in this final rule prohibits EPA in its capacity as a Federal permitting agency to continue to agree to modifications to certifications in the types of circumstances previously prescribed in 40 CFR 124.55(b), as long as such modifications are consistent with § 121.10 of the final rule. The final rule is broadening the circumstances under which the Agency might agree with a certifying authority that a modification is appropriate for a certification of an EPA-issued NPDES permit.

EPA does not expect to develop an exhaustive list of circumstances under which EPA (when acting as the Federal permitting agency) expects to agree to a modification to a grant of certification by a certifying authority; however, EPA will work with certifying authorities where unanticipated water quality impacts, shifting project design plans, and new information warrant a modification to a grant of certification (and subsequently a modification to an EPA-issued NPDES permit). The Agency may develop guidance in the future regarding Agency agreements to modifications of grants of certification for NPDES permits issued by EPA.

3. Implementation

As previously discussed, the Agency is finalizing a process for modifying a grant of certification that requires the certifying authority and Federal agency

⁹³ This statement is not meant to address a certifying authority's action on a state or tribally-issued license or permit, which sometimes concurrently acts as the state or Tribe's section 401 certification decision. Such matters are outside the scope of this rulemaking.

to agree that a modification is appropriate but does not require agreement on the substance of the modification. The process is meant to support a cooperative approach to adapting to changing circumstances or new information in an efficient and transparent way. As with other parts of the final rule, EPA is updating the section 401 regulations regarding modifications to support some of the past practices that certifying authorities and Federal agencies became familiar with over 50 years prior to the 2020 Rule. This includes a collaborative modification process like the one in the 1971 Rule. EPA is not aware of issues with modifications pursued under the 1971 Rule and notes that many stakeholders requested implementation guidance after the 2020 Rule omitted a process for modifying certification decisions. Therefore, the modification provision of the final rule will restore flexibility and efficiency where certifying authorities and Federal agencies find it appropriate to update a previously issued grant of certification rather than restart the section 401 certification process in response to changed circumstances or new information. However, EPA does not expect the modification provision to address every issue that may arise after a certification has been granted.

Certifying authorities and Federal agencies are encouraged to work together to address new information or changed water quality conditions throughout the life of the project such that congressional intent behind section 401—enabling states to protect their water quality—can be preserved. In the spirit of cooperative federalism central to section 401, EPA expects that Federal agencies will not unreasonably withhold agreement to a modification. The provision at 40 CFR 121.10 also does not preclude Federal agencies from developing a process for coordinating on certification modifications within the framework provided in this final rule.

EPA recommends that certifying authorities maintain clear records surrounding the development of certification decisions and any modifications to previously granted certifications, including justifications for modifying any certification conditions.⁹⁴ EPA wishes to emphasize that the same scope of section 401 that applies to a certification decision also

applies to any subsequent modification to a grant of certification. *See* 40 CFR 121.3(b).

J. Enforcement and Inspections

1. What is the Agency finalizing?

This section of the preamble discusses several issues that have arisen with respect to enforcement of the requirement to obtain CWA section 401 certifications and enforcement of certification conditions. EPA did not propose to retain any regulatory text regarding enforcement of the requirement to obtain section 401 certification or enforcement of certification conditions.⁹⁵ However, EPA requested comment on whether it should add regulatory text on its interpretations on the enforceability of certification conditions by Federal agencies and certifying authorities; the judicial holdings regarding the application of the CWA citizen suit provision to certifications and certification conditions; and the interpretation of the term “review” in CWA section 401(a)(4). EPA is not finalizing any regulatory text on enforcement, consistent with the proposal. *See* 87 FR 35363 (June 9, 2022). Nevertheless, in light of the pre-proposal input and public comments EPA received on this issue, as well as stakeholder concern and confusion over how the 2020 Rule addressed CWA section 401 enforcement, EPA will discuss some of the more common concerns that have been identified regarding enforcement of the requirement to obtain section 401 certification and enforcement of certification conditions. To be clear, EPA is not offering new interpretations or positions on the issues discussed below.

2. Summary of Final Rule Rationale and Public Comment

a. General Enforcement Issues

Section 401 contains three provisions directly relevant to enforcement. First, section 401(a)(4) provides certifying authorities with an opportunity, prior to operation, to inspect a certified federally licensed or permitted activity or facility that does not require a Federal operating license to assure its operation will not violate water quality requirement. 33 U.S.C. 1341(a)(4). If the certifying authority determines that the operation will violate applicable water quality requirements, the Federal agency may suspend the Federal license or permit

after a public hearing. *Id.* Second, section 401(a)(5) provides that any certified Federal license or permit may be “suspended or revoked” by the Federal agency “upon the entering of a judgment under [the CWA] that such facility or activity has been operated in violation” of the enumerated sections of the CWA. *Id.* at 1341(a)(5). Third, section 401(d) provides that if a grant of certification includes conditions, those conditions “shall become a condition on any Federal license or permit subject to the provisions of this section.” *Id.* at 1341(d).

Of these three provisions, the 1971 Rule only included regulatory text on section 401(a)(4), as discussed below in the section on inspection authority. The 1971 Rule did not contain any regulatory provisions addressing section 401(a)(5) or section 401(d) (the latter of which was not added to the statute until the 1972 amendments). The 2020 Rule addressed section 401(d) and section 401(a)(4). Regarding section 401(d), the 2020 Rule stated that the Federal agency “shall be responsible for enforcing certification conditions” incorporated into its license or permit. 40 CFR 121.11(c) (2020). Regarding section 401(a)(4), the 2020 Rule allowed the pre-operation inspection under section 401(a)(4) of all certified projects, regardless of whether they had received a subsequent Federal operating license or permit. *Id.* at § 121.11(a) and (b) (2020). The 2020 Rule preamble also stated that the “CWA does not provide an independent regulatory enforcement role for certifying authorities,” 85 FR 42275 (July 13, 2020), and declined to finalize an interpretation regarding CWA section 505 citizen suits and section 401. *Id.* at 42277.

In both pre-proposal input and public comment, stakeholders generally agreed that Federal agencies could enforce certification conditions. However, stakeholders expressed concern that the 2020 Rule prevented states and Tribes from exercising their independent enforcement authority and relied solely on Federal agencies to enforce certification conditions. Many commenters raised concerns over Federal agencies’ willingness or capacity to enforce certifications and certification conditions. For example, some commenters asserted that Federal agency resource limitations coupled with the large jurisdictional territories necessitate state and Tribal enforcement, otherwise the conditions may never be enforced. Conversely, some commenters asserted that certifying authorities did not have an enforcement role either under section 401 or any other provision of the CWA,

⁹⁴ *See* discussion in section IV.F.2.d of this preamble regarding EPA’s recommendation that certifying authorities include in their certification conditions a statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements. *See* also 40 CFR 121.7(d)(3).

⁹⁵ EPA is finalizing regulatory text regarding Federal agency review of certification decisions. *See* section IV.G of this preamble for further discussion.

including section 505 (the CWA's citizen suit provision). Other commenters asserted that section 505 provided for citizen suit enforcement of both failures to obtain section 401 certification and failure to comply with certification conditions. Many commenters requested that EPA expressly state in the final rule that states and Tribes have independent authority under the CWA to enforce certifications and certification conditions.

EPA observes that this final rule is generally focused on interpreting the text of section 401 itself, and not other provisions of the CWA. Section 401 does not directly address state or Tribal enforcement authority and the Agency is declining to add regulatory text on that issue. Consistent with the approach taken in the 2020 Rule, this rulemaking does not include interpretations of other enforcement-related sections of the CWA, such as section 505. As such, the Agency is not adding regulatory text to address state or Tribal enforcement authority with respect to section 505.

The Agency views section 401 certification conditions that are incorporated into the Federal license or permit as enforceable by Federal licensing or permitting agencies. Section 401(d) provides that if a grant of certification includes any conditions, those conditions "shall become a condition on any Federal license or permit." As a result, the Federal agency can enforce any such conditions in the same manner as it can enforce any other conditions of its license or permit. EPA expressed this interpretation in the 2020 Rule, 85 FR 42275–76, and a decade prior to that rulemaking. *See, e.g.*, 2010 Handbook at 32 (rescinded in 2019, *see supra*). EPA also observes that Federal agencies have considerable discretion in deciding whether and when to enforce requirements and conditions in their licenses and permits. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (discussing why it is important for agencies to retain enforcement discretion).

However, as noted above, the 2020 Rule included regulatory text that explicitly stated that Federal agencies were responsible for enforcing certification conditions incorporated into its Federal license or permit. 40 CFR 121.11(c) (2020). EPA proposed to remove this regulatory provision because it introduced ambiguity into the Agency's longstanding position that nothing in section 401 precludes states from enforcing certification conditions when authorized under state law (and not precluded by other Federal law besides section 401). It has also led to

stakeholder confusion over whether the 2020 Rule prevented states and Tribes from exercising their independent enforcement authority and whether the 2020 Rule limited Federal agency discretion regarding their enforcement of section 401 conditions in their licenses or permits. Most commenters supported EPA's proposal to remove the 2020 Rule's language at § 121.11(c). However, some commenters disagreed with EPA's proposed approach, arguing that the enforcement of certification conditions incorporated into Federal licenses or permits must lie exclusively with the Federal permitting and licensing agencies. EPA disagrees. The Agency has consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law. In the 2020 Rule preamble, the Agency concluded that "[n]othing in this final [2020] rule prohibits States from exercising their enforcement authority under enacted State laws." 85 FR 42276. EPA did, however, consider this authority limited to "where State authority is not preempted by federal law." *Id.* A decade prior to the 2020 Rule, EPA had already recognized that states enforce certification conditions when authorized to do so under state law. *See e.g.*, 2010 Handbook at 32–33 (rescinded in 2019, *see supra*) ("Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority.").

Some commenters argued that Federal and certifying authority enforcement will lead to confusion, unnecessary litigation, and possibly duplicative or inconsistent enforcement actions and conditions. EPA disagrees that Federal and certifying authority enforcement will lead to confusion or duplicative actions. After over 50 years of section 401 implementation experience, EPA expects that certifying authorities and Federal agencies are well-versed in coordinating enforcement actions. Nevertheless, EPA recommends that certifying authorities clearly indicate which certification conditions derive from state or Tribal law.

With respect to CWA citizen suits and their application to both the requirement to obtain section 401 certification and the requirement to comply with certification conditions, some courts have addressed these issues. First, the Ninth Circuit Court of Appeals held that citizen suits may be brought to enforce the requirement to obtain certification. *ONDA v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). In *ONDA*, the court rejected the argument that CWA section 505 authorizes only suits to enforce certification conditions

but not the requirement to obtain a certification. The court pointed to the plain language of section 505, which cross-references the entirety of section 401 (and not, for example, only section 401(d), which concerns certification conditions). *Id.* Second, a few Federal courts have held that certification conditions can be enforced through CWA citizen suits. In *Deschutes River Alliance*, a U.S. district court considered the issue at length and ultimately held that CWA section 505 authorizes citizens to enforce certification conditions. *See Deschutes River Alliance v. Portland Gen. Elec. Co.*, 249 F. Supp. 3d 1182, 1188 (D. Or. 2017) (considering the issue with respect to a FERC license); *see also Pub. Emps. for Env'tl. Responsibility v. Schroer*, No. 3:18–CV–13–TAV–HBG, 2019 WL 11274596, at *8–10 (E.D. Tenn. June 21, 2019) (relying in part on *Deschutes River Alliance* and considering the issue with respect to a section 404 permit issued by the Corps). EPA is not aware of any Federal court that has considered the issue and reached the opposite conclusion. *Deschutes River Alliance* also noted that certifying states (in addition to the citizen group before the court) are among the persons that may enforce certification conditions via the CWA citizen suit provision. 249 F. Supp. 3d at 1191–92. The court reasoned that section 505 is the only provision of the CWA that could bestow Federal authority upon states to enforce certification conditions and, given this, interpreting section 505 to preclude state enforcement of certification conditions would run "contrary to the CWA's purpose and framework." *Id.* at 1191.

b. Certifying Authority Inspection Authority

As discussed above, section 401(a)(4) identifies one set of circumstances where the certifying authority may review the manner in which a facility or activity will operate once the facility or activity has received certification. 33 U.S.C. 1341(a)(4). The certifying authority's review is limited to determining if the post-construction operation of the facility or activity will ensure that applicable effluent limitations, other limitations, or other applicable water quality requirements will not be violated. Section 401(a)(4) further states that when the certifying authority notifies the Federal agency that the operation or activity will violate effluent limits, other limits or other water quality requirements, the Federal agency, after public hearing, may suspend the Federal license or permit.

Id. The Federal license or permit shall remain suspended until there is reasonable assurance that the facility or activity will not violate CWA section 301, 302, 303, 306, or 307. *Id.*

The 1971 Rule clarified that the ability to “review the manner in which the facility or activity shall be operated or conducted” meant the right to inspect a facility or activity, and that the inspection is limited to a situation where there was a Federal construction license or permit and a subsequent Federal operating license or permit was not required. The 1971 Rule set forth the procedure regarding inspection and subsequent inspection findings; however, these regulations only applied where EPA was the certifying authority. See 40 CFR 121.26 through 121.28 (2019). The 2020 Rule interpreted section 401(a)(4) to apply to all certifying authorities. It also expanded the ability to conduct inspections pursuant to section 401(a)(4) to any certified project where the Federal license or permit and certification were issued prior to operation, instead of only for projects where there was a Federal construction license or permit and a subsequent Federal operating license or permit was not required. 40 CFR 121.11(a) (2020); 85 FR 42277. In pre-proposal input, several stakeholders pressed the Agency to allow for inspections before, during, and post-operation.

EPA is removing § 121.11(a) and (b) from the 2020 Rule in this final rule because the 2020 Rule incorrectly interpreted the limited applicability of section 401(a)(4) and the statutory language does not need further clarification. A few commenters recommended that the Agency add regulatory text regarding section 401(a)(4). However, the Agency finds that the statute clearly outlines the inspection authorities available under section 401. On its face, section 401(a)(4) applies to a limited circumstance where a Federal license or permit and certification are issued *prior to* operation of the facility or activity and a subsequent Federal operating license or permit is *not* necessary for the facility or activity to operate. Under these limited circumstances, the statute is clear that the licensee or permittee must provide the certifying authority with the ability to “review” the facility or activity to determine whether it will comply with effluent limitations, other limitations, or other water quality requirements. EPA interprets the term “review” found in section 401(a)(4) as broad enough to include inspection, but it is not necessarily limited to inspection. It arguably also includes the

right to review preliminary monitoring reports or other such records that can assist the certifying authority in determining whether the operation of the facility or activity will comply with effluent limitations, other limitations, or other water quality requirements. EPA requested comment on whether it should articulate this interpretation of section 401(a)(4) in regulatory text. A few commenters recommended that EPA adopt regulatory text regarding its proposed interpretation of the term “review” found in section 401(a)(4). After considering public comments, however, EPA finds it unnecessary to add regulatory text defining the term “review” as used in section 401(a)(4).

EPA emphasizes that section 401(a)(4) does not necessarily limit the certifying authority’s ability to inspect facilities or activities before or during operation in accordance with the certifying authority’s laws and regulations. The Agency is aware that states and Tribes may have their own authority to inspect a facility or activity to determine compliance with conditions set forth in a section 401 certification. Similarly, section 401(a)(4) does not necessarily limit a Federal agency’s ability to inspect a facility during the life of the license or permit pursuant to that Federal agency’s laws and regulations.

K. Neighboring Jurisdictions

1. What is the Agency finalizing?

The Agency is finalizing its proposed approach to the section 401(a)(2) process, referred to as the neighboring jurisdictions process, with some modifications to the regulatory text for clarity. See 40 CFR part 121, subpart B.

The Agency is adding text to § 121.12 of the final rule, which provides the contents of a notification to the Regional Administrator, to clarify that Federal licensing and permitting agencies notify EPA upon receipt of a Federal license or permit application⁹⁶ and certification or waiver by providing written notification to the “appropriate” Regional Administrator. EPA is also modifying the proposed text of § 121.13, which provided that a Federal license or permit “may not be issued pending the conclusion of the process described” in §§ 121.14 and 121.15, to more clearly state that a Federal license or permit “shall not be issued pending the conclusion of the process described” in § 121.13 (EPA’s determination of effects

on neighboring jurisdictions) as well as §§ 121.14 and 121.15.⁹⁷

For purposes of language consistency and clarity, the Agency removed “certified or waived” from the proposed language of § 121.13(a), which stated that “[w]ithin 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the certified or waived project may affect water quality in a neighboring jurisdiction.” The removal of “certified or waived” is intended to remove redundancy, as § 121.12(a) already states that the Federal agency shall provide written notification to the appropriate Regional Administrator “[w]ithin five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit,” and to ensure conformity of the use of “discharge from the project” across subpart B.

Additionally, EPA is finalizing most of § 121.13(c), which provides the contents of the Regional Administrator’s may affect notification, as proposed, except the Agency is revising the proposed language in § 121.13(c)(3) to conform the statement that the Agency provides to notified neighboring jurisdictions more closely with the statutory text of section 401(a)(2) and provide greater clarity about notification needed for an objection. Rather than providing a statement that the notified neighboring jurisdiction “has 60 days” to provide written notification “whether it has determined that the discharge will violate any of its water quality requirements,” as proposed in § 121.13(c)(3), the final rule states that the Agency provides a statement that the notified neighboring jurisdiction “has 60 days after such notification” from the Agency to provide written notification “if it has determined that the discharge will violate any of its water quality requirements.” 40 CFR 121.13(c)(3). This revision more closely reflects the statutory text of section 401(a)(2) which provides that a notified neighboring jurisdiction may object to issuance of a Federal license or permit “[i]f, within sixty days after receipt” of notification from the Agency it “determines that such discharge will affect the quality of its waters so as to violate any water quality requirements.” 33 U.S.C. 1341(a)(2). As a result, the text of § 121.13(c)(3) of the final rule also more clearly conveys the statutory time

⁹⁶ See section IV.C.2 of the preamble regarding the expectation that the Federal license or permit application be complete. See section IV.K.2 of this preamble *infra* for further discussion about the contents of the Federal agency’s notification to EPA.

⁹⁷ See section IV.K.2.d. of this preamble *infra* for further discussion of the requirement for the neighboring jurisdictions process to conclude before issuance of a license or permit by a Federal agency.

and content requirements of the notification needed for an objection than the proposed regulatory text.

EPA is also modifying the proposed text of §§ 121.13 and 121.14 to remove language requiring the Administrator and notified neighboring jurisdiction to provide notification to the certifying authority during the neighboring jurisdictions process, to more closely reflect the statutory language in section 401(a)(2), which does not require such notification to the certifying authority in this process.

Further, the Agency is modifying the proposed text of §§ 121.14 and 121.15 to clarify that references to a “neighboring jurisdiction” in these provisions refer to a “notified” neighboring jurisdiction, meaning a neighboring jurisdiction that has received notification that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction’s water quality. The proposed text of § 121.14(a) referenced notice being provided to a neighboring jurisdiction “in accordance with § 121.13(c),” and the language in §§ 121.14 and 121.15 referred to “the neighboring jurisdiction” or “a neighboring jurisdiction” without more explicitly stating that the provisions were addressing “notified” neighboring jurisdictions. In the final rule, EPA is revising the internal citation in § 121.14(a) to more appropriately reference § 121.13(b), the provision in the final rule requiring the Regional Administrator to provide notification upon determining that discharge from the project may affect water quality in a neighboring jurisdiction. Likewise, EPA is revising the “neighboring jurisdiction” references in §§ 121.14 and 121.15 to specify that these refer to a “notified” neighboring jurisdiction, to remove ambiguity and improve clarity in these sections.

The Agency is also adding language to the provision in § 121.15 to clarify the process for the Federal agency to provide notice of a hearing on a section 401(a)(2) objection, and provide greater transparency as to how Federal agencies provide such notification. The proposed text of § 121.15(b) required the Federal agency conducting a hearing on an objection from a neighboring jurisdiction to “provide public notice at least 30 days in advance of the hearing.” In the final rule, § 121.15(b) requires the Federal agency in such circumstances to “provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.” This

addition clarifies that that such notice must go to interested parties to ensure that they can prepare for and provide their testimony or comments at the public hearing. It further provides a greater level of transparency regarding how all Federal licensing or permitting agencies will provide public notice of a hearing on an objection.

Additionally, for purposes of improving the efficiency and clarity of the neighboring jurisdictions process in circumstances where a notified neighboring jurisdiction seeks to withdraw a previously issued objection, EPA is adding text in §§ 121.14 and 121.15 of the final rule to allow for withdrawal of an objection in these circumstances. Specifically, § 121.14(c) of the final rule provides that “[t]he notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.” Consistently, EPA is adding text to § 121.15(a) of the final rule, providing that the Federal licensing or permitting agency shall hold a public hearing on the notified neighboring jurisdiction’s objection “unless the objection is withdrawn in accordance with § 121.14(c).” As discussed further below, EPA finds that including a provision addressing withdrawal of an objection improves the efficiency of the neighboring jurisdictions process, as it recognizes the possibility that neighboring jurisdictions may be able to resolve objections before the hearing stage of the neighboring jurisdictions process, and conserves resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances. Additionally, the added text regarding withdrawal of an objection in §§ 121.14 and 121.15 of the final rule add clarity by establishing a uniform procedure for executing withdrawal of an objection.

As discussed in greater detail below, EPA is finalizing its proposed approach to the definition of neighboring jurisdiction, the scope of the neighboring jurisdictions process, the circumstances initiating the neighboring jurisdictions process, and the timing in which a Federal licensing or permitting agency must provide notification to EPA pursuant to section 401(a)(2). The Agency is also maintaining its previously stated positions regarding the roles of the Federal licensing or permitting agency, EPA, and a neighboring jurisdiction in the neighboring jurisdictions process, but is providing some further discussion

regarding certain aspects of these roles below to provide added clarity.

2. Summary of Final Rule Rationale and Public Comment

a. Definition of Neighboring Jurisdiction

The Agency is finalizing the definition of neighboring jurisdiction at § 121.1(g) as proposed. This final rule revises the definition of this term used in the 2020 Rule to clarify that it includes “any state, or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.” See 40 CFR 121.1(g). In contrast, the definition of “neighboring jurisdiction” in the 2020 Rule inaccurately suggested that a neighboring jurisdiction may only include a state or TAS Tribe that EPA determines may be affected by a discharge from another jurisdiction. 40 CFR 121.1(i) (2020). As EPA noted in the proposed rule, a neighboring jurisdiction’s status is not based upon EPA’s “may affect” determination, but rather a neighboring jurisdiction has this status by being a jurisdiction other than the one where the discharge originates or will originate. Thus, the current definition is more consistent with the statutory text establishing the process set forth in section 401(a)(2) for purposes of considering the water quality effects to “any other state” than the previous definition for the 2020 Rule. The current definition also reflects the TAS provisions for Indian Tribes to administer section 401 that are being finalized in § 121.11.

A few commenters addressing the definition of neighboring jurisdiction in the proposed rule advocated for EPA to adopt a narrower definition of this term. EPA finds that a narrower definition of neighboring jurisdiction is not supported by the statutory text in section 401(a)(2), which establishes a process for considering water quality effects to “any other state.” This statutory language does not impose any other requirement on a neighboring jurisdiction other than not being the jurisdiction in which the discharge originates or will originate, meaning the jurisdiction with certifying authority. Accordingly, EPA declines to adopt a narrower definition of neighboring jurisdiction. Additionally, EPA notes that the definition of neighboring jurisdiction makes clear that this term is not limited to adjacent or downstream states or Tribes with TAS for section 401, consistent with the relevant statutory language in section 401(a)(2).

b. Scope of the Neighboring Jurisdictions Process

The Agency is also maintaining in the final rule the interpretation of the scope of section 401(a)(2) stated in the proposed rule. In the proposed rule, EPA interpreted the scope of section 401(a)(2) as limited by the statutory language to considering potential effects only from a “discharge” from an activity, explaining that this is based upon the statutory language in section 401(a)(2) which limits EPA to considering whether a “discharge” from an activity may affect the water quality of a neighboring jurisdiction, and likewise limits a neighboring jurisdiction to determining whether a “discharge” from the activity will affect its water quality so as to violate any water quality requirements. 87 FR 35365 (June 9, 2022). A few commenters observed that EPA’s proposed interpretation of the scope of section 401(a)(2) differed from its proposed interpretation of the scope for certification, and one such commenter asserted that EPA’s differing interpretations of scope for certification and the neighboring jurisdictions process in section 401(a)(2) is arbitrary. EPA disagrees.

The neighboring jurisdictions process established in section 401(a)(2) is distinct from the process for certification, which is a prior step in the statutory regime. Whereas the text of section 401(a)(1) and section 401(d) refers to a “certification” of compliance with water quality requirements, the text of section 401(a)(2) does not refer to the actions taken by the Administrator or a neighboring jurisdiction as “certifications.” Instead, the text of section 401(a)(2) is clear that the neighboring jurisdictions process is distinct from, and follows after, a “certification” made pursuant to section 401(a)(1) and section 401(d). EPA rejects the assertion that the scope of the neighboring jurisdictions process in section 401(a)(2) must be the same as the scope of certification, as there are different statutory provisions relating to certification and the neighboring jurisdictions process, and interpreting them the same would not be consistent with the language of these distinct statutory provisions. Section 401(d), which is key to EPA’s conclusion regarding scope of certification, applies only to certification and not to the neighboring jurisdictions process established in section 401(a)(2). Likewise, the Supreme Court’s reasoning in *PUD No. 1* regarding the proper scope of certification (which EPA agrees with) does not extend to the

neighboring jurisdictions process in section 401(a)(2).

In contrast to statutory language pertaining to certification, which supports a broader scope, the text of section 401(a)(2) establishes that the Administrator and notified neighboring jurisdictions consider the potential discharges of the project. Specifically, pursuant to section 401(a)(2) the Administrator considers whether “such a discharge” may affect the water quality of a neighboring jurisdiction, and likewise, a notified neighboring jurisdiction considers whether “such discharge” will affect its water quality so as to violate water quality requirements. EPA interprets this language as limiting the neighboring jurisdictions process to discharges from the project. One commenter asserted that the scope of section 401(a)(2), outlining the neighboring jurisdictions process, is the same as section 401(a)(1), relating to certification, because section 401(a)(2) is inextricably linked to section 401(a)(1) through the use of “such” referring to the scope of discharges addressed in section 401(a)(1).

While EPA agrees that the “such” language employed in section 401(a)(2) refers to discharges from “any activity” subject to certification pursuant to section 401(a)(1), the Agency does not conclude that section 401(a)(1) compels the scope of the neighboring jurisdictions process to be the same as the scope of certification. As discussed above, the scope of certification is based, in part, upon statutory text within both section 401(a)(1) and section 401(d), and nothing in either of these statutory provisions or section 401(a)(2) compels the neighboring jurisdictions process to have the same scope as certification. This interpretation is also consistent with the legislative history regarding the neighboring jurisdictions process. The text of the neighboring jurisdictions process in the Water Quality Improvement Act of 1970 (in section 21(b)(2)) used “such a discharge” and “such discharge” language later employed in section 401(a)(2), even though the 1970 act used the term “activity” in place of “discharge” in what is now section 401(a)(1). The “discharge” language for the neighboring jurisdictions process remained unchanged during the 1972 amendments that changed the language regarding certification from “such activity” to “such discharge” in CWA section 401(a)(1). The fact that the “discharge” language in section 401(a)(2) remained consistent throughout amendments supports that

Congress intended the scope of the neighboring jurisdictions process to consider “discharges,” and it adopted and maintained a statutory regime with differing scopes for certification and the neighboring jurisdictions process.

EPA’s interpretation of the scope of the neighboring jurisdictions process is further supported by procedural differences between this process and certification. Several procedural differences reflect a more limited authority for notified neighboring jurisdictions than that of certifying authorities. A more limited scope of review is consistent with the more limited nature of the neighboring jurisdictions process. As discussed further below, neighboring jurisdictions only receive notification under section 401(a)(2) when EPA determines that a discharge from the project may affect their water quality, unlike section 401(a)(1) certification where the project proponent for the Federal license or permit *must* request certification from the certifying authority regardless of the known or suspected potential impacts to water quality. Likewise, notified neighboring jurisdictions determine whether discharge from the project will affect the quality of their waters so as to violate any water quality requirements, a standard inverse to that of a certifying authority determining if it can certify compliance with water quality requirements pursuant to section 401(a)(1). This distinction matters because the neighboring jurisdiction must make an affirmative case to support a “will affect” determination, a higher bar than that of a certifying authority, which could deny certification because of a lack of information supporting a conclusion that the activity will comply with water quality requirements. Additionally, in contrast to the certification decision made by the certifying authority, the outcome of the neighboring jurisdictions process following a hearing is determined by the Federal licensing or permitting agency, based upon the recommendations of the neighboring jurisdiction and EPA, and any additional information presented at the hearing. Taken together, these procedural distinctions reflect a more limited authority for notified neighboring jurisdictions in the neighboring jurisdictions process than the role of a certifying authorities, which supports EPA’s interpretation finding a more limited scope for the neighboring jurisdictions process.

In addition to the differences between the extent of authority of a notified neighboring jurisdiction and a certifying authority, the statutory text of section

401 also reflects differences in the timing of the neighboring jurisdictions process compared to the timing of certification, which likewise support EPA's interpretation of differing scopes for these steps. In the neighboring jurisdictions process, both EPA and notified neighboring jurisdictions are provided less time to make determinations regarding the water quality effects to a neighboring jurisdiction (30 days and 60 days, respectively) than a certifying authority has for acting on a request for certification (up to a year). The difference in the timing of determinations at these steps supports differing scopes, as it may be possible for EPA and notified neighboring jurisdictions to complete determinations in the more limited time provided for in the neighboring jurisdictions process based upon a more discrete analysis focused on discharges.

c. Circumstances Initiating the Neighboring Jurisdictions Process

The Agency is finalizing its proposed approach to clarify that both grants of certification (with or without conditions) and waivers of certification initiate the neighboring jurisdictions process established by section 401(a)(2). Section 401(a)(2) provides that the Federal licensing or permitting agency must immediately notify the EPA Administrator upon receipt of a Federal license or permit application and certification. 33 U.S.C. 1341(a)(2). Under the 1971 Rule, EPA's section 401(a)(2) review was initiated upon receipt of either a certification or a waiver, which was treated as a substitute for certification. *See* 40 CFR 121.11, 121.16 (2019). In the 2020 Rule, EPA's section 401(a)(2) review was initiated only upon receipt of a certification. 40 CFR 121.12(a) (2020); *see* 85 FR 42287 (July 13, 2020). Additionally, the 2020 Rule further provided that a Federal agency may issue a license or permit upon issuance of a written notice of waiver. 40 CFR 121.9(e) (2020). As proposed, EPA is returning to the approach taken in the 1971 Rule that the neighboring jurisdictions process is initiated by either a certification or waiver.

Although the statutory text does not explicitly identify waiver of certification as an action that initiates the neighboring jurisdictions process in section 401(a)(2),⁹⁸ the Agency maintains that it is reasonable to

interpret the waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2) review for several reasons. First, this treatment is consistent with the purpose of section 401(a)(2). Section 401(a)(2) provides a mechanism for a notified neighboring jurisdiction to object to the issuance of a Federal license or permit when it determines that discharge from a project originating in another jurisdiction will affect the quality of its waters thus violating its water quality requirements. A waiver does not indicate a certifying authority's substantive opinion regarding the water quality implications (for itself or another jurisdiction) of a project subject to Federal licensing or permitting. Rather, a certifying authority may affirmatively waive certification for a variety of reasons, including a lack of resources to evaluate the project. In addition, a certifying authority may be deemed to have waived certification if that certifying authority fails or refuses to act on a request for certification before the end of the reasonable period of time. *See* section IV.F of this preamble for further discussion on waivers of certification. Ultimately a waiver of certification allows the Federal licensing or permitting agency to issue its license or permit without receipt of a water quality certification. As a result, a waived certification could result in water quality impacts that might violate a neighboring jurisdiction's water quality requirements. It is reasonable to afford a mechanism for EPA and a neighboring jurisdiction to evaluate that possibility.

Second, the approach taken under the 2020 Rule to exclude waivers from the neighboring jurisdictions process created a method for certifying authorities to circumvent the neighboring jurisdictions process in circumstances where they are aware of water quality concerns from a neighboring jurisdiction regarding a project. As noted above, EPA finds that section 401(a)(2) was established as a mechanism to allow notified neighboring jurisdictions an opportunity to object to the issuance of a Federal license or permit in circumstances where they find a discharge from the licensed or permitted project will violate their water quality requirements. EPA does not find that the statutory language of section 401(a)(2) supports such circumvention of the neighboring jurisdictions process, as this would thwart the very purpose of the process established by the statutory text.

Finally, including waivers as actions initiating the neighboring jurisdictions process was the Agency's position for

over 50 years prior to the 2020 Rule. *See* 40 CFR 121.16 (2019). The final rule provides clarification on when waiver of certification has occurred, allowing Federal agencies to provide EPA notice of the Federal license or permit application and waiver as required by § 121.12 of the final rule. Therefore, consistent with the approach taken in the 1971 Rule, the Agency is restoring the interpretation that waivers, in addition to certifications, initiate the neighboring jurisdictions process established in section 401(a)(2).

Accordingly, in § 121.12(a) of the final rule, the Agency is clarifying that the neighboring jurisdictions process is initiated when the Federal agency "has received both the application and either a certification or waiver for a Federal license or permit," and must provide notice to EPA. Additionally, as proposed, the Agency is removing the regulatory provision located at § 121.9(e) of the 2020 Rule, which provided that a Federal agency may issue a license or permit upon issuance of a written notice of waiver. As discussed above, under this final rule waivers of certification also initiate the neighboring jurisdictions process and EPA may make a "may affect" determination based upon a waiver of certification. *See* 40 CFR 121.12(a). Consistent with the language at § 121.13(d) of the final rule, a Federal agency shall not issue a Federal license or permit pending the conclusion of the neighboring jurisdictions process.

Several commenters provided input on the proposed approach to have waiver initiate the neighboring jurisdictions process. A few commenters agreed that a waiver should initiate the neighboring jurisdictions process and asserted that this approach would improve the neighboring jurisdictions process. Conversely, a few other commenters argued that a waiver should not initiate the neighboring jurisdictions process and asserted that there is no statutory basis for the inclusion of waivers in this process. One of these commenters added that expanding the notification process beyond what the statute provides would lead to needless process and delays.

EPA disagrees with the assertion that the statute does not support waiver initiating the neighboring jurisdictions process established in section 401(a)(2). As explained above, EPA is interpreting waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2) based upon the purpose of this statutory provision.⁹⁹

⁹⁸ *See* 33 U.S.C. 1341(a)(2) ("Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification.") (emphasis added).

⁹⁹ In fact, the language in section 401(a)(1) describes waivers of certification as a substitute for

Employing a more restrictive interpretation would otherwise allow certifying authorities to circumvent the neighboring jurisdictions process by waiving certification on projects affecting the water quality of neighboring jurisdictions, which is counter to the purpose of the process established in section 401(a)(2). Additionally, EPA also does not agree that this interpretation will result in unnecessary delays for Federal licensing or permitting because the statute limits the time EPA and the notified neighboring jurisdiction have to respond to a notification (30 days and 60 days, respectively). Further, as the process established by section 401(a)(2) provides an important mechanism for notified neighboring jurisdictions to meaningfully engage with Federal agencies on objections where they find a discharge from a project will violate their water quality requirements, EPA does not find this approach results in unreasonable process.

d. Neighboring Jurisdictions Process Must Conclude Before Federal License or Permit Issuance

The proposed text of § 121.13(d) included language intended to explain that the neighboring jurisdictions process must conclude before a Federal agency issues a license or permit, stating that “[a] Federal license or permit may not be issued pending the conclusion of the process described in §§ 121.14 and 121.15.” This proposed text retained language similar to § 121.12(c) of the 2020 Rule, which stated that “[t]he federal license or permit may not be issued pending the conclusion of the processes.” 40 CFR 121.12(c) (2020). The Agency is modifying the proposed text of § 121.13 to more clearly state that a Federal agency is prohibited from issuing a license or permit subject to section 401 certification pending conclusion of the neighboring jurisdictions processes addressed in §§ 121.13, 121.14, and 121.15. Specifically, EPA changed the proposed text of § 121.13(d) from providing that the Federal license or permit “may not be” issued pending the conclusion of the neighboring jurisdictions process to more directly stating that the Federal license or permit “shall not be” issued pending the conclusion of the

neighboring jurisdictions process. Further, EPA modified the text of § 121.13 to make clear that the neighboring jurisdictions process includes the processes described in §§ 121.13, 121.14, and 121.15. These changes are consistent with the proposed regulatory text, but provide further clarity that pursuant to § 121.13, and the statutory text of section 401(a)(2), a Federal agency cannot proceed with issuing its license or permit until the neighboring jurisdictions process set forth in §§ 121.13, 121.14, and 121.15 has concluded.

In practical terms, this means that Federal agencies must wait to issue a Federal license or permit until the neighboring jurisdictions process has concluded. The neighboring jurisdictions process may conclude in several different ways, depending on factual and procedural circumstances. One way the neighboring jurisdictions process concludes occurs when the appropriate Regional Administrator has completed the “may affect” determination within 30 days after receiving notice from the Federal agency, pursuant to § 121.13(a), without making a “may affect” finding. In such circumstances, the neighboring jurisdictions process has concluded, and the Federal agency may proceed with issuing the Federal license or permit without waiting for further proceedings.

In contrast, when the appropriate Regional Administrator completes the “may affect” determination by making a “may affect” finding and provides notification of this finding pursuant to § 121.13(b), the Federal agency must wait to issue the Federal license or permit until the notified neighboring jurisdiction has made a “will violate” determination, pursuant to § 121.14, within 60 days of the notification from EPA pursuant to § 121.13, or this time period has passed. Where a notified neighboring jurisdiction has determined that a discharge will violate its water quality requirements and has provided notification of its objection and request for hearing pursuant to § 121.14(a) and (b), the Federal agency cannot issue the license or permit until either the public hearing process described in § 121.15 is completed, or the notified neighboring jurisdiction withdraws its objection pursuant to § 121.14(c).

A few commenters raised concerns regarding the neighboring jurisdictions process delaying the issuance of Federal licenses or permits. Additionally, a commenter asserted that EPA should consider only requiring the neighboring jurisdictions process for larger, complex

individual permit projects because of wide-ranging implications of this process. The Agency notes that the neighboring jurisdictions process is a component of the section 401 statutory regime established by section 401(a)(2) and is not a regulatory creation by EPA.¹⁰⁰ Moreover, as section 401(a)(2) sets timelines for certain actions in the neighboring jurisdictions process, it is clear from the statutory text that Congress considered the timing of this process when it was established. As discussed further below, EPA is adding clarity regarding the procedures involved in the neighboring jurisdictions process in the final rule, which are intended to improve efficiency and reduce the time necessary for this process. EPA also finds no basis in the statutory text supporting an exception to this process for general permits or less complex individual permits. Instead, the type of project and discharge covered in the Federal license or permit are factors that may be considered by EPA and any notified neighboring jurisdictions in their determinations regarding the water quality effects of a discharge from a project in the neighboring jurisdictions process.

e. Federal Licensing or Permitting Agency's Role in Initiating the Neighboring Jurisdictions Process

Section 401(a)(2) requires the Federal licensing or permitting agency to notify EPA immediately upon receipt of a Federal license or permit application and the related section 401 water quality certification. 33 U.S.C. 1341(a)(2). This notification from the Federal agency commences the remaining steps of the neighboring jurisdictions process addressed in section 401(a)(2) and discussed in §§ 121.13, 121.14, and 121.15 of the final rule. The 1971 Rule established some procedural requirements for this notification process, which EPA updated in the 2020 Rule. The 2020 Rule included additional specificity on the timing of Federal agency notification but did not contain a standardized process for notification. 40 CFR 121.12(a) (2020). Instead, under the 2020 Rule, EPA relied on Federal agencies to develop notification processes and procedures that work within their licensing or permitting programs. 85 FR 42273.

In the proposed rule, the Agency likewise proposed regulatory text to

a granted certification because the Federal licensing or permitting agency is unable to proceed with their licensing or permitting process “until the certification required by [section 401(a)(1)] has been obtained or has been waived.” 33 U.S.C. 1341(a)(1). By listing the two scenarios under which the process continues, it is reasonable to consider a waiver of certification as a substitute for a certification.

¹⁰⁰ Several commenters suggested that the neighboring jurisdictions process resulted, in part, from the 1971 Rule. As discussed, the statutory text of section 401(a)(2) establishes this process.

provide clarity regarding the timing by which a Federal agency must provide notification to EPA pursuant to section 401(a)(2), and further proposed additional procedures for Federal agencies to follow when providing notification to EPA. In the final rule, EPA is maintaining its interpretation of the timing for Federal agencies to provide notification pursuant to the statutory text in section 401(a)(2), and otherwise finalizing the proposed procedures for Federal agencies to follow when providing notification to EPA with some minor changes to the text of § 121.12 and the deletion of the definition of “application” proposed at § 121.1(c).

i. Timing of Notice From a Federal Agency

As noted, to initiate the neighboring jurisdictions process, a Federal licensing or permitting agency must “immediately” notify EPA when it receives a Federal license or permit application and a section 401 certification. 33 U.S.C. 1341(a)(2). EPA is finalizing its proposed interpretation of “immediately” to mean within five calendar days of the Federal agency’s receipt of the application for a Federal license or permit and either receipt of certification or waiver. This approach retains the same interpretation of “immediately” used in the 2020 Rule. 40 CFR 121.12(a) (2020); *see* 85 FR 42273.

EPA is also finalizing the regulatory text in § 121.12(a) of the final rule providing that “[w]ithin five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.” EPA is finalizing this provision with only minor changes from the proposal for added clarity. Specifically, EPA added language to specify that the Federal agency shall provide the written notification to the “appropriate” Regional Administrator, but otherwise maintained the proposed text providing that the period for the Federal agency to provide such notification commences upon “the date that it has received both the application and either a certification or waiver.” *See* 87 FR 35380.

As previously discussed, this provision reflects EPA’s interpretation that the neighboring jurisdictions process set forth in section 401(a)(2) is initiated by either certification or waiver. *See supra* for further discussion on actions initiating the neighboring jurisdictions process. It further makes clear that the Federal agency is only

considered to be in receipt of an application for a Federal license or permit and certification within the meaning of section 401(a)(2) when such agency has received *both* an application for a Federal license or a permit, as discussed above, *and* has either received a corresponding certification or a waiver has occurred.¹⁰¹

EPA received several comments on its proposal to retain the five-day interpretation of “immediately” in the context of section 401(a)(2). A few commenters agreed with EPA maintaining the five-day interpretation of immediately, asserting that this period was adequate for such notice and consistent with the statutory language. However, one commenter argued that providing Federal agencies with five calendar days to notify EPA is an unrealistic timeframe, and asked EPA to consider interpreting “immediately” as five business days or ten calendar days. EPA disagrees that the five-day period is unrealistic. EPA did not encounter significant challenges in implementing this interpretation in the 2020 Rule. The Agency finds five days a prompt yet reasonable amount of time for Federal agencies to complete notification to EPA pursuant to section 401(a)(2). This interpretation reflects the urgency connoted in the statutory language of section 401(a)(2), while also recognizing that the Federal agency needs some amount of time to process receipt of the Federal license or permit application and certification or waiver from the project proponent or certifying authority, and then transmit notice to the appropriate EPA regional office. Additionally, EPA finds that this approach provides clarity to Federal agencies regarding the timing of notification to EPA pursuant to section 401(a)(2), and also ensures consistency in practices across Federal licensing and permitting agencies.

Several commenters discussed the proposed language, finalized in § 121.12(a) of the final rule, which

establishes that a Federal agency’s obligation to provide notification to EPA only commences upon the Federal agency’s receipt of both the Federal license or permit application and either certification or waiver. One commenter agreed with this approach, noting that the Agency’s clarification on this point will ensure that EPA and neighboring jurisdictions have necessary information to make determinations within the neighboring jurisdictions process, and that this otherwise addresses confusion and information gaps caused by prior inconsistent information sharing practices. A few commenters, however, suggested that the Federal agency should be able to provide notification to EPA prior to receipt of certification, such as upon a receipt of an application for a Federal license or permit and a request for certification. One such commenter argued that requiring the Federal agency to be in receipt of both the Federal license or permit application and certification before notifying EPA would increase delays in the Federal licensing or permitting process. EPA disagrees that notification provided by a Federal agency prior to receipt of certification satisfies the notification requirement in section 401(a)(2), as this is inconsistent with the statutory language, which provides that the Federal agency shall provide notification “[u]pon receipt of such application and certification.” As a result, notification prior to receipt of certification or waiver would not be sufficient to satisfy a Federal agency’s obligation pursuant to section 401(a)(2). Furthermore, EPA disagrees that notification after a Federal agency receives a certification decision will increase delays in the Federal licensing or permitting process. Rather, a certification decision may render the need to notify EPA under section 401(a)(2) moot (*i.e.*, denial) or it may inform EPA’s analysis for its “may affect” determination and make it unnecessary to make a “may affect” finding (*i.e.*, a certification with conditions).

A few commenters argued that requiring Federal agencies to provide notification to EPA after receipt of a certification precluded Federal agencies from providing notification to EPA earlier (*e.g.*, after receipt of an application for a Federal license or permit), therefore prohibiting Federal agencies from engaging in early coordination with EPA. However, this is not correct. Nothing in the proposed text, or final rule, prevents a Federal agency from providing notification to EPA of a Federal license or permit

¹⁰¹ Although this statutory language is unambiguous, EPA is further discussing when receipt occurs due to questions and conflicting practices among Federal licensing and permitting agencies. For example, some Federal agencies provide notice to EPA concurrently with its public notice on the licensed or permitted application, *see, e.g.*, 33 CFR 325.2(b)(1)(i) (“The public notice for such activity . . . will serve as the notification to the Administrator . . . pursuant to section 401(a)(2) of the Clean Water Act.”). Such practices are not consistent with the statutory language or this final rule. It is necessary that certification or waiver occur for EPA to make a determination as to whether a discharge from the activity “may affect” the water quality of a neighboring jurisdiction under section 401(a)(2), as EPA only makes such a determination where certification or waiver has occurred, and considers any conditions included in a certification in making this determination.

application for purposes of early coordination. Rather, such notice for coordination purposes does not satisfy the requirement that the Federal agency provide notification to EPA upon receipt of the Federal license or permit application and certification or waiver, pursuant to § 121.12 of the final rule, and would not commence the 30-day period for EPA's "may affect" determination pursuant to section 401(a)(2). Thus, EPA is providing this clarification in the final rule.

With regard to the meaning of "application" for purposes of section 401(a)(2), the Agency is maintaining the position stated in the proposed rule that within this context the term "application" is used to refer to the "application for such Federal license or permit." See 87 FR 35366. Section 401 uses the term "application" throughout section 401(a); however, when read in context, the term is used for both "applications for certification" and "applications for such Federal license or permit." 33 U.S.C. 1341(a)(1)–(2). The Agency considers the "request for certification" to be an "application for certification." See section IV.C in this preamble for further discussion on request for certification. The context of the relevant statutory language in section 401(a)(2), directing the Federal agency to provide notification to EPA "[u]pon receipt of such application and certification," reflects that this use of the term "application" refers to "application for such Federal license or permit," rather than "application for certification." *Id.* at 1341(a)(2). Accordingly, the obligation for the Federal agency to provide notification to EPA pursuant to section 401(a)(2) is initiated upon receipt of both a Federal license or permit application and either a section 401 certification or a waiver of certification.

In the proposed rule, EPA noted that there are instances where a Federal license or permit application does not accompany a certification or waiver, and therefore proposed to define the term "application" to mean "an application for a license or permit submitted to a Federal agency, or if available, the draft license or permit" to account for differing Federal licensing or permitting practices. EPA received a few comments related to this definition in the context of the Federal agency providing notification to EPA pursuant to section 401(a)(2). One commenter argued that EPA should not require the Federal agency to have a draft Federal license or permit when it notifies EPA under the neighboring jurisdictions process. In contrast, another commenter supported draft Federal licenses or

permits being included in notification to EPA where such drafts are provided before a certification decision. However, as previously discussed, in the context of requests for certification, many commenters opposed to EPA's proposed approach of requiring the project proponent to include the draft Federal license or permit in all requests for certification. As a result, EPA is finalizing a bifurcated approach. A project proponent seeking certification on the issuance of a general license or permit must submit a copy of the draft Federal license or permit in its request for certification. A project proponent seeking certification on an individual license or permit must submit a copy of the Federal license or permit application in its request for certification. See section IV.C in this preamble for discussion on bifurcated request for certification process; 40 CFR 121.5(a). As a result of the comments received related to the proposed definition of "application" and finalized approach regarding use of draft Federal licenses or permits in the request for certification context, EPA is not finalizing the proposed definition of the term "application" in the proposed rule. Although the Agency is not proposing a definition of the term "application" in the final rule, it recognizes that with respect to general Federal licenses and permits, there is no formal "application," and for that reason acknowledges that Federal agencies may provide a draft Federal license or permit in notification to EPA pursuant to section 401(a)(2).¹⁰²

ii. Contents of Notification From a Federal Agency

Although the text of section 401(a)(2) requires a Federal agency to notify EPA upon receipt of a Federal license or permit application and certification,¹⁰³ it does not define the contents of such notification. 33 U.S.C. 1341(a)(2). The 1971 Rule and 2020 Rule provided some direction on information that could be submitted to EPA as part of the neighboring jurisdictions process, but neither regulation defined the contents of the section 401(a)(2) notification. See

¹⁰² For this final rulemaking, EPA is not suggesting that Corps civil works projects are exempt from neighboring jurisdictions processes, even though there are no "applications" or draft Federal licenses or permits. Rather, EPA expects the Corps to determine how best to comply with all section 401 requirements. Compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification.

¹⁰³ As previously discussed, EPA interprets the waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2). See section IV.K.2.c. of this preamble for further discussion of this interpretation.

40 CFR 121.12(b) (2020); 40 CFR 121.13 (2019).

The 1971 Rule provided that upon receipt of an application for a license or permit with an accompanying certification, the Federal agency shall forward copies of the application and certification to the Regional Administrator. 40 CFR 121.11 (2019). It further stated that only those portions of the application which relate to water quality shall be forwarded to the Regional Administrator and allowed for the Regional Administrator to ask for supplemental information if the documents forwarded did not contain sufficient information to make the determination provided for in § 121.13. See 40 CFR 121.12 and 121.13 (2019). In the preamble to the 2020 Rule, EPA stated its expectation that Federal agencies would develop notification processes and procedures, but noted that the Administrator could request copies of the certification and Federal license or permit application. 85 FR 42273. During implementation of the 2020 Rule, some but not all agencies developed their own procedures, and such procedures varied between Federal agencies and across the country.

EPA is finalizing its proposed approach to add regulatory text defining the minimum level of information that must be included in the notification to EPA to provide consistency in practices across Federal agencies and to streamline the notification process. In § 121.12(a), the Agency provides that the notification must be in writing and contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location information (e.g., latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment on the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, the notification shall include a copy of those comments. 40 CFR 121.12(a)(2). Additionally, the notification shall include a copy of the certification or notice of waiver, and the Federal license or permit application. 40 CFR 121.12(a)(1).

EPA is also finalizing the proposed approach allowing the Regional Administrator to submit a written request to a Federal agency upon determining there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to section 401(a)(2). 40 CFR

121.12(b). This provision allows the Regional Administrator to request that such information be provided in a timely manner for EPA's "may affect" determination and provides that the Federal agency "shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe." Likewise, the Agency is finalizing the proposed language allowing the Regional Administrator to develop agreements with Federal agencies to refine the notification process and the provision of supplemental information, in § 121.12(c) of the final rule.

One commenter addressing these proposed provisions argued that the Federal agency should not be required to provide EPA with any information other than the certification or waiver of certification and the Federal license or permit application, because requiring such information would exceed EPA's authority under section 401(a)(2) and could result in burden on the Federal agency and the applicant. The commenter further asserted that if the final rule includes supplemental information requirements for section 401(a)(2) notification, then such information should be limited to existing information that is readily available. EPA disagrees that the provision in § 121.12(b) of the final rule allowing the Regional Administrator to request supplemental information where needed to make a "may affect" determination exceeds the Agency's statutory authority pursuant to section 401(a)(2). The statutory text of section 401(a)(2) does not preclude the Agency from seeking supplemental information in such circumstances, and otherwise does not limit what information the Agency considers in making a "may affect" determination. *See* 33 U.S.C. 1341(a)(2). Additionally, the Agency finds that as a practical matter, it is both reasonable and in the best interests of the Federal licensing or permitting agency and the project proponent for the Agency to have adequate information to inform its "may affect" determination. Although EPA is not creating formalized strictures on the supplemental information the Regional Administrator may request pursuant to § 121.12(b) of the final rule, given the uncertainty of addressing unknown circumstances necessitating such supplemental information, it generally anticipates that such supplemental information would be information readily available to the Federal agency or project proponent.

f. EPA's Role Under Section 401(a)(2)

Section 401(a)(2) provides that whenever a discharge "may affect, as determined by the Administrator, the quality of the waters of any other State," the Administrator must notify the neighboring jurisdiction, Federal agency, and the project proponent of the determination within thirty days of the date of notice of the application. 33 U.S.C. 1341(a)(2). In § 121.13 of the final rule, EPA is finalizing its proposed approach to making a "may affect" determination and providing notification of a determination that a discharge from a project may affect the water quality of a neighboring jurisdiction, although it is doing so with changes to the proposed regulatory text to omit the requirement that EPA provide such notice to a certifying authority, and to provide further clarification that a Federal license or permit cannot be issued without the neighboring jurisdictions processes concluding, as discussed above. EPA is otherwise maintaining its positions regarding the requirement that EPA make a "may affect" determination, the timing of this determination and notification, the meaning of "may affect" and EPA's "may affect" analysis, and procedural and content requirements of "may affect" notification, as reflected in § 121.13 of the final rule and discussed further below.

i. Requirement for EPA To Make "May Affect" Determination

At proposal, EPA stated its interpretation that the statutory text of section 401(a)(2) requires the Agency to determine whether a discharge "may affect" a neighboring jurisdiction once it receives notification of the application and certification or waiver. 87 FR 35367. Therefore, EPA proposed regulatory text in § 121.13(a) providing that the Regional Administrator "shall determine whether a discharge from the certified or waived project may affect water quality in a neighboring jurisdiction." EPA is finalizing the proposed language in § 121.13(a) of the final rule with revisions to remove the term "certified or waived." The removal of "certified or waived" is intended to ensure language conformity across subpart B, and remove redundancy, as § 121.12(a) of the final rule already states that once the Federal agency "has received both the application and either a *certification or waiver*," the Federal agency "shall provide written notification to the appropriate Regional Administrator." 40 CFR 121.12(a) (emphasis added).

Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit application, the certification, and any supplemental information provided to EPA, and, if the Regional Administrator determined that there was "reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates," the Regional Administrator would notify the affected jurisdictions within thirty days of receipt of the Federal license or permit application materials and certification. *See* 40 CFR 121.13 (2019). Similarly, the 2020 Rule acknowledged EPA's responsibility to notify a neighboring jurisdiction whenever it determined that a discharge from the certified activity may affect the water quality of the neighboring jurisdiction. 40 CFR 121.12(b) (2020); 85 FR 42274. However, the 2020 Rule asserted that it was within the Agency's discretion whether to make a "may affect" determination in the first place, and that EPA was, therefore, not required to make such a determination. 85 FR 42273.

To date, EPA is only aware that one Federal district court has addressed EPA's obligation to make a determination pursuant to section 401(a)(2). In *Fond du Lac Band of Lake Superior Chippewa v. Wheeler*, 519 F. Supp. 3d 549 (D. Minn. 2021), the court addressed two issues concerning section 401(a)(2): (1) whether EPA is required to make a "may affect" determination and (2) whether EPA's "may affect" determination is judicially reviewable. The court concluded that EPA is required to determine whether the discharge may affect the quality of a neighboring jurisdiction's waters pursuant to section 401(a)(2). In coming to this conclusion, the court examined the statutory text and found that it requires EPA to make "a discrete factual determination . . . within a specific timeframe . . . based on an application and certification. . . ." *Id.* at 564. The court found that "the existence of such a clear and limited timeframe supports the argument that the statute imposes a duty on EPA to make a 'may affect' determination." *Id.* Further, the court concluded that Federal courts have the jurisdiction to review EPA's "may affect" determination.¹⁰⁴

The Agency agrees with the court in *Fond du Lac* that EPA, pursuant to section 401(a)(2), must determine whether a discharge "may affect" a

¹⁰⁴ Notably, the court in *Fond du Lac* did not opine on the specific meaning of "may affect" or factors that EPA should consider in making a "may affect" determination. *See* 519 F. Supp. 3d 549.

neighboring jurisdiction once it receives notification of the Federal license or permit application and certification or waiver from the Federal agency consistent with § 121.12(a) of the final rule. As discussed by the court in *Fond du Lac*, the statutory language in section 401(a)(2), which requires the Agency to provide notification within a set timeframe to a neighboring jurisdiction when it finds that discharge from the project may affect its water quality, supports finding that EPA is required to make a “may affect” determination. See *Fond du Lac*, 519 F.Supp.3d at 563–64. Accordingly, the Agency is finalizing language in § 121.13(a) of the final rule, with the modifications discussed above, to reflect this interpretation and clarify that the Regional Administrator shall make this determination, consistent with the Agency’s interpretation of section 401(a)(2).

EPA received comments regarding its interpretation of section 401(a)(2) requiring the Agency to make a “may affect” determination, and commenters were divided on whether EPA is required to make a “may affect” determination. Some commenters agreed with EPA’s interpretation and the language in the proposal stating that section 401(a)(2) requires EPA to make a “may affect” determination upon receiving notice from the Federal licensing or permitting agency. Reasons cited for supporting this position included the rationale provided by the court in *Fond du Lac*, cited by some commenters, and the assertion that this approach better allows neighboring jurisdictions to protect their water quality and provides transparency regarding the Agency’s actions.

Some other commenters asserted that section 401 provides EPA discretion whether to make a “may affect” determination, and that EPA need not make this determination with regard to all Federal licenses or permits subject to section 401. In addition to asserting the position, taken in the 2020 Rule, that the statutory language provides EPA discretion as to whether to make a “may affect” determination, some of these commenters otherwise argued that requiring EPA to make a “may affect” determination for all Federal licenses or permits subject to section 401 would be an inefficient use of EPA resources and would result in unnecessary delays in the Federal licensing or permitting process.

EPA finds that the statutory language in section 401(a)(2) provides EPA discretion when making a “may affect” determination. However, the Agency does not agree that the statutory text provides EPA with discretion to decide

that the Agency will not make a may affect determination following appropriate notification from the Federal agency. As noted by the court in *Fond du Lac*, this interpretation would be inconsistent with the statutory text of section 401(a)(2) directing the Agency to provide notification within a set timeframe to a neighboring jurisdiction when it finds that a discharge from a project may affect its water quality. See *Fond du Lac*, 519 F.Supp.3d at 563 (noting that it would be odd “if a decisionmaker . . . was mandated by law to do everything that was necessary to make a particular type of decision . . . but was not mandated by law to actually *make* the decision.”). Given the Agency’s interpretation that it is required to make a “may affect” determination upon appropriate notification from the Federal licensing or permitting agency pursuant to section 401(a)(2), the Agency finds that use of resources for this purpose is necessary to comply with the statute. Finally, the Agency rejects the argument that making “may affect” determinations in accordance with § 121.13(a) of the final rule will add unnecessary delays to the Federal licensing or permitting process, as the Agency is finding that it is required to make a “may affect” determination pursuant to section 401(a)(2), and the statutory text provides a set, relatively short, timeframe for the Agency to make this determination (30 days). See 33 U.S.C. 1341(a)(2).

ii. Timing of EPA’s “May Affect” Determination and Notification

As previously discussed, section 401(a)(2) requires EPA to provide notification “within thirty days of the date of notice of application for such Federal license or permit” to the neighboring jurisdiction, the Federal Agency, and the project proponent whenever it determines that a discharge from a project may affect the water quality of a neighboring jurisdiction. 33 U.S.C. 1341(a)(2). EPA finds that the “notice of application for such license or permit” references the prior statutory text of section 401(a)(2) requiring the Federal agency to immediately notify the Administrator “[u]pon receipt of such application and certification.” See section IV.K.2.e in this preamble for discussion regarding timing of Federal agency notification to EPA pursuant to section 401(a)(2). Accordingly, EPA finds that section 401(a)(2) provides EPA with a 30-day period to make its “may affect” determination and provide any required notification after receiving notice from the Federal agency of the Federal license or permit application and certification or waiver. EPA has,

therefore, incorporated this 30-day period into the provisions it is finalizing in § 121.13(a) and (b) regarding its “may affect” determination and “may affect” notification, as it proposed. This is consistent with the approach taken in the 2020 Rule, which also provided a 30-day period for the EPA to make a “may affect” determination and provide “may affect” notification following appropriate notice from the Federal agency. See 40 CFR 121.12 (2020).

A few commenters discussed the period EPA is provided to make a “may affect” determination or “may affect” notification. One commenter argued that 30 days is too long of a period for EPA to make “may affect” determinations, and suggested EPA limit the timeframe to complete these determinations to 15 days. Another commenter requested that EPA establish a reasonable period of time to provide notification to the Federal agency and certifying authority calculated from the date the individual certification is issued for purposes of avoiding unnecessary permitting delays. As discussed above, the statute provides EPA with a 30-day period to make a “may affect” determination and provide any required notification, and EPA declines to shorten the time period for the Agency to take such actions. EPA notes that the 2020 Rule also provided a 30-day timeframe for the Agency to perform these actions, and EPA did not find that this approach resulted in unnecessary Federal licensing or permitting delays. Accordingly, the Agency finds it reasonable to retain the 30-day period reflected in statute for making a “may affect” determination and providing any required notification.

iii. EPA’s “May Affect” Determination and “May Affect” Standard

Section 401(a)(2) provides that EPA makes the “may affect” determination in the neighboring jurisdictions process, as discussed above, but notably does not delineate specific factors for the Agency to consider in determining whether a discharge from a project may affect the water quality of a neighboring jurisdiction. See 33 U.S.C. 1341(a)(2). Likewise, the 2020 Rule did not address in either preamble or regulatory text whether there are specific factors that the EPA considers in making a “may affect” determination or whether any other interested party can be involved in making this determination. See 85 FR 42273. During the pre-proposal outreach, stakeholders raised concerns that EPA had not clearly identified what factors it intended to use in determining whether a discharge “may affect” the water quality of a neighboring jurisdiction. Stakeholders also objected

to EPA asserting sole discretion over this “may affect” determination without obtaining input from the neighboring jurisdiction or other stakeholders.

In the preamble to the proposed rule, EPA asserted that the Agency, in making a “may affect” determination, has discretion to look at a variety of factors depending on the type of Federal license or permit and discharge. 87 FR 35367. EPA further stated that factors it may consider in making a “may affect” determination include but are not limited to the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to other jurisdictions, certification conditions and other conditions already contained in the draft Federal license or permit, and the neighboring jurisdiction’s water quality requirements. 87 FR 35367–68. The Agency clarified that it was not proposing to identify specific factors EPA must analyze in making a “may affect” determination, given the range of Federal licenses or permits that are covered by CWA section 401(a)(2) and EPA’s discretion to look at various factors. 87 FR 35368. The Agency noted that each “may affect” determination is likely to be fact-dependent and based on situation-specific circumstances and expressed uncertainty that it could provide a required list of factors for it to consider in making a “may affect” determination. *Id.* However, the Agency solicited comment on whether such a list of specific factors that EPA must consider in making a “may affect” determination should be set forth in regulation and, if so, what factors should be included. *Id.*

Additionally, in the proposal, the Agency clarified its position that it has sole discretion under section 401(a)(2) to examine the facts and determine whether the discharge “may affect” the quality of a neighboring jurisdiction’s waters once it receives notice from a Federal agency initiating its obligation to make a “may affect” determination. 87 FR 35368. As a result, EPA stated that the Agency is not required to engage with stakeholders or seek their input in making this determination, and otherwise noted interested parties may have recourse under the Administrative Procedure Act, as discussed in *Fond du Lac* case. *Id.*; see also *Fond du Lac*, 519 F.Supp.3d at 565–67. However, EPA stated that it intends to consider the views of neighboring jurisdictions in making its “may affect” determination if such views are provided in a timely manner. *Id.* Specifically, the Agency proposed regulatory language in § 121.12(a), as discussed above, to define the contents of a Federal agency’s

notification to EPA to include an indication of whether any neighboring jurisdictions have expressed water quality concerns or provided such comment on the project.¹⁰⁵

The Agency is maintaining its position that it has sole discretion, pursuant to section 401(a)(2), to examine the facts and determine whether the discharge “may affect” the quality of a neighboring jurisdiction’s waters. This interpretation regarding the Agency’s discretion is consistent with the statutory language of section 401(a)(2), which directs EPA to notify neighboring jurisdictions “[w]henver such a discharge may affect, as determined by the Administrator. . . .” 33 U.S.C. 1341(a)(2) (emphasis added). The Agency is further maintaining its position that EPA is not required to engage with stakeholders or seek their input in making a “may affect” determination. However, as previously discussed, the Agency may consider the neighboring jurisdiction’s views on the effect of a discharge from the project on its water quality as a factor in making a “may affect” determination. Further, in § 121.12(a) of the final rule, EPA is finalizing the proposed regulatory text defining the contents of a Federal agency’s notification to EPA to include an indication of whether any neighboring jurisdictions have expressed water quality concerns or provided such comment on the project. This provision may increase EPA’s awareness of water quality concerns raised by neighboring jurisdictions at the time the Agency receives notice prompting it to make a “may affect” determination, and EPA reiterates its intention to consider such views of neighboring jurisdictions if provided in a timely manner.

Some commenters disagreed with EPA’s position on the role of neighboring jurisdictions or other stakeholders during in its “may affect” process. A few commenters suggested that EPA consult with or involve neighboring jurisdictions in making “may affect” determinations. Additionally, a commenter argued that it was appropriate and reasonable for EPA to solicit input from the project proponent and Federal licensing or permitting agency in the process of making a “may affect” determination. EPA finds its position regarding its sole discretion in making a “may affect” determination and the role of

stakeholders, including neighboring jurisdictions, in such a determination is reasonable and consistent with the statutory text of section 401(a)(2). Section 401(a)(2) specifically recognizes EPA’s discretion in making a “may affect” determination, and does not establish a role for stakeholders in EPA’s determination. Further, section 401(a)(2) provides EPA with only 30 days to make a “may affect” notification and provide any required notification to neighboring jurisdictions. EPA does not find the limited period of time that the statute affords the Agency for its “may affect” determination and any required notification consistent with a process in which it engages stakeholders and solicits their input, and imposing such a process would burden the Agency. Accordingly, EPA declines to adopt such a process for “may affect” determinations.

EPA is not further defining the meaning of “may affect” in section 401(a)(2), aside from identifying factors that it may consider in making a “may affect” determination, as the statutory language provides sufficient clarity that this standard is met “[w]henver such a discharge may affect, as determined by the Administrator, the quality of the waters” of a neighboring jurisdiction. 33 U.S.C. 1341(a)(2). Some commenters sought, or offered, further interpretations of the “may affect” standard in section 401(a)(2). Such commenters asserted differing interpretations of the meaning of the “may affect” standard, including recommending that EPA make an actual demonstration that there may be an effect and suggesting that it is a low threshold (*i.e.*, some reasonable possibility an effect may exist). As stated above, EPA is not defining the meaning of the “may affect” standard. This standard is necessarily broadly applicable, as it must be applied to differing Federal licenses and permits in a wide range of factual circumstances. Moreover, section 401(a)(2) recognizes the Administrator’s discretion applying this standard in a “may affect” determination.

Although EPA is not attempting to further define the “may affect” standard in the final rule, it notes that this standard is distinguishable from the standard that notified neighboring jurisdictions apply to make a determination regarding an objection, which is whether “such discharge will affect the quality of its waters so as to violate any water quality requirements” in its jurisdiction. See 33 U.S.C. 1341(a)(2). Unlike the standard applied by notified neighboring jurisdictions in making a determination regarding an

¹⁰⁵ The Agency notes, as it did at proposal, that there are other opportunities for stakeholders to provide input into the certification and Federal licensing or permitting process, including the public notice and comment processes on the certification and the Federal license or permit.

objection, the standard applied by EPA in its “may affect” analysis does not require consideration of whether water quality effects of discharge from the project will result in violation of water quality requirements. Instead, the standard applied by EPA in its “may affect” determination only requires analysis of whether discharge from the project may have water quality effects on a neighboring jurisdiction.¹⁰⁶ Additionally, the “may affect” standard, in contrast to the standard applied by notified neighboring jurisdictions, does not require a finding that the discharge “will” effect water quality. Accordingly, EPA finds this standard may be met where there may be an effect to a neighboring jurisdiction’s water quality, but such effect is not certain to occur.

EPA is finalizing the proposed approach to identify factors that EPA may consider in making a “may affect” determination and is not establishing specific factors that EPA must analyze in making a “may affect” determination. EPA is also reiterating the factors that it identified in the preamble of its proposal as factors it may consider in making a “may affect” determination. Accordingly, EPA is identifying that such factors include, but are not limited to, the type of project and discharge covered in the Federal license or permit, the proximity of the project and discharge to neighboring jurisdictions, certification conditions and, as applicable, other conditions already contained in the draft Federal license or permit, the neighboring jurisdiction’s water quality requirements, and the views of the neighboring jurisdiction on the effect of discharge from the project on its water quality. Based on public comments, EPA is also identifying additional factors it may consider. Specifically, EPA may consider the current water quality and characteristics of the water receiving the discharge in making a “may affect” determination. However, EPA reiterates that it is neither limited to considering, nor required to consider, the factors identified here.

With regard to the Agency’s proposed approach of identifying factors it may consider in making a “may affect” determination, most commenters addressing this approach supported EPA providing some identification of such factors in the final rule. Such commenters noted that identification of factors clarifies and provides broader understanding of the EPA’s process in making a “may affect” determination

and could improve efficiency in making this determination. Some commenters agreed that EPA has discretion in making a “may affect” determination, but asserted that this discretion is constrained by the statutory bounds of section 401.

However, commenters were notably divided on the approach the Agency should take to identifying these factors. Some commenters recommended that EPA establish an exclusive list of factors it considers in making “may affect” determinations, limiting the factors considered in each determination to only those identified on this list. Commenters supporting this position collectively asserted that this approach would limit subjectivity in such determinations, increase predictability, and allow Federal agencies and project proponents to better plan for these determinations. Other commenters supported EPA codifying a list of factors it must consider in making a “may affect” determination, but providing that EPA may consider other factors. In contrast, some other commenters supported EPA’s proposed approach to identify examples of factors the Agency may consider, but did not recommend requiring EPA to consider factors in recognition of the fact-dependent nature of “may affect” determinations.

EPA agrees that its discretion regarding making a “may affect” determination is bounded by the statutory grant of authority in section 401. EPA disagrees with the approaches suggested by certain commenters that EPA identify either an exclusive list of factors for the Agency to consider in making this determination, or establish a minimum list of factors that EPA must consider, as these approaches do not recognize the fact-dependent nature of a “may affect” determination and do not provide the flexibility necessary for the Agency to make “may affect” determinations involving different types of licenses and permits. Identifying an exclusive list of factors for the Agency to consider in making a “may affect” determination could preclude the Agency from considering important information relevant to determining whether discharge from a project may affect the water quality of a neighboring jurisdiction. Additionally, this approach does not appear to be consistent with the statutory language in section 401(a)(2), which does not impose limitations on the information the Agency may consider in making this determination, but rather recognizes the Agency’s discretion in making this determination. Likewise, establishing a minimum list of factors that EPA must consider in a “may affect”

determination could require the Agency to consider factors even where they are not relevant to determining whether discharge may affect the water quality of a neighboring jurisdiction. This approach would not prove efficient, which is of particular concern as the Agency is only afforded 30 days to make a “may affect” determination and provide any required “may affect” notification. Instead, the Agency finds that identifying examples of factors that it may consider in making a “may affect” determination, as it has above, provides greater clarity without inappropriately limiting the Agency from considering other relevant factors or requiring it to apply factors where they are irrelevant.

iv. “May Affect” Notification

If EPA determines that a discharge from a project may affect a neighboring jurisdiction’s water quality, section 401(a)(2) requires EPA to notify the neighboring jurisdiction, Federal agency, and the project proponent. 33 U.S.C. 1341(a)(2). As previously discussed, EPA must provide such notification within 30 days from notice provided by the Federal agency in accordance with section 401(a)(2). *See id.*; section IV.K.2.f.ii in this preamble for discussion on timing of EPA’s may affect finding and any resulting notice. Notably, a finding by EPA that a discharge from a project may affect a neighboring jurisdiction’s water quality pursuant to section 401(a)(2) is often referred to as a “may affect” finding, and the resulting notification of this finding is referred to as a “may affect” notification. Section 401(a)(2) does not require EPA to provide notification in circumstances where it has completed its “may affect” determination but has not found that a discharge from the project may affect a neighboring jurisdiction’s water quality (*i.e.*, has not made a “may affect” finding). *See* 33 U.S.C. 1341(a)(2). Accordingly, in its proposal, EPA stated that it is not required to provide notification of its “may affect” determination in such circumstances. Consistently, EPA further stated that if a Federal agency does not receive notification from EPA that a discharge may affect a neighboring jurisdiction’s water quality within 30 days after the proper notice, then the Federal agency may proceed with processing the Federal license or permit. 87 FR 35368.

EPA received comments relating to its “may affect” notification in the neighboring jurisdictions process. A few commenters expressed concern that EPA is not required to provide a response when not finding that a

¹⁰⁶ *See* section IV.E of this preamble for further discussion on the breadth of water quality effects that may be considered under section 401.

discharge may affect the water quality of a neighboring jurisdiction and suggested that lack of a response could have meaning other than this finding. Some of these commenters proposed that EPA provide notification to neighboring jurisdictions in circumstances where the Agency's "may affect" determination does not result in "may affect" finding, or otherwise suggested that the Agency provide public notice regarding its "may affect" determination. Some commenters supporting these approaches to notification asserted that they would increase transparency regarding EPA's "may affect" determination and inform interested parties regarding this determination.

In consideration of the statutory constraints on EPA to make a "may affect" determination and provide "may affect" notification within 30 days of proper notice from the Federal agency, EPA is not expanding the notification requirements beyond the circumstances and to the parties it is required to provide such notification pursuant to section 401(a)(2). The neighboring jurisdictions process established in section 401(a)(2) does not direct the EPA to provide notification outside of circumstances in which the Agency has determined that a discharge from the project may affect a neighboring jurisdiction's water quality. Likewise, the statutory language does not provide for "may affect" notification to other parties besides the relevant neighboring jurisdiction, the Federal agency, and the project proponent. *See* 33 U.S.C. 1341(a)(2). Accordingly, the statutory language reflects a more limited process for the Agency to provide "may affect" notification than suggested by certain commenters, which is consistent with the limited duration of time afforded the Agency for making a "may affect" determination and providing such notification in section 401(a)(2). Given the limited 30-day period for Agency action in this context, and in consideration of the overall volume of "may affect" determinations made by the Agency, EPA finds it reasonable to maintain the notification requirements established in the statutory text of section 401(a)(2), and is not expanding these requirements beyond the statutory bounds.

In addition to incorporating the notification requirements on EPA in section 401(a)(2) pertaining to a "may affect" finding, the 2020 Rule established additional procedures for EPA in providing such notification. The 2020 Rule required EPA to provide such notification to the certifying authority, as well as the neighboring jurisdiction, Federal agency, and the project

proponent. 40 CFR 121.12(c) (2020). Additionally, the 2020 Rule required the notification to be dated and in writing and established certain requirements on the content of such notification. 40 CFR 121.12(c)(1) (2020). Specifically, the 2020 Rule required that the notification identify the materials provided by the Federal agency and inform the neighboring jurisdiction that it had 60 days to notify the Administrator and the Federal agency, in writing, whether it had determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency. *Id.* In contrast, the 1971 Rule did not define the contents of a "may affect" notification from EPA to a neighboring jurisdiction, Federal agency, and project proponent. However, the 1971 Rule required EPA to send the neighboring jurisdiction a copy of the application and certification it received to initiate the neighboring jurisdictions process. 40 CFR 121.14 (2019).

EPA proposed retaining regulatory text similar to that in the 2020 Rule requiring EPA to provide the "may affect" notification to the neighboring jurisdiction, Federal agency, the project proponent, and the certifying authority. The Agency further proposed maintaining content requirements for the "may affect" notification, but proposed revising these requirements to establish that the notification shall be in writing and shall include a statement that the Agency has determined that the discharge may affect the neighboring jurisdiction's water quality, as well as a description of the next steps in the neighboring jurisdictions process, a copy of the certification or waiver, and a copy of the Federal license or permit application.

In § 121.13(b) and (c) of the final rule, EPA is finalizing the proposed approach for providing a "may affect" notification with minor changes to the content requirements for a "may affect" notification and the omission of the requirement that EPA provide such notice to a certifying authority. As noted above, EPA revised the proposed text of § 121.13(c), addressing the contents of the Regional Administrator's "may affect" notification, to conform the statement that the Agency provides to notified neighboring jurisdictions more closely with the statutory text of section 401(a)(2) and provide greater clarity about notification needed for an objection. Rather than providing a statement that the notified neighboring jurisdiction "has 60 days" to provide written notification "whether it has

determined that the discharge will violate any of its water quality requirements," as proposed in § 121.13(c)(3), the final rule states that the Agency provides a statement that the notified neighboring jurisdiction "has 60 days after such notification" from the Agency to provide written notification "if it has determined that the discharge will violate any of its water quality requirements." 40 CFR 121.13(c)(3). This revision ensures that the "may affect" notification reflects the statutory text of section 401(a)(2) and more clearly conveys the statutory time and content requirements of the notification needed for an objection than the proposed regulatory text.

Likewise, as previously mentioned, § 121.13(b) and (c) of the final rule was revised to omit the requirement that EPA provide the "may affect" notification to the certifying authority. Although the 2020 Rule required EPA to provide the "may affect" notification to the certifying authority, and proposed retaining this provision, EPA is omitting such notification to the certifying authority in the final rule to more closely reflect the statutory language in section 401(a)(2), which does not require such notification to the certifying authority. This is consistent with the Agency's approach in the final rule to likewise remove language from the proposed regulatory text requiring a notified neighboring jurisdiction to provide notification to the certifying authority in § 121.14. Both changes reflect the structure of the neighboring jurisdictions process established in section 401(a)(2), which does not provide a specified role for the certifying authority.

In addition to EPA's role in the neighboring jurisdictions process to make a "may affect" determination and provide "may affect" notification, as addressed in § 121.13 of the final rule and described above, the Agency also has a role at a hearing on an objection of a notified neighboring jurisdiction, which is reflected in § 121.15(c) of the final rule and discussed further below. *See* section IV.K.2.h in this preamble for discussion of the Agency's role to provide its evaluation and recommendations concerning the objection at such hearing and § 121.15(c).

g. Neighboring Jurisdiction's Role Under Section 401(a)(2)

CWA section 401(a)(2) provides that if, within 60 days after receipt of EPA's "may affect" notification, a neighboring jurisdiction determines that such discharge will affect the quality of its waters so as to violate any water quality

requirements in its jurisdiction, and within such 60-day period notifies the Administrator and the Federal licensing or permitting agency in writing of its objection to the issuance of such Federal license or permit and requests a public hearing, the Federal licensing or permitting agency shall hold a public hearing on the objection. 33 U.S.C. 1341(a)(2). Therefore, only neighboring jurisdictions notified by EPA may object to issuance of a Federal license or permit and request a hearing on this objection pursuant to section 401(a)(2). Further, in order for a notified neighboring jurisdiction to make an objection, it must (1) determine that a discharge from the project for which it received such notification will affect the quality of its waters so as to violate any of its water quality requirements, and (2) provide written notification of its objection and request for hearing to EPA and the Federal licensing or permitting agency within sixty days after receipt of notification from EPA. Notably, the determination made by a notified neighboring jurisdiction as to whether a discharge from the project will affect the quality of its waters so as to violate any water quality requirements is often referred to as a “will violate” determination. The provisions in the final rule regarding a notified neighboring jurisdiction’s “will violate” determination and notification of objection and request for hearing are discussed below.

i. “Will Violate” Determination and Standard

Under section 401(a)(2), a notified neighboring jurisdiction’s “will violate” determination is based upon whether a discharge from the project “will affect the quality of its waters so as to violate any water quality requirements” in its jurisdiction. 33 U.S.C. 1341(a)(2). EPA incorporated this standard in the proposed text of § 121.14(a), which reflected that the neighboring jurisdiction “determines that a discharge will violate any of its water quality requirements.” However, EPA did not propose to further define the “will violate” standard applied by notified neighboring jurisdictions, or otherwise identify specific factors that neighboring jurisdictions may or must consider in making this determination.

EPA is revising the proposed text of § 121.14 to clarify that the “will violate” determination is made only by a notified neighboring jurisdiction, and is therefore adding text to § 121.14(a) providing that a “will violate” determination is made by “a neighboring jurisdiction notified by the Regional Administrator pursuant to

§ 121.13(b),” and is otherwise revising references to “the neighboring jurisdiction” in the proposed text to “the notified neighboring jurisdiction” in § 121.14 of the final rule. EPA is otherwise modifying the text of § 121.14(a) to further reflect that the notified neighboring jurisdiction is evaluating “discharge from the project.” 40 CFR 121.14. These changes were made to add clarity, as pursuant to section 401(a)(2), only notified neighboring jurisdictions make a “will violate” determination, and this determination evaluates discharge from the project for which the neighboring jurisdiction received such notification from EPA. *See* 33 U.S.C. 1341(a)(2). EPA is otherwise maintaining the proposed approach in the final rule to not further define the “will violate” standard in regulation or identify factors for consideration in making this determination.

EPA received comment related to the “will violate” standard applied by notified neighboring jurisdictions. One commenter requested that EPA modify proposed § 121.14 to ensure that the regulation reflects that the “will affect” standard includes a discharge’s contributions to water quality violations and that the discharge itself does not have to be the sole cause of the water quality violation. EPA finds that the statutory text of section 401(a)(2), and the consistent text of § 121.14(a), sufficiently establish the “will violate standard,” and therefore declines to further define this standard. Like the Agency’s “may affect” standard, the “will violate” standard is necessarily broadly applicable, as it must be applied to differing Federal licenses and permits in a wide range of factual circumstances. Accordingly, the Agency is not modifying § 121.14 as suggested by the commenter; however, EPA agrees that the “will violate” standard includes a discharge’s contributions to water quality violations. Therefore, the neighboring jurisdiction does not have to find that the discharge itself violates water quality requirements and, instead, can find that the discharge contributes to violations of water quality requirements to determine the “will violate” standard is met. EPA further notes that the public, including interested stakeholders, will have the opportunity to participate in any hearing on an objection conducted by the Federal licensing or permitting agency, pursuant to section 401(a)(2) and § 121.15 of the final rule.

ii. Notification of Objection and Request for Hearing

As previously noted, section 401(a)(2) requires a notified neighboring jurisdiction to provide written notification of its objection and request for hearing to EPA and the Federal licensing or permitting agency within sixty days after receipt of notification from EPA in order to raise an objection. *See* 33 U.S.C. 1341(a)(2). The statutory text, however, does not further describe the contents of this written notification. The 1971 Rule did not describe the contents or form that such an objection notification must take. However, the 2020 Rule provided that “[n]otification of objection and request for a hearing from the neighboring jurisdiction shall: be in writing; identify the receiving waters it determined will be affected by the discharge; and identify the specific water quality requirements it determines will be violated by the certified project. 40 CFR 121.12(c)(2) (2020); 85 FR 42274.

EPA proposed to revise the specific regulatory requirements for what a neighboring jurisdiction is required to include in an objection notification and request for hearing sent pursuant to section 401(a)(2) in proposed § 121.14(b). Consistent with the statutory text of section 401(a)(2), the Agency proposed to retain the requirement that the objection be in writing. Additionally, EPA proposed that the notification of objection and request for hearing from the notified neighboring jurisdiction include “[a] statement that the neighboring jurisdiction objects to the issuance of the Federal license or permit” (proposed § 121.14(b)(1)), and “[a] request for a public hearing from the Federal agency on its objection” (proposed § 121.14(b)(3)). However, rather than requiring the notified neighboring jurisdiction to identify the receiving waters affected by the discharge and the specific water quality requirements violated as required in the 2020 Rule, EPA proposed in § 121.14(b)(2) that the notification include “[a]n explanation of the reasons supporting the neighboring jurisdiction’s determination that the discharge will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated.” EPA proposed in § 121.14(a), that the notification of objection and request for hearing from the notified neighboring jurisdiction be made “within 60 days after receiving notice in accordance with § 121.13(c),” and otherwise that such notification be made to the Regional Administrator, the

Federal agency, and the certifying authority.

In § 121.14, the Agency is finalizing the proposed contents of a notification of objection and request for hearing from a notified neighboring jurisdiction with modifications for purposes of adding clarity and more closely conforming this regulatory text with section 401(a)(2). Consistent with revisions throughout §§ 121.14 and 121.15 in the final rule, EPA revised references to “the neighboring jurisdiction” in the proposed text of § 121.14 to “the notified neighboring jurisdiction” in the final rule to clarify that pursuant to section 401(a)(2) only a neighboring jurisdiction notified by EPA makes a “will violate” determination and may provide notification of an objection and request a hearing. Likewise, consistent with revisions throughout Subpart B of the final rule, EPA revised § 121.14 of the final rule to clarify that the “discharge” that the notified neighboring jurisdiction considered in its “will violate” determination is “discharge from the project” in accordance with section 401(a)(2). Otherwise, EPA is maintaining the requirements that the notification of objection and request for hearing be in writing and include (1) a statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit, (2) an explanation of the reasons supporting the notified neighboring jurisdiction’s determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated, and (3) a request for public hearing from the Federal agency on the notified neighboring jurisdiction’s objection.

EPA received comments regarding the contents of a notification of objection and request for hearing from a notified neighboring jurisdiction. Some commenters stated that EPA should eliminate any content requirements that go beyond the express language in section 401(a)(2), including an explanation of the reasons supporting the determination that the discharge will violate water quality requirements. More specifically, these commenters objected to the requirement that the neighboring jurisdiction identify the water quality requirements that will be violated on the basis that this requirement is too burdensome on the notified neighboring jurisdiction. Other commenters concurred that the objection should include identifiable and justifiable reasons supporting the determination that the discharge will

violate water quality requirements. In addition, some commenters stated that the neighboring jurisdiction should be required to include a citation to the water quality requirements that it believes will be violated.

EPA does not find that § 121.14(b) is too burdensome on the notified neighboring jurisdiction, and otherwise finds it reasonable that the notified neighboring jurisdiction’s notification of an objection and request for hearing include an explanation of the reasons supporting the “will violate” determination. Section 401(a)(2) of the CWA states that a notified neighboring jurisdiction may make an objection and request a hearing “[i]f . . . [the neighboring jurisdiction] *determines* that such discharge will affect the quality of its waters so as to violate any water quality requirements. . . .” 33 U.S.C. 1341(a)(2) (emphasis added). To accomplish this, the neighboring jurisdiction necessarily must consider its water quality requirements and complete an analysis or evaluation to determine that a discharge from the project will violate such water quality requirements. All EPA is requiring in § 121.14(b)(2) of the final rule is that the neighboring jurisdiction provide an explanation of that analysis or evaluation in its notification of objection and request for hearing, including the identification of the water quality requirements that will be violated. This will inform the Federal licensing or permitting agency, EPA, and the project proponent of the reasoning for the objection; allow the Federal agency and EPA to prepare for a hearing on the objection; and may assist in determining whether there is a way to resolve the objection before the public hearing. EPA finds this requirement is reasonable to inform the neighboring jurisdictions process and does not find it imposes an unreasonable burden on the notified neighboring jurisdiction.

Some commenters recommended that EPA require the neighboring jurisdiction to identify a Federal license or permit condition(s) that it thinks would resolve the objection in its notification of objection and request for hearing. Conversely, one commenter stated that EPA should not require the neighboring jurisdiction to provide conditions that would resolve the objection. EPA is not requiring the notified neighboring jurisdiction to include conditions with its objection notification and request for hearing; however, EPA recommends that the neighboring jurisdiction provide Federal license or permit conditions that will resolve the objection, if this is possible. Identifying

conditions to resolve an objection, where possible, may help inform the hearing process, and could also help resolve an objection in advance of a hearing. In circumstances where the notified neighboring jurisdiction does not find any conditions would resolve the objection, EPA notes that the neighboring jurisdiction could simply state this in its objection notification and hearing request.

A few commenters asserted that the project proponent, as opposed to the neighboring jurisdiction, has the burden to show that a Federal license or permit should be issued. EPA observes that section 401(a)(2) only provides the notified neighboring jurisdiction, the Federal licensing or permitting agency, and EPA with explicit roles and duties in the neighboring jurisdictions process. CWA section 401(a)(2) requires the neighboring jurisdiction to determine whether the discharge will violate its water quality requirements after EPA makes a “may affect” determination, and if so, object to the issuance of the Federal license or permit and request a public hearing. After that, if the neighboring jurisdiction does not withdraw its objection, the Federal licensing or permitting agency must hold a public hearing and determine whether any conditions are necessary to ensure that the neighboring jurisdiction’s water quality requirements are met. *See* 33 U.S.C. 1341(a)(2) (“Such Agency . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.”). Section 401(a)(2) does not provide an explicit role for the project proponent in the neighboring jurisdictions process, although the project proponent may provide input at the public hearing. Accordingly, this final rule cannot require a project proponent to demonstrate that a Federal license or permit should be issued through the neighboring jurisdictions process.

Some commenters asserted that the neighboring jurisdiction should be required to identify the “potentially affected” receiving water in an objection notification and request for hearing. This request appears similar to language in the 2020 Rule that required a notified neighboring jurisdiction to “identify the receiving waters it determined will be affected by the discharge.” 40 CFR 121.12(c)(2) (2020). One of these commenters stated that failure to identify the receiving water makes it impossible to determine the validity of the concerns raised to resolve the neighboring jurisdiction’s concerns and allows the neighboring jurisdiction to

raise arbitrary concerns to slow down the Federal licensing or permitting process.

EPA declines to require the notified neighboring jurisdiction to specifically identify affected receiving waters in its notification of objection and request for hearing. However, as EPA noted in its proposal, the Agency anticipates that this information is likely to be included in a notified neighboring jurisdiction's explanation of the reasons supporting its "will violate" determination, and EPA encourages neighboring jurisdictions to include this information where possible, as it may assist the Federal agency in evaluating the objection. As the notified neighboring jurisdiction has a limited time period of 60-days to make its "will violate" determination and issue any notification of an objection and request for hearing, imposing a requirement that this notification identify all waters where discharge will violate water quality requirements may not be feasible in all circumstances. Accordingly, EPA is not including this requirement.

In addition to the requirements regarding the content of a notification of objection and request for hearing, EPA is also finalizing the procedural requirements in § 121.14(a) with some modifications for purposes of added clarity and consistency with section 401(a)(2). Consistent with the statutory language in section 401(a)(2), EPA is retaining the requirement that the notified neighboring jurisdiction provide notification of its objection and request for hearing within 60 days of a "may affect" notice from EPA but is updating the internal citation to reflect that this notification is provided by the Regional Administrator "pursuant to § 121.13(b)" of the final rule. Additionally, as mentioned above, EPA is removing the requirement in the proposed regulatory text that a notified neighboring jurisdiction provide notification to the certifying authority in order to more closely reflect the statutory language in section 401(a)(2), which does not require notification to the certifying authority.

EPA received comments regarding its proposal to require the notified neighboring jurisdiction to send the "will affect" notification to the certifying authority, as well as to the Federal licensing or permitting agency and Regional Administrator. Some commenters supported this proposed approach. Conversely, another commenter stated that the neighboring jurisdiction should not be required to send the notification to the certifying authority because there is no statutory basis for this requirement and CWA

section 401(a)(2) provides no role for the certifying authority. As noted, in the final rule, EPA has eliminated the requirement that the notified neighboring jurisdiction send the notification to the certifying authority to conform the regulatory text more closely with the statutory language in section 401(a)(2), which does not require notification to the certifying authority. EPA agrees that, unlike the Regional Administrator and the Federal agency, the certifying authority does not have a specific role under CWA section 401(a)(2). In fact, the neighboring jurisdictions process occurs *after* the certifying authority has acted on a request for certification. However, like the project proponent, the certifying authority may participate in the neighboring jurisdictions process by providing comments during the public hearing. EPA encourages the Federal agency to involve the certifying authority in conversations that occur prior to the public hearing, if it believes that the certifying authority may have information that could inform discussions with the notified neighboring jurisdiction.

iii. Withdrawal of Objection Prior to Hearing

CWA section 401(a)(2) states that if a notified neighboring jurisdiction notifies EPA and the Federal agency "in writing of its objection to the issuance of [the] license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing." 33 U.S.C. 1341(a)(2). Therefore, for a hearing to be required under section 401(a)(2), there must be (1) a written objection from the notified neighboring jurisdiction and (2) a request for a public hearing on the objection. *Id.* EPA proposed that if one of these elements were not present, then the Federal agency would not be required to hold a hearing and requested comment on whether to develop regulatory text for a process where the neighboring jurisdiction could withdraw its objection and eliminate the requirement to hold a public hearing. 87 FR 35370.

EPA received numerous comments recommending that it include language allowing notified neighboring jurisdictions to withdraw their objections before the hearing, thus, eliminating the need to hold a public hearing. Some of these commenters stated that allowing the neighboring jurisdiction to withdraw its objection is in line with section 401's cooperative federalism scheme, while other commenters stated that allowing for withdrawal provides for efficiency in

the Federal licensing or permitting process. EPA agrees that including a provision addressing withdrawal of an objection improves the efficiency of the neighboring jurisdictions process, as it recognizes the possibility that neighboring jurisdictions may be able to resolve objections before the hearing stage of the neighboring jurisdictions process, conserving resources that would otherwise be expended to conduct and participate in such a hearing in these circumstances. EPA observes that nothing in the statute prohibits withdrawal of an objection, which would remove the prerequisite condition for a Federal agency to hold a public hearing. EPA also finds that including a provision addressing the circumstances of withdrawal provides added clarity by establishing a uniform procedure for executing withdrawal of an objection. Accordingly, EPA has included a provision in § 121.14(c) that allows a notified neighboring jurisdiction to withdraw its objection prior to the public hearing. The final rule states that if the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and Federal agency in writing of the withdrawal. *See* 40 CFR 121.14(c). If the neighboring jurisdiction withdraws the objection, the Federal agency will not need to proceed with a public hearing and can move forward with issuing the Federal license or permit. EPA has also added language to this effect at § 121.15(a). It should be noted that the Federal agency might have to comply with its own public notice procedures if it agreed to add certain Federal license or permit conditions in return for withdrawal of the objection.

h. Objection and Public Hearing Process Under Section 401(a)(2)

CWA section 401(a)(2) requires the Federal licensing or permitting agency to hold a public hearing on the objection of a notified neighboring jurisdiction if such neighboring jurisdiction provides notification of its objection and request for hearing in the required 60-day timeframe. 33 U.S.C. 1341(a)(2). As explained above, EPA is adding language to § 121.15(a) which clarifies that if the neighboring jurisdiction withdraws its objection, then the Federal agency does not have to proceed with a public hearing. Otherwise, consistent with section 401(a)(2), the final rule provides that the Federal agency must hold the public hearing upon a request for hearing from a notified neighboring jurisdiction in accordance with the requirements for the notification and request for hearing

in § 121.14(b) of the final rule. 40 CFR 121.15(a).

Section 401(a)(2) does not provide for a specific process for the public hearing conducted by the Federal licensing or permitting agency. It merely states that the hearing is public and shall be held by the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2). The statute further provides that the EPA Administrator must submit an evaluation and recommendations regarding the objection at the hearing. *Id.* Further, section 401(a)(2) states that additional evidence may be presented at the hearing. After the public hearing, the Federal licensing or permitting agency must consider the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the Federal license or permit as may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the Federal agency shall not issue the license or permit. *Id.* Notably, the statute is silent as to whether public notice of the public hearing is required; the nature of, and specific procedures for, the public hearing; the need for a court reporter or transcript; whether the Federal licensing or permitting agency's decision is appealable; and other such matters.

The Agency proposed to add transparency to the neighboring jurisdictions process by requiring the Federal agency to provide for a minimum of a 30-day public notice of the hearing, but declined to define the type of public hearing that the Federal agency must hold. Commenters provided various recommendations regarding the Federal agency's public hearing, including those addressing the notice of hearing, hearing procedures, and the location of a hearing. One commenter, who supported EPA's approach to the public hearing process, suggested that EPA should develop hearing procedures that can act as a default for Federal agencies that do not have public hearing procedures. On the other hand, another commenter stated that EPA should not impose a minimum notice requirement for the public hearing.

EPA is finalizing the proposed requirement that the Federal agency must provide notice at least 30-days prior to the public hearing, but is adding text to clarify that only a notified neighboring jurisdiction can make a request for hearing, and specify that the Federal agency must provide such

public notice to interested parties. Consistent with revisions to § 121.14 of the final rule, discussed above, EPA is adding language to § 121.15 of the final rule to make clear that pursuant to section 401(a)(2) only a notified neighboring jurisdiction may provide notification of an objection and request a hearing. Additionally, EPA is adding language in § 121.15(b) that requires the Federal agency to provide public notice "to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator," at least 30 days prior to the public hearing. 40 CFR 121.15(b). This language was included to ensure that all interested parties will have notice of the public hearing such that they can prepare for and provide their testimony or comments at the public hearing.

The Agency is otherwise maintaining the approach of not defining the type of public hearing that the Federal agency must hold, since many Federal agencies have their own regulations regarding public hearings on licenses and permits, and the Federal agencies are better suited to determine the appropriate process for holding their own public hearings. However, EPA recommends that the Federal agency accept comments and additional evidence on the objection at the public hearing. EPA also defers to the Federal agency to decide whether the public hearing would be conducted in-person and/or remotely through telephone, online, or other virtual platforms depending on the circumstances and the Federal agency's public hearing regulations. In determining the method for conducting the hearing and hearing location, EPA encourages the Federal agency to take into consideration the purpose of CWA section 401(a)(2) to establish a mechanism allowing notified neighboring jurisdictions an opportunity to object to the issuance of a Federal license or permit in circumstances where they find a discharge from the licensed or permitted project will violate their water quality requirements. Thus, interested parties, which include representatives of the neighboring jurisdiction, should be able to easily attend the public hearing.

As previously mentioned, section 401(a)(2), also establishes a role for EPA at the public hearing, providing that the Agency "shall . . . submit [its] evaluation and recommendations with respect to any such objection to the licensing or permitting agency" at the public hearing. 33 U.S.C. 1341(a)(2). Consistently, EPA is finalizing § 121.15(c) as proposed which mirrors

the statute by stating that "[a]t the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection." 40 CFR 121.15(c). As stated in its proposal, EPA interprets its role in providing the evaluation and recommendations on the notified neighboring jurisdiction's objection as that of an objective and neutral evaluator providing recommendations to the Federal licensing or permitting agency based upon its expert, technical analysis of the record before it. 87 FR 35369. EPA intends to conduct its evaluation and make any recommendations based on the information before it, giving equal consideration to the information and views—if provided—by interested parties, including the objecting neighboring jurisdiction, project proponent, and certifying authority. *Id.* Consistent with this approach, as a general matter EPA does not intend to invite public comment and input from, or engage with, interested parties when developing its evaluation and recommendations on the objection. However, EPA may, where it deems it appropriate, seek additional information regarding a notified neighboring jurisdiction's objection to be sure EPA is able to develop an informed and well-supported evaluation and accompanying recommendations. This approach to developing its evaluation and recommendations is consistent with the hearing process established by section 401(a)(2), which recognizes a role for the notified neighboring jurisdiction independent of the Agency and allows for presentation of evidence at the hearing by any interested stakeholder, including the notified neighboring jurisdiction. If a stakeholder agrees or disagrees with EPA's evaluation and recommendations presented at the hearing, such stakeholder may have an opportunity to provide additional information and comment directly to the Federal agency for its consideration.

After conducting the public hearing, pursuant to CWA section 401(a)(2), the Federal licensing or permitting agency must consider the recommendations of the notified neighboring jurisdiction and EPA, as well as any additional evidence presented at the hearing, as it determines whether additional permit or license conditions are necessary to ensure compliance with applicable water quality requirements. 33 U.S.C. 1341(a)(2). The Act does not accord special status to EPA's evaluation and recommendations compared with the notified neighboring jurisdiction's input

or other evidence received at the hearing; rather, the section appears to contemplate that the Federal agency will consider all of the information presented in making its decision.

If the Federal licensing or permitting agency determines that additional conditions may be necessary to ensure compliance with the neighboring jurisdiction's water quality requirements, the Federal licensing or permitting agency must include those conditions in the Federal license or permit pursuant to section 401(a)(2). 33 U.S.C. 1341(a)(2). In addition, if the Federal licensing or permitting agency cannot include conditions that will ensure compliance with applicable water quality requirements, the Federal agency cannot issue the Federal license or permit. *Id.* EPA is finalizing regulatory text that specifically incorporates these statutory requirements. 40 CFR 121.15(d) and (e). If the Federal agency decides that conditions are necessary to ensure that a project will comply with a neighboring jurisdiction's water quality requirements, EPA notes that the Federal agency may also have to comply with its own public notice and comment requirements before finalizing the Federal license or permit.

A few commenters provided input on how the Federal agency should engage with stakeholders after the conclusion of the public hearing. EPA declines to prescribe how a Federal agency must engage with stakeholders after the public hearing. However, EPA encourages the Federal agency to consult with the objecting neighboring jurisdiction and certifying authority, as well as all necessary parties, before making a decision under CWA section 401(a)(2).

EPA did not propose to establish a deadline by which the Federal licensing or permitting agency must make a determination after the public hearing on the notified neighboring jurisdiction's objection but requested comment on whether such a deadline should be established. A few commenters recommended that EPA create a timeline of the neighboring jurisdictions process and specifically include timelines for establishing a public hearing, making determinations, and finishing the post-public hearing process. Several commenters recommended that EPA establish a deadline for the Federal agency to make a decision after the public hearing on the objection. At least one commenter stated that establishing a deadline would be inappropriate and inconsistent with CWA section 401(a)(2), arguing that Congress

consciously chose not to impose a deadline on the Federal agency and did not include language that would allow EPA to establish a deadline. In the final rule, the Agency is declining to add specific timelines for the neighboring jurisdictions process beyond those already established in the statute. There are many factors, including the complexity of the facts at issue in an objection and a Federal agency's own regulations, that impact the duration of time necessary for a Federal agency to complete its determination following a hearing on a neighboring jurisdiction's objection. However, EPA encourages Federal agencies to communicate with the notified neighboring jurisdiction and other interested stakeholders regarding its expectations or considerations in determining the time to make a decision on the Federal license or permit after a public hearing.

3. Implementation

As discussed in detail above, once a Federal agency receives a Federal license or permit application and a certification or waiver, it may proceed with the neighboring jurisdictions process (*i.e.*, notify EPA as required under this final rule). The Agency wishes to reiterate that *all* certifications or waivers will trigger the neighboring jurisdictions process, even those for minor or remote projects. The requirement to notify EPA under section 401(a)(2) depends on the Federal agency's receipt of a Federal license or permit application and certification or waiver; it does not depend on the location of the project or the nature of the Federal license or permit. The Agency is aware that there are instances where a Federal license or permit application does not accompany a certification or waiver (*e.g.*, certification on general permits or Corps civil works projects). Certifications or waivers on those projects are not exempt from the neighboring jurisdictions process. Rather, EPA expects Federal agencies to determine how best to comply with all section 401 requirements. For example, on a Corps civil works project, compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification. Ultimately, EPA is responsible for determining whether a discharge from a project may affect the water quality of a neighboring jurisdiction. As stated in § 121.13(d) of the final rule, and discussed above, a Federal agency cannot issue a license or permit pending the conclusion of the neighboring jurisdictions process, set forth in §§ 121.13, 121.14, and 121.15 of the final rule.

Several commenters discussed the need for collaboration between EPA and other stakeholders prior to the initiation of the neighboring jurisdictions process. EPA agrees that early coordination can generally be beneficial to all parties, though this may not always be necessary depending on project complexity and resources. The Agency has encouraged early coordination and communication throughout the final rule, including pre-filing meeting requests and request for certification. Additionally, EPA observes that section 401 requires certifying authorities to develop public notice procedures for requests for certification. *See* 33 U.S.C. 1341(a)(1). A certifying authority's public notice procedures for certification could provide an additional opportunity for neighboring jurisdictions and other stakeholders to participate in the process. Generally, early engagement can provide stakeholders the opportunity to communicate needs and requirements, potentially streamlining processes and helping ensure any concerns are noted and addressed. EPA disagrees with one commenter's assertion that EPA has a responsibility to proactively work with project proponents and other Federal agencies as early as possible in the Federal licensing or permitting process. As discussed above, EPA has a specific, statutorily defined role in the neighboring jurisdictions process, which does not require the Agency to proactively coordinate with other Federal agencies or project proponents or take any action pursuant to section 401(a)(2) prior to receiving notice from the Federal agency of its receipt of the application and either a certification or waiver.

L. Treatment in a Similar Manner as a State Under Section 401

1. What is the Agency finalizing?

The Agency is finalizing the proposed provisions enabling Tribes to obtain TAS solely for section 401, as well as provisions on how Tribes can obtain TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2).¹⁰⁷ Section 121.11 of the final rule includes the criteria an applicant Tribe would be

¹⁰⁷ Prior to this final rule, in the absence of TAS provisions tailored specifically for section 401, Tribes had received TAS for section 401 when eligible for TAS to administer the section 303(c) program for water quality standards. 40 CFR 131.4(c) ("Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.").

required to meet to be treated in a similar manner as states, the information the Tribe would be required to provide in its application to EPA, and the procedure EPA would use to review the Tribal application.

Consistent with the requirements provided in CWA section 518, the final rule requires that four criteria must be met for Tribes to obtain TAS for section 401, including section 401(a)(2). First, the Tribe must be federally recognized by the U.S. Department of the Interior and meet the definitions finalized in § 121.1(d) and (e). Second, the Tribe must have a governing body that carries out “substantial governmental duties and powers” over a defined area. Third, the Tribe must have appropriate authority to regulate and manage water resources within the borders of the Tribe’s reservation. Lastly, the Tribe must be reasonably expected, in the Regional Administrator’s judgment, to be capable of administering a section 401 water quality certification program.

The Tribe may satisfy the first criterion by stating that it is included on the list of federally recognized Tribes that is published periodically by the U.S. Department of the Interior. Alternatively, the Tribe may submit other appropriate documentation (e.g., if the Tribe is not yet included on the U.S. Department of the Interior list but is federally recognized).

To meet the second criterion, the Tribe would show that it conducts “substantial governmental duties and powers,” which the Agency views as performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. *See* 54 FR 39101; 81 FR 65906. This requires a descriptive statement that (1) describes the form of Tribal government, (2) describes the types of essential governmental functions currently performed by the Tribal governing body, including but not limited to, the exercise of the power of eminent domain, taxation, and police power, and (3) identifies the sources of authorities to carry out these functions.

To meet the third criterion that the Tribe has the authority to manage the water resources within the borders of the Tribe’s reservation, the Tribe would submit a descriptive statement comprised of two components: (1) a map or legal description of the area over which the Tribe has authority to regulate surface water quality, and (2) a statement signed by the Tribe’s legal counsel or equivalent explaining the legal basis for the Tribe’s regulatory authority. EPA notes that section 518 of the CWA includes a delegation of

authority from Congress to eligible Indian Tribes to regulate the quality of waters of their reservations under the CWA. *See* 81 FR 30183 (May 16, 2016). Absent rare circumstances that may affect a Tribe’s ability to effectuate the delegation of authority, Tribes may rely on the congressional delegation of authority included in section 518 of the statute as the source of authority to administer a section 401 water quality certification program. This is identical to the way Tribes have been demonstrating authority for eligibility to administer 401 certifications under existing TAS regulations, the only change being that under the final regulations, Tribes will be able to seek TAS eligibility for section 401 only. Similarly, as with Tribes already administering section 401 under prior TAS approvals, the authority to issue certifications exercised by a Tribe authorized under the new regulation will, by virtue of the congressional delegation, apply throughout the reservation area covered by the TAS approval, irrespective of land ownership or the Tribal membership status of the Federal license or permit applicant. *See, e.g.,* 81 FR 30190. Therefore, grants or waivers of certification by an authorized Tribe, as well as any conditions included in a certification or denials of certification by an authorized Tribe, would apply to any application for a Federal license or permit throughout the relevant reservation without any separate need to demonstrate inherent Tribal jurisdiction.

A Tribe may satisfy the fourth criterion regarding its capability by either (1) providing a description of the Tribe’s technical and management skills to administer a water quality certification program or (2) providing a plan that proposes how the Tribe will acquire such skills. Additionally, when considering Tribal capability, EPA would also consider whether the Tribe can demonstrate the existence of institutions that exercise executive, legislative, and judicial functions, and whether the Tribe has a history of successful managerial performance of public health or environmental programs.

Section 121.11 of the final rule is intended to ensure that Tribes treated in a similar manner as states for the purposes of the section 401 water quality certification program are qualified, consistent with CWA requirements, to implement a water quality certification program. The procedures are meant to provide more opportunities for Tribes to engage fully in the program and are not intended to act as a barrier to Tribal administration

of the section 401 program. The procedures are modeled after the TAS regulatory provisions for the CWA section 303(c) water quality standards (WQS) program, located at 40 CFR 131.8, and the TAS provisions for the CWA section 303(d) impaired water listing and total maximum daily load program, located at 40 CFR 130.16. The WQS TAS regulations, developed in the early 1990s, have acted as a model for other programs including the section 303(d) regulations. *See* 81 FR 65905. Additionally, EPA’s TAS regulations allow Tribes to simultaneously obtain TAS for sections 303(c) and 401. As a result, the part 131 and part 130 TAS regulations provide an appropriate model for this final rule.

These provisions provide more opportunities and clarity for Tribes interested in participating in the section 401 certification process. Although the CWA clearly allows Tribes to obtain TAS for section 401, current regulations and practice treat TAS for section 401 as an adjunct to TAS for the CWA section 303(c) program for water quality standards. To date, 83 federally recognized Tribes (out of 574) have received TAS for section 401 concurrently with obtaining TAS for section 303(c).¹⁰⁸ The TAS provisions in this final rule do not eliminate or modify the section 401 procedures already found in part 131. Instead, they provide an alternate path for Tribes wishing to obtain TAS status only for section 401 and not also for section 303(c).

Upon receiving TAS for section 401, Tribes have two roles. First, Tribes that receive section 401 TAS are responsible for acting as a certifying authority for projects that may result in a discharge into waters of the United States on their Indian reservations. As certifying authorities, Tribes with TAS may grant, grant with conditions, deny, or waive certification based on whether a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of Tribal law. *See* 33 U.S.C. 1341(a)(1) and (d). Second, Tribes that receive section 401 TAS are accorded the status of “neighboring jurisdiction” for purposes of section 401(a)(2). If EPA makes a “may affect” finding during its determination with respect to that neighboring jurisdiction, the notified neighboring jurisdiction, including Tribes with TAS for section 401 and

¹⁰⁸ *See* <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>. To date, one Tribe with TAS for section 303(c) (Havasupai Tribe in Arizona) has declined TAS for section 401.

Tribes with TAS for section 401(a)(2), may object to the issuance of the Federal license or permit if they determine that a discharge from the project “will violate” any of its water quality requirements and request a public hearing from the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2); 40 CFR part 121, subpart B.

2. Summary of Final Rule Rationale and Public Comment

The final rule’s inclusion of TAS provisions solely for section 401 and 401(a)(2) provides alternate paths for Tribes to engage in the section 401 process without also needing to apply for section 303(c), promoting cooperative federalism and Tribal rights. Many of the commenters addressing the proposal to add provisions enabling Tribes to obtain TAS solely for section 401 and for section 401(a)(2) expressed support for finalizing the proposed TAS provisions. These commenters supported the inclusion of section 401 TAS provisions for various reasons including interest in supporting Tribal agency, increasing Tribal participation in Federal licensing and permitting processes, providing Tribes a tool for protecting water quality and treaty rights, recognizing the vast knowledge of Tribal communities and their sovereignty, respecting the role waters play in Tribal cultures, and affording Tribes more options regarding administration of CWA programs.

EPA appreciates these commenters’ support. Promulgating a regulation expressly providing a process and requirements for section 401 TAS in the absence of section 303(c) TAS is consistent with section 518 and would provide clarity and increased opportunities for interested Tribes to participate in section 401. CWA section 518 authorizes the Agency to treat eligible Tribes with reservations in a similar manner to states “for purposes of subchapter II of this chapter and sections . . . 1341, . . . of this title to the degree necessary to carry out the objectives of this section.” See 33 U.S.C. 1377(e). Section 518(e) establishes eligibility criteria for TAS.¹⁰⁹

¹⁰⁹ Section 518(e) authorizes EPA to treat eligible Tribes in a similar manner as a state if (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian tribe is reasonably expected to be capable, in the Administrator’s judgment, of carrying out the functions to be exercised in a

Additionally, developing regulations on section 401 TAS as a standalone process for Tribes seeking this authority who are not concurrently applying for section 303(c) TAS may encourage more Tribes to seek TAS for section 401. Decoupling section 401 TAS from section 303(c) recognizes that section 401 and section 303(c) administration are related, but distinct functions and is responsive to Tribal stakeholders who have expressed an interest in participating in the section 401 certification process.

However, EPA recognizes that some Tribes may not desire or have the resources to apply for the section 401 certification program. Pre-proposal input suggested that Tribes may wish to be notified about and have the ability to object to and provide information regarding, potential Federal licenses and permits that may impact their waters. Several Tribal stakeholders have expressed concern that Tribes without TAS are not able to participate in the section 401(a)(2) neighboring jurisdictions process. In response to pre-proposal input, EPA proposed a separate TAS provision for the section 401(a)(2) neighboring jurisdictions process. Many commenters from the public comment period indicated support for the proposed TAS provisions, including specifically for section 401(a)(2). Commenters asserted that waters on reservations are susceptible to degradation from upstream discharges and that the TAS provisions for section 401(a)(2) provided a mechanism for objecting and requesting a hearing on the issuance of Federal licenses and permits for those discharges while limiting administrative burdens associated with obtaining TAS for section 401(a)(1). As a result of this input, EPA is finalizing as proposed to provide Tribes with an opportunity to seek TAS authorization for the limited purpose of being a neighboring jurisdiction pursuant to section 401(a)(2). The final rule promotes Tribal engagement by providing an opportunity for Tribes to protect their water quality through participating in the section 401 certification process without needing to assume all of the authorities and responsibilities of section 401. Tribes applying for TAS solely for section 401(a)(2) will still need to meet the same four criteria discussed above. However, since participating as a neighboring jurisdiction under section 401(a)(2) does not involve any exercise of regulatory

manner consistent with the terms and purposes of this chapter and of all applicable regulations. See 33 U.S.C. 1377(e).

authority and involves carrying out fewer functions than acting as a certifying authority, EPA anticipates that demonstrations that the applicant Tribe satisfies the criteria will be more streamlined than the demonstrations in applications for TAS for purposes of administering the entirety of section 401. See discussion *infra*.

Some commenters expressed concern about the addition of TAS provisions for section 401 and section 401(a)(2). Some of these commenters asserted that section 401 is limited to ensuring compliance with EPA-approved water quality standards, and they questioned how Tribes without EPA-approved water quality standards under section 303(c) of the Clean Water Act would implement section 401. EPA disagrees that section 401 is limited to ensuring compliance with Clean Water Act section 303(c) water quality standards. The term “water quality requirements” is used throughout section 401, and EPA has defined “water quality requirements” to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state or Tribal laws or regulations implementing the enumerated provisions, and any other water quality-related requirement of state or Tribal law regardless of whether they apply to point or nonpoint source discharges. 40 CFR 121.1(j). Under this approach, authorized Tribes can base their section 401 certification decisions on compliance with water quality requirements other than Tribal water quality standards approved under section 303(c). Examples include Tribal ordinances or other Tribal laws related to water quality, or, if present, Federal water quality standards promulgated by EPA for reservation waters.¹¹⁰

Other commenters who raised concerns about the TAS provisions requested that EPA provide explicit acknowledgement of the specific circumstances regarding Oklahoma’s authority under the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA). Some of these commenters said that EPA should note that the TAS provisions for section 401 and section 401(a)(2) are subject to limitations consistent with this authority.

¹¹⁰ Federal water quality standards are currently in place for the Confederated Tribes of the Colville Reservation. See 40 CFR 131.35. EPA recently published a proposed rule that would establish Federal baseline water quality standards for waters on Indian reservations that do not have water quality standards in effect for CWA purposes. 88 FR 29496 (May 5, 2023). Upon finalizing the rule, those Federal baseline water quality standards would serve as the applicable water quality standards in effect for CWA purposes.

EPA holds that the provisions in this final rule for obtaining TAS for section 401 and section 401(a)(2) have no effect on the separate TAS requirement of section 10211(b) of SAFETEA. Additionally, the section 401(a)(2) neighboring jurisdiction role is similar to the affected state commenting role established under section 505(a)(2) of the Clean Air Act. *See* 87 FR 35372 (June 9, 2022). Functioning as a neighboring jurisdiction under section 401(a)(2) does not involve any exercise of regulatory authority by a Tribe (or state) who may be affected by a federally licensed or permitted discharge from a neighboring jurisdiction. The neighboring jurisdiction role involves an opportunity to provide input regarding water quality impacts and to inform decision making of the Federal licensing or permitting agency. Ultimately, it is the Federal agency that exercises regulatory authority through its licensing or permitting decision, and the certifying authority in the neighboring state or Indian reservation where the discharge originates that exercises authority to grant, grant with conditions, deny, or waive certification. The section 401(a)(2) neighboring jurisdiction role is similar to the affected state commenting role established under section 505(a)(2) of the Clean Air Act. *See* 87 FR 35372.

3. Implementation

As this final rule includes TAS provisions solely for section 401 and section 401(a)(2) for the first time, the Agency is developing materials to aid the implementation of this aspect of the final rule. To implement the TAS provisions in this rule, EPA will need to communicate how Tribes can apply and process any incoming TAS applications from Tribes. This implementation section also includes discussion of how Tribes can implement a certification program or participate in the neighboring jurisdictions process if they obtain TAS for section 401 and/or section 401(a)(2).

Commenters requested that EPA provide transparency on TAS applications through establishing guidelines for applying and identifying necessary materials for applications, as well as keeping applicant Tribes updated on their application status. EPA agrees that the TAS application process should be transparent and has included provisions in this final rule to create clarity and efficiencies in the application process. To provide direction on how a Tribe may meet the criteria described in section IV.L.1 of this preamble, EPA has described the contents of an application for TAS for

section 401. *See* 40 CFR 121.11(b). To assist applicant Tribes, the Agency is also developing a template which would provide explanations and instructions for documenting how the Tribe meets the eligibility requirements. The template would consist of areas for Tribes to include a statement that the Tribe is recognized by the Secretary of the Interior, a descriptive statement that demonstrates the Tribal government carries out substantial duties and powers, a descriptive statement of the Tribe's authority to regulate water quality, and a narrative statement that describes the Tribe's capability to administer a section 401 water quality certification program. Consistent with existing TAS regulations for other programs, this final rule also provides that Tribal applicants include additional documentation that may be required by EPA to support the Tribal application. Each TAS application will present its own set of legal and factual circumstances, and EPA anticipates that in some cases it may be necessary to request additional information when reviewing a Tribe's application. Such requests would, for instance, generally relate to ensuring that the application contains sufficient complete information to address the required statutory and regulatory TAS criteria. This could include, for instance, information relating to a unique issue pertaining to the applicant Tribe or its reservation or an issue identified during the comment process described below. Consistent with longstanding practice, the Agency would work with Tribes in an appropriately streamlined manner to ensure that their TAS applications contain all necessary information to address applicable statutory and regulatory criteria. If a Tribe has previously qualified for TAS under another EPA program, the Tribe is only required to submit information that was not previously submitted as part of a prior TAS application.

The final rule also describes EPA's procedures to review and process an application for section 401 TAS. *See* 40 CFR 121.11(c). Once EPA receives a complete Tribal application, it will promptly notify the Tribe of receipt and process the application in a timely manner. Within 30 days after receipt of the Tribe's complete application for section 401 TAS, EPA shall provide notice to appropriate governmental entities¹¹¹ of the application, including

information on the substance of and basis for the Tribe's assertion of authority to regulate reservation water quality. Appropriate governmental entities will be given 30 days to provide comment on the Tribe's assertion of authority. Consistent with prior practice regarding such notice in connection with TAS applications for other programs, EPA also intends to provide sufficiently broad notice (e.g., through local newspapers, electronic media, or other appropriate media) to inform other potentially interested entities of the applicant Tribe's complete application and of the opportunity to provide relevant information regarding the Tribe's assertion of authority. If the Tribe's assertion of authority is challenged, EPA will determine whether the Tribe has adequately demonstrated authority to regulate water quality on the reservation after considering all relevant comments received.

However, if a Tribe previously qualified for TAS for another program that also required a Tribe to demonstrate authority to regulate reservation water quality (*i.e.*, CWA section 303(c) program, CWA section 303(d) program, CWA section 402 program, or CWA section 404 program) and EPA provided a notice and comment opportunity, the Agency would not require notice on the Tribe's assertion of authority to appropriate governmental entities in the section 401 TAS application unless there were different jurisdictional issues or significant new factual or legal information relevant to jurisdiction. EPA thinks this approach could help streamline the process and avoid a potentially duplicative notice process. This approach will apply prospectively only, *i.e.*, where the Tribe obtains TAS for the CWA section 303(c), 402, or 404 programs after the effective date of this rule. In other words, if a Tribe first gains TAS for another CWA regulatory program after this rule is effective, and subsequently seeks TAS under this rule, additional notice and comment would not be required as part of the section 401 TAS application unless different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are presented in the section 401 TAS application. If the Regional Administrator determines that a Tribe's application meets the requirements in § 121.11(b), the Regional Administrator will promptly notify the Tribe in writing. A decision by the Regional Administrator that a Tribe does not meet the requirements in § 121.11(b) would not preclude the Tribe from resubmitting the application at a future date. If the Regional Administrator

¹¹¹ EPA defines the term "appropriate governmental entities" as "States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State." 56 FR 64876, 64884 (December 12, 1991).

determines that a Tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the Tribe can make changes as appropriate and necessary.

M. Implementation Considerations

EPA recognizes that both certifying authorities and Federal agencies have existing regulations addressing implementation of section 401. For example, as discussed in section IV.C in this preamble, the Agency is aware that some certifying authorities have regulations defining the contents of a request for certification. As a result of this rulemaking effort, certifying authorities may choose to modify their existing regulations (*e.g.*, they may choose to define the contents of a certification request instead of relying on EPA's definition). Similarly, EPA is aware that the Corps and FERC have separate section 401 implementation regulations addressing their respective Federal licensing or permitting programs.¹¹² EPA expects that Federal agencies with existing section 401 implementing regulations will evaluate their regulations and other guidance documents to ensure consistency with this final rule.

Given that EPA intends many of the provisions of the final rule to represent a return to past practices with added clarity, the Agency anticipates that implementation of the final rule will not require a significant overhaul of state, Tribal, or other Federal regulations. EPA will support implementation of the final rule through training sessions for each of the various stakeholder groups, as well as through engagement with an interagency Federal CWA section 401 workgroup.

The Agency also wishes to clarify the applicability of the final rule to ongoing certification actions. As of the effective date of this final rule, which will be 60 days after publication of the final rule in the **Federal Register**, all actions taken as part of the section 401 certification process must be taken pursuant to the final rule. However, the final rule does not apply retroactively to actions already taken under the 2020 Rule. For example, if a certifying authority received a request for certification, prior to the effective date of this final rule, and the certifying authority has not acted on the request for certification as of the effective date, any decision issued by the certifying authority after the effective date of this final rule must

comply with the requirements in the final rule (*e.g.*, scope of certification) and any Federal agency review of a certification decision must comply with § 121.8. However, the validity of the request for certification would be determined under the 2020 Rule and the project proponent would not need to re-request certification consistent with the final rule. The certifying authority may request more information to help inform its decision-making on the request for certification, including information relevant to determining water-quality impacts from the activity subject to certification, but the certifying authority must still issue its certification decision within the reasonable period of time, which would not pause while the certifying authority is seeking more information.¹¹³ A "reasonable period of time" determined under the 2020 Rule prior to the effective date of the final rule would not automatically change because this final rule went into effect; however, the certifying authority may request an extension to the reasonable period of time pursuant to § 121.6(e) of the final rule, or avail itself to an automatic extension to the reasonable period of time pursuant to § 121.6(d)—provided that the reasonable period of time does not exceed one year from the date that the request for certification was received. Additionally, after the effective date, if a project proponent has not submitted a request for certification or if the project proponent has only submitted a pre-filing meeting request by the time the final rule goes into effect, the project proponent is responsible for submitting a request for certification in accordance with § 121.5 of the final rule. Finally, after the effective date, a certifying authority and Federal agency can apply the final rule's modification process at § 121.10 to any certification decision, even if that decision was provided while a prior rule (*e.g.*, 1971 Rule or 2020 Rule) was in effect.¹¹⁴ Similarly, if a Federal agency determined pursuant to the 2020 Rule and prior to the effective date of the final rule that a certifying authority

constructively waived certification for failure to comply with the procedural requirements of the 2020 Rule, that determination is not affected by this final rule going into effect, even if the relevant Federal license or permit has not yet been issued. As discussed above, if a "reasonable period of time" was established under the 2020 Rule prior to the effective date of the final rule, that reasonable period of time would not automatically change because this final rule went into effect.

The approach the Agency adopts here regarding the applicability of the final rule to ongoing certification actions is consistent with the approach taken by the Agency after a court vacatur of the 2020 Rule in 2021 and the Supreme Court's stay of that vacatur in 2022. See section III.C.3 for background on the litigation to the 2020 Rule. The Agency is not aware of any disruptions or delays in the certification process as the result of the Agency's approach to ongoing certification actions in those instances.

N. Severability

The purpose of this section is to clarify the Agency's intent with respect to the severability of provisions of this rule in the event of litigation. In the event of a stay or invalidation of any part of this rule, the Agency's intent is to preserve the remaining portions of the rule to the fullest possible extent. To dispel any doubt regarding EPA's intent and to inform how the regulation would operate if severed, EPA has added the following regulatory text at § 121.19:

"The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect." The Agency would have adopted each portion of this rule independent of the other portions. As explained below, the Agency carefully crafted this rule so that each provision or element of the rule is capable of operating independently. Moreover, the Agency has organized the rule so that if any provision or element of this rule is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the remainder of this rule invalid.

Section 121.3 regarding the scope of review for certification decisions is a good example of how the Agency structured the final rule so its various provision and elements operate independently. The provisions regarding scope operate entirely independently from the other provisions of this rule, as § 121.3, which concerns scope, is not cross-referenced or necessary for the operation of any other section of part 121 or any other EPA

¹¹² See *e.g.*, 33 CFR 325.2 (water quality certification on section 404 permits); 18 CFR 4.34 (water quality certification on FERC hydropower licenses).

¹¹³ Under both this final rule and the 2020 Rule, a certifying authority may request more information to help inform its decision-making after a request for certification is made and the reasonable period of time has begun. See section IV.C of this preamble and 85 FR 42245 (July 13, 2020) ("Nothing in the final rule's definition of 'certification request' precludes a project proponent from submitting additional, relevant information or precludes a certifying authority from requesting and evaluating additional information within the reasonable period of time").

¹¹⁴ However, if the relevant Federal license or permit has not yet been issued, the project proponent could request certification anew, and the certifying authority would then need to act on that request consistent with this final rule.

regulation. The other provisions of this rule operate the same regardless of whether the scope of certification is water quality-related impacts from the full activity subject to the Federal license or permit or only its point source discharges. First, the rule's provisions regarding when certification is required (§ 121.2) would be the same regardless of the scope of certification. The Agency's rationale for when certification is required does not rely on and is independent of the Agency's rationale for the proper scope of certification. What triggers a requirement to apply for certification is a distinct issue, independent from what the certifying authority can consider in its subsequent certification decision. Second, this rule's definition of water quality requirements remains valid regardless of the scope of certification. The rule defines "water quality requirements" to mean "any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law." Section 121.1(j). The first two clauses (listing the sections of the CWA identified in section 401 and the state or Tribal laws implementing them) clearly hold true regardless of scope of certification. In addition, regardless of the scope of certification (*i.e.*, either the full activity subject to the Federal license or permit or only its point source discharges), in order to qualify as an "appropriate" requirement of state or Tribal law, the requirement must be "water quality-related." Additionally, the issue of which waters to consider when acting on a request for certification is independent of the issue of the proper scope of certification. Under either a "discharge-only" or activity-based scope of certification, the question remains whether certifying authorities may consider impacts to state or Tribal waters beyond "navigable waters." EPA's interpretation regarding which waters may be considered is also severable from all other aspects of this final rule. No provision of this final rule operates differently depending on which waters a certifying authority may consider when acting on a request for certification.¹¹⁵ Further, the Agency's interpretation regarding scope of the neighboring jurisdictions process in section 401(a)(2) is independent and

does not rely on the Agency's interpretation regarding the scope of certification. As explained in this preamble, the certification process and the neighboring jurisdictions process are two distinct processes with distinct statutory text and legislative history. EPA's interpretation of the scope of the neighboring jurisdictions process expressly accounts for these differences.

The other topics addressed in this rulemaking all function the same regardless of the scope of certification. Many are important process improvements (*e.g.*, how to set the reasonable period of time, when extensions are permissible, what are the elements of a request for certification, when and how to modify a grant of certification) that function the same regardless of scope. All the topics addressed in this rulemaking beyond scope are important provisions that EPA would have promulgated absent promulgation of a rule changing the scope of certification. As explained throughout this preamble, these other aspects of the rule provide independent benefits to the certification process including regulatory certainty and transparency, efficient certification reviews, and enhanced cooperative federalism. Regardless of the scope of certification, for the reasons articulated in this preamble, EPA would adopt the same pre-filing meeting requirement (§ 121.4); the same minimum contents for a request for certification (§ 121.5); the same process for determining the reasonable period of time (§ 121.6); the same four ways a certifying authority may act on a request (grant, grant with conditions, deny, or expressly waive) (§ 121.7); the same limitations regarding Federal agency review (§ 121.8); the same standard for when inadvertent waiver occurs (§ 121.9); the same procedure and limitations for modifying a grant of certification (§ 121.10); the same requirements for Indian Tribes to administer a certification program (§ 121.11); the same procedures regarding the neighboring jurisdictions process (§§ 121.12 through 121.15); the same additional procedures for when EPA acts as a certifying authority (§§ 121.16 and 121.17); the same rules regarding EPA review and advice (§ 121.18), and would otherwise take the same approach as it did in this final rule. EPA's rationales for adopting these provisions apply equally regardless of the scope of certification and these provisions would function equally under any scope of certification.

Likewise, the other provisions of this rule operate independently from each other and are intended to be severable. For example, the contents of a request

for certification (§ 121.5) function independently from the procedures for setting and extending the reasonable period of time (§ 121.6). The process and limitations for modifying a grant of certification (§ 121.10) have no bearing on a federally recognized Tribe's ability to apply for TAS for section 401 (§ 121.11). The limitations on Federal agency review (§ 121.8) have no bearing on when a request for certification is required (§ 121.2). Were any element of these provisions stayed or invalidated by a reviewing court, the elements that remained in effect would continue to provide vital improvements to the certification process including regulatory certainty and transparency, efficient certification reviews, enhanced cooperative federalism, and where appropriate, reasonable flexibility to adapt to changing circumstances. The examples provided throughout this section are illustrative, rather than exhaustive, and EPA intends each portion of the rule to be independent and severable. Further, if the application of any portion of this rule to a particular circumstance is determined to be invalid, the Agency intends that the rule remain applicable to all other circumstances.

V. Economic Analysis

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 14094 (Modernizing Regulatory Review), EPA has prepared an economic analysis (Economic Analysis for the Final Rule) to inform the public of potential effects associated with this rulemaking. This analysis is not required by the CWA.

To support the final rulemaking, EPA prepared an Economic Analysis for the Final Rule and other related rule analyses to assess potential impacts of the rule. These analyses seek to evaluate the benefits and costs of the rulemaking and the effects of the rule on vulnerable groups and small entities. The Economic Analysis for the Final Rule presents an overview of practice under the 1971 Rule and 2020 Rule (baselines),¹¹⁶ a description of the final rule changes, and an assessment of the potential impacts of the final rulemaking on project proponents, certifying authorities, and Federal agencies as changes from each baseline of regulatory practice to the new requirements. Appendix A in the Economic Analysis for the Final Rule provides a plain-language comparison of the 1971 Rule, 2020 Rule, and final

¹¹⁵ In fact, the Agency's interpretation of which waters may be considered in certification is not reflected in the regulatory text, including the text regarding scope of certification at § 121.3.

¹¹⁶ Due to ongoing litigation on the 2020 Rule, EPA considers two baselines in the economic analysis.

rulemaking provisions in a table format. Within the Economic Analysis for the Final Rule, the Agency included discussion of the environmental benefits and process costs with examples relative to the final rulemaking provisions. EPA also assessed environmental justice impacts of the rulemaking on vulnerable communities and impacts on small entities. The Agency also prepared an Information Collection Request Supporting Statement which describes the overall burden of the section 401 regulations, thus including any new burdens resulting from this final rule. See section VI.B of this preamble.

Section 401 certification decisions have varying effects on certifying authorities and project proponents. However, the Agency has limited data regarding the number of requests for certification submitted and the certification decisions taken on requests for certification (*i.e.*, whether certifications were granted, granted with conditions, denied, or waived). The Agency does not maintain a national database of certifying authority decisions and therefore did not have enough data available to perform a fully quantitative economic analysis. Given the absence of data related to section 401 regulations, EPA performed a qualitative analysis of the section 401 certification process under the 1971 Rule, the 2020 Rule, and under the final rulemaking.

The Agency reviewed information from several sources to characterize section 401 baseline conditions and understand potential impacts of the regulatory changes. Specifically, the Agency investigated State and territory websites and assembled available information concerning section 401 fees and certification decisions. EPA also conducted a focused review of pre-proposal input letters¹¹⁷ and public comments¹¹⁸ to extract any information concerning economic impacts of section 401 and key issues identified during implementation of section 401.

Section 401 is a direct grant of authority to states and authorized Tribes. Accordingly, EPA does not provide program oversight to state or Tribal programs. Nevertheless, EPA reviewed state and territory websites to investigate data availability on certification decisions and found that seven certifying authorities have section 401 certification decision documents publicly available. The Agency reviewed a random sample of 200 certification decisions from seven

different state websites¹¹⁹ and used a machine reading approach to determine whether the Agency could derive any information on timing and certification decisions to inform this rulemaking.¹²⁰ Due to significant data limitations, EPA was unable to use the review of the certification decisions to make any conclusions to inform this rulemaking. More information about the analysis that EPA performed when reviewing these decision documents can be found in the Economic Analysis for the Final Rule.

Within the Economic Analysis, the Agency describes the various Federal licenses and permits that require section 401 certification and the potential actions that certifying authorities may take pursuant to their section 401 authority. Additionally, the Agency summarized the annual number of licenses and permits that require section 401 certification under different Federal authorities to determine the extent of licensing and permitting actions within the section 401 universe. These types of information are used in the Economic Analysis for the Final Rule to describe implementation practices and trends under the baselines and serve as the basis for assessing impacts of the final rulemaking.

In determining the potential effects of the final rulemaking, EPA described the impacts of rule revisions in several key areas including pre-filing meetings, contents of requests for certification, reasonable period of time, neighboring jurisdictions, and Tribal provisions for implementing section 401. The 1971 Rule baseline did not include a pre-filing meeting request requirement. However, because pre-filing meetings allow for early discussion of project details, such meetings would ultimately be expected to reduce burden elsewhere in the section 401 certification process. The 2020 Rule did not provide certifying authorities with the option to waive or shorten the pre-filing meeting request requirement. The Agency anticipates that the pre-filing meeting request provision will provide flexibility for certifying authorities to decide whether to require pre-filing meeting requests and whether to hold pre-filing meetings based on project complexity and other factors. Relative to

both the 1971 Rule and 2020 Rule baselines, the Agency expects that the minimum content requirements for all requests for certifications will support a transparent and efficient certification process. Additionally, relative to each of the two baselines, the changes concerning the reasonable period of time for certification review will balance equities between certifying authorities and Federal agencies and provide flexibility for certifying authorities and Federal agencies to determine the optimal length for the reasonable period of time or any extensions, provided they do not exceed one year from the date the request for certification was received. For example, the final rule will allow certifying authorities to ensure that the reasonable period of time is informed by the size and complexity of the project, the certifying authority's available resources (*e.g.*, staff size), public notice and comment requirements, and other relevant timing considerations (*e.g.*, Federal license or permit deadlines; associated National Environmental Policy Act deadlines; and/or anticipated timeframe for neighboring jurisdictions process). Allowing the certifying authority and Federal agency to negotiate a reasonable period of time at or before the beginning of the certification process (subject to a six-month default) is also likely to improve the efficiency of the review process. The final rule also provides greater clarity regarding the process to protect neighboring jurisdiction waters (*e.g.*, by specifying the contents of a notification from a Federal agency to EPA), which is expected to increase its efficiency. This clarity and efficiency are expected when using the 1971 Rule as the baseline, as well as for the 2020 Rule baseline (though potentially to a lesser extent due to some updated provisions in the 2020 Rule). Neither the 1971 Rule nor the 2020 Rule included TAS provisions. Final revisions permitting Tribes to obtain TAS solely for section 401 and, if desired, to only obtain TAS for the purpose of participating as neighboring jurisdictions under section 401(a)(2), will provide Tribes with a greater ability to protect their water resources from the adverse effects of pollution from federally licensed or permitted projects.

In some areas, the rulemaking would revive practices that had been widely implemented for 50 years before the 2020 Rule. Specifically, the rule would return the scope of a certifying authority's section 401 review as encompassing the "activity" which is consistent with longstanding Agency and certifying authority practice and

¹¹⁷ Docket ID No. EPA-HQ-OW-2021-0302.

¹¹⁸ Docket ID No. EPA-HQ-OW-2022-0128.

¹¹⁹ Arkansas, California Water Board of San Diego, Idaho, Mississippi, New Hampshire, Oregon, and Washington.

¹²⁰ For more detailed information about the Agency's methodology for selecting random samples and conducting the machine reading analysis, please see *Clean Water Act Section 401 Water Quality Certification Improvement Rule—Final Rule, Memorandum to the File, Certification Decision PDF Extraction Effort*, available in Docket ID No. EPA-HQ-OW-2022-0128.

allows certifying authorities to protect their waters from the widest range of impacts. The Agency is finalizing a certification modification process, allowing certifying authorities and Federal agencies the flexibility to mutually agree on circumstances warranting modification. Provided that certification modification efforts are appropriately coordinated, the modification process under the final rule would allow certifying authorities to adapt to changes in environmental and regulatory conditions, and provide needed flexibility to accommodate changed circumstances after issuance of a grant of certification, with or without conditions.

EPA anticipates that the rulemaking will enhance the ability of states and Tribes to protect their water resources by clarifying key components of the water quality certification process and improving coordination between Federal agencies, certifying authorities, and project proponents.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action” as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to Executive Order 12866 review is available in the docket for this action. The Agency prepared an economic analysis of the potential impacts associated with this action, and concluded that the benefits of the rule justify the costs. This analysis, the Economic Analysis for the Final Rule, is available in the docket for this action (Docket ID No. EPA-HQ-OW-2022-0128) and is briefly summarized in section V in this preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this rulemaking have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2603.08 (OMB Control No. 2040-0295). You can find a copy of the

ICR in the docket for this rule, and it is briefly summarized here.

The information collected under section 401 is used by certifying authorities and EPA to evaluate potential water quality impacts from federally licensed or permitted projects. When states or Tribes with TAS act as the certifying authority, the primary collection of this information is performed by the Federal agencies issuing the licenses or permits or the states and Tribes acting as certifying authorities. When EPA acts as the certifying authority or evaluates potential neighboring jurisdiction impacts, the information is collected by EPA. Information collected directly by EPA under section 401 in support of the section 402 NPDES program is already captured under existing ICR No. 0229.255 (OMB Control No. 2040-0004). The information collected under section 518(e) is used by EPA to determine whether a Tribe is eligible for TAS for section 401 or TAS for section 401(a)(2). Information collected directly by EPA under section 518(e) in support of the process for Tribes to obtain TAS for CWA section 303(c) and section 401 simultaneously is already captured under existing ICR No. 0988.14 (OMB Control No. 2040-0049). The information collection requirements are not enforceable until OMB approves them.

The revisions clarify the nature of the information project proponents must include in a request for section 401 certification. They also contain a pre-filing meeting request requirement for project proponents which may be waived or shortened by a certifying authority. The revisions also provide Tribes with the ability to obtain TAS solely for either section 401 or section 401(a)(2). Total annual burden for respondents (project proponents and certifying authorities and Tribes applying for TAS) are anticipated to be 861,274 hours with the associated annual labor costs being approximately \$48 million. EPA expects these revisions to provide greater clarity regarding section 401 requirements, to reduce the overall preparation time spent by a project proponent on requests for certification, and to reduce the review time for certifying authorities.

In the interest of transparency, EPA is providing the following summary of the relevant portions of the burden assessment associated with EPA’s existing certification regulations. EPA does not expect any measurable change in information collection burden associated with the rulemaking changes.

Respondents/affected entities: Project proponents, state and Tribal reviewers

(certifying authorities), Tribes applying for TAS.

Respondent’s obligation to respond: Required to obtain section 401 water quality certification; voluntary for Tribes to apply for TAS.

Estimated number of respondents: 154,006 responses from 77,146 respondents annually.

Frequency of response: Variable (one per Federal license or permit application, or only once) depending on type of information collected.

Total estimated burden: 861,274 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: \$48 million (per year).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this final rule will not have a significant economic impact on a substantial number of small entities under the RFA. The small entities subject to the requirements of this action are project proponents that are small businesses applying for Federal licenses or permits subject to section 401 certification, which includes construction, manufacturing, mining, and utility businesses. Section 401 requires project proponents to obtain a water quality certification from the certifying authority where the potential discharge originates or will originate before it may obtain such Federal license or permit.

EPA is not able to quantify the impacts of the rulemaking on small entities due to several data limitations and uncertainties, which are described within the Economic Analysis for the Final Rule, available in the docket for this rulemaking. However, EPA is including a qualitative assessment of the potential impacts of the rulemaking on project proponents that are small entities in the Economic Analysis for the Final Rule. Based on the qualitative analysis, the Agency has determined that some small entities may experience some impact from the rulemaking but that the impact would not be significant, nor would the number of small entities be substantial. See the Economic

Analysis for the Final Rule for details of the qualitative analysis.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates enforceable duties for the private sector, the cost does not exceed \$100 million or more. This action does not create enforceable duties for state and Tribal governments. See the Economic Analysis for the Final Rule in the docket for further discussion on UMRA.

E. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), EPA has determined that this rulemaking does not have federalism implications but expects that this rulemaking may be of significant interest to state and local governments. Consistent with EPA's policy to promote communication between EPA and state and local governments, EPA conducted outreach and engagement with state and local government officials and representatives prior to the finalization of this rule to permit them to have meaningful and timely input into its development.

EPA is finalizing updates to its CWA section 401 regulation to provide greater clarity and flexibility for certifying authorities in relation to acting on pre-filing meeting requests, contents of requests for certification, acting within the reasonable period of time, modifying a grant of certification, and participating in the neighboring jurisdictions process. EPA is also finalizing clarifications to the scope of Federal agency review; however, nothing in EPA's rulemaking would preempt state law. These regulatory clarifications and revisions will reinforce the authority granted to states by CWA section 401 to protect their water quality, which had been exercised by the states prior to implementation of the 2020 Rule.

Prior to proposing a rule in June 2022, EPA solicited recommendations and conducted pre-proposal outreach, such as virtual listening sessions, where many state and local governments, intergovernmental associations, and other associations representing state and local governments participated. Specifically, EPA hosted webinar-based listening sessions for pre-proposal input on June 14, June 15, June 23, and June 24, 2021, with over 400 participants from most states and a few territories. Furthermore, EPA accommodated

requests for listening sessions with representatives from the Association of Clean Water Administrators, the Association of State Wetland Managers, the Environmental Council of the States, Western States Water Council, Indiana Department of Environmental Management, Maryland Department of the Environment, New Mexico Environmental Department, New York Department of Environmental Conservation, Oregon Department of Environmental Quality, Virginia Department of Environmental Quality, and Washington Department of Ecology. All pre-proposal input letters and summaries of the webinar-based listening sessions are available in Docket ID No. EPA–HQ–OW–2021–0302. These webinars, meetings, and input letters provided a wide and diverse range of interests, positions, and recommendations to the Agency.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period, and EPA held a public hearing on July 18, 2022 for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for state and territory government representatives on June 15, 22, and 28, 2022—there were over 175 attendees at these listening sessions. Summaries of the public hearing sessions and of the input received during the state/territory listening sessions can be found in the docket for this rulemaking.

Furthermore, EPA reviewed and responded to the public comment letters from state, territory, and local governments in a Response to Comments document that can also be found in the docket for this rulemaking.

Comments on the proposed rule were submitted by various state and territory governmental agencies, predominately state environmental agencies or departments, with some comments from state departments of agriculture, wildlife (and fish and game), public health, and transportation. In addition, some comments were submitted by governors' offices and attorneys general, with a few joint comments from multiple state attorneys general. A few comments were submitted by state-specific, state-level water boards or departments. Comments were also submitted by several national and regional state associations. Many of these commenters were generally supportive of the rulemaking effort and elements of the proposed rule, but also offered suggestions and/or critiques of specific aspects of the proposed rule. Commenters in support of the proposed

rule generally critiqued the 2020 Rule or offered support for the 1971 Rule approach to section 401. These commenters argued that the proposed rule was an improvement over the 2020 Rule in terms of cooperative federalism and/or the purported approach to the CWA and discussed the importance of state involvement under the CWA and section 401, with several commenters discussing specific approaches in their states. On the other hand, other state commenters, including a large group of state attorneys general that signed onto one letter, voiced support for the 2020 Rule, arguing that the narrowed scope of certification review introduced in the 2020 Rule was necessary to prevent the abuse or misuse of CWA section 401 by certifying authorities.

As discussed throughout this preamble, EPA acknowledges that the final rule may change how states and territories administer the section 401 program, but anticipates that the adjustments incorporated into the final rule will provide states and territories with additional flexibility (1) in waiving or shortening the pre-filing meeting request requirement, (2) in defining additional content requirements for requests for certification, (3) in negotiating the length of the reasonable period of time (including development of categorical agreements), (4) in reviewing the water quality-related impacts from the activity, (5) in development of their certification decision documents, (6) in the ability to modify a grant of certification, and (7) in the neighboring jurisdictions process if a potential discharge originating in another jurisdiction may affect their water quality. Finally, the final rule provides clarity for states acting as certifying authorities on several key aspects of the certification process, including (1) the minimum contents of a request for certification, (2) the start of the reasonable period of time (and the default length of the reasonable period of time), (3) the water quality-related scope of review, (4) the recommended contents of certification decisions, (5) the extent of Federal agency review, (6) the limits to modifications of certifications, and (7) the neighboring jurisdictions process.

As mentioned above, all state and local government comment letters and recommendations received during the comment period are included in the rulemaking docket (Docket ID No. EPA–HQ–OW–2022–0128).

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

This action may have implications for Tribal governments. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. This action may change how Tribes with TAS for section 401 administer the section 401 program, but it will not have an administrative impact on Tribes on whose behalf EPA issues certifications. As discussed in the preamble, EPA expects this final rule to expand and further clarify the opportunities for Tribal participation in the CWA section 401 water quality certification process.

EPA consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this rulemaking to allow them to have meaningful and timely input into its development. EPA has developed a final “Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule” which further describes EPA’s efforts to engage with Tribal representatives and is available in the docket for this rulemaking.

As required by section 7(a), EPA’s Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

As previously mentioned, the Agency initiated a Tribal consultation and coordination process before proposing a rule by sending a “Notification of Consultation and Coordination” letter, dated June 7, 2021, to all 574 of the Tribes federally recognized at that time (*see* Docket ID No. EPA–HQ–OW–2021–0302). The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process for this rulemaking. In addition to two national Tribal webinars held on June 29 and July 7, 2021, the Agency convened other listening sessions, that Tribal members and representatives attended, for certifying authorities and the public. EPA continued outreach and engagement with Tribes and sought other opportunities to provide information and hear feedback from Tribes at national and regional Tribal meetings during and after the end of the consultation period. The Agency did not receive any consultation requests. All Tribal and Tribal organization letters

and webinar feedback are included in the pre-proposal docket (Docket ID No. EPA–HQ–OW–2021–0302), and a summary of the Tribal consultation and coordination effort may be found in the docket for this action (Docket ID No. EPA–HQ–OW–2022–0128). Many Tribal feedback letters or meeting participants expressed an interest in receiving additional information and in continued engagement with the Agency during development of the proposed rulemaking; however, most of these Tribal representatives highlighted other ongoing rulemakings that also required their engagement.

After publishing the proposed rule in the **Federal Register**, stakeholders were encouraged to submit comment letters during a 60-day public comment period, and EPA held a public hearing on July 18, 2022 for all stakeholders to provide public comment on the proposed rule. Additionally, EPA hosted three listening sessions specifically for Tribal representatives on June 15, 22, and 28, 2022—there were over 75 attendees at these listening sessions. Summaries of the public hearing sessions and of the input received during the Tribal listening sessions can be found in the docket for this rulemaking. Furthermore, EPA reviewed and responded to the public comment letters from Tribal representatives in a Response to Comments document that can also be found in the docket for this rulemaking.

Most Tribal commenters expressed support for the proposed rule’s return to pre-2020 rule practices to restore Tribal sovereignty for the protection of their water resources. Many Tribal commenters supported inclusion of a section 401 TAS process independent of TAS for section 303(c), asserting that it would increase Tribal authority related to the neighboring jurisdictions process and increase Tribal regulatory capability as certifying authorities. Many Tribal commenters supported EPA’s return to the Agency’s longstanding “activity as a whole” scope of review. Many Tribal commenters also expressed support for the proposed rule’s approach to extensions to the reasonable period of time, as well as the proposed removal of the regulatory prohibition on withdrawal and resubmission of requests for certification. Some Tribal commenters supported increased flexibility for modifications.

While many of the Tribal commenters supported the proposed rule, some Tribal commenters expressed disagreement or concern with portions of the proposed rule. A few Tribal commenters said that they were concerned with the inability to

participate in the neighboring jurisdictions process if EPA does not commit in the regulation to consulting with Tribes during EPA’s 30-day review period. Another issue some Tribal commenters raised was the need for more clarity regarding Tribal enforcement of section 401 certification conditions. Additionally, a few Tribal commenters expressed concern that the default 60-day reasonable period of time would not be enough time for their review of large, complex projects. As mentioned throughout this preamble, the Agency expects the adjustments made from the proposed rule to the final rule to address any Tribal representative concerns while continuing to provide the flexibility and clarity that many Tribal representatives requested. For more information about the Tribal consultation and coordination efforts, please see the final “Summary Report of Tribal Consultation and Engagement for the Clean Water Act Section 401 Water Quality Certification Improvement Rule” in the docket (Docket ID No. EPA–HQ–OW–2022–0128).

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive order.

Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA’s Policy on Children’s Health also does not apply.

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

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. *See* the Economic Analysis for the Final Rule in the docket for further discussion on Executive Order 13211.

I. National Technology Transfer and Advancement Act

This final rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. The Economic Analysis for the Final Rule includes information about the data limitations and uncertainties that exist regarding both baseline environmental conditions and how stakeholders, including certifying authorities, may respond to this final rule.

The Agency recognizes that the burdens of environmental pollution disproportionately fall on certain communities with environmental justice concerns, and EPA is responsive to environmental justice concerns through multiple provisions in this rule.

One of the ways the Agency addresses environmental justice concerns through the final rule is through the pre-filing meeting request requirement, which provides a mechanism to ensure certifying authorities can request and receive information needed to protect their water resources and ensure the activity will comply with applicable water quality requirements, including through consideration of information and input from potentially affected communities with environmental justice concerns during early engagement. In addition to informing the certification process, this also advances the goals of Executive Order 14096, including “meaningful involvement.”

Additionally, the final rule empowers certifying authorities to make a well-informed decision that may affect communities with environmental justice concerns because under the final rule, the certifying authority can determine the additional contents of requests for certification (as long as those contents are relevant to the water quality-related impacts from the activity and are identified prior to when a project proponent submits a request). Starting the certifying authority's review of a request for certification with the necessary information about water quality-related impacts from the activity promotes environmental justice and transparency in the certification process. This also enables certifying authorities to share a greater level of detail with the public (including any communities that may be impacted by a

proposed project), so that participants in the public notice and comment process can provide better informed input.¹²¹

Under the final rule's collaborative approach for determining the reasonable period of time, certifying authorities can take the needs of potentially affected communities into account when determining the amount of time they need to review and evaluate the potential impacts of a proposed project on the communities' water resources (e.g., a certifying authority may suggest a longer reasonable period of time to facilitate outreach to communities or to conduct studies on a proposed project's impact on local communities). Additionally, the “activity” approach for scope of review has the potential to benefit communities with environmental justice concerns by ensuring that the certifying authority can broadly review the potential water quality impacts on affected communities.

Furthermore, the TAS provisions for section 401 as a whole or only for section 401(a)(2) give Tribes additional options to obtain TAS, as well as more opportunities to provide input and voice any water quality concerns during the section 401 process. Lastly, when EPA is acting as the certifying authority, the Agency is finalizing the proposed updates to the public notice provision to facilitate participation by the broadest number of potentially interested stakeholders, including communities with environmental justice concerns.

The information supporting this Executive order review, including a description of data limitations and uncertainties, is contained in the Economic Analysis for the Final Rule, which can be found in the docket for this action and is briefly summarized in section V in this preamble.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 121

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

¹²¹ Under CWA section 401(a)(1), certifying authorities are required to establish procedures for public notice and, to the extent it deems appropriate, procedures for public hearings. 33 U.S.C. 1341(a)(1).

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Michael S. Regan,
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR parts 121, 122, and 124 as follows:

- 1. Revise part 121 to read as follows:

PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

Sec.

Subpart A—General

- 121.1 Definitions.
- 121.2 When certification is required.
- 121.3 Scope of certification.
- 121.4 Pre-filing meeting requests.
- 121.5 Request for certification.
- 121.6 Reasonable period of time.
- 121.7 Certification decisions.
- 121.8 Extent of Federal agency review.
- 121.9 Failure or refusal to act.
- 121.10 Modification to a grant of certification.
- 121.11 Requirements for Indian Tribes to administer a water quality certification program.

Subpart B—Neighboring Jurisdictions

- 121.12 Notification to the Regional Administrator.
- 121.13 Determination of effects on neighboring jurisdictions.
- 121.14 Objection from notified neighboring jurisdiction and request for a public hearing.
- 121.15 Public hearing and Federal agency evaluation of objection.

Subpart C—Certification by the Administrator

- 121.16 When the Administrator certifies.
- 121.17 Public notice and hearing.

Subpart D—Review and Advice

- 121.18 Review and advice.

Subpart E—Severability

- 121.19 Severability

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General

§ 121.1 Definitions.

As used in this part, the following terms shall have the meanings indicated:

(a) *Administrator* means the Administrator, Environmental Protection Agency (EPA).

(b) *Certifying authority* means the entity responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.

(c) *Federal agency* means any agency of the Federal Government to which application is made for a Federal license or permit that is subject to Clean Water Act section 401.

(d) *Federal Indian Reservation, Indian reservation, or reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(e) *Indian Tribe or Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation.

(f) *License or permit* means any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United States.

(g) *Neighboring jurisdiction* means any state, or Tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.

(h) *Project proponent* means the applicant for a Federal license or permit, or the entity seeking certification.

(i) *Regional Administrator* means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(j) *Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306, and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.

§ 121.2 When certification is required.

Certification or waiver is required for any Federal license or permit that authorizes any activity which may result in any discharge from a point source into waters of the United States.

§ 121.3 Scope of certification.

(a) When a certifying authority reviews a request for certification, the

certifying authority shall evaluate whether the activity will comply with applicable water quality requirements. The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation.

(b) Consistent with the scope of review identified in paragraph (a) of this section, a certifying authority shall include any conditions in a grant of certification necessary to assure that the activity will comply with applicable water quality requirements.

§ 121.4 Pre-filing meeting requests.

The project proponent shall request a pre-filing meeting with the certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the requirement for a pre-filing meeting request.

§ 121.5 Request for certification.

(a) Where a project proponent is seeking certification from any certifying authority, the request for certification shall include the following minimum contents:

(1) If the request for certification is for an individual Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the Federal license or permit application submitted to the Federal agency; and

(ii) Any readily available water quality-related materials that informed the development of the application.

(2) If the request for certification is for the issuance of a general Federal license or permit, it shall be in writing, signed, and dated and shall include the following:

(i) A copy of the draft Federal license or permit; and

(ii) Any readily available water quality-related materials that informed the development of the draft Federal license or permit.

(b) Where a project proponent is seeking certification from the Regional Administrator, if not already included in the request for certification in accordance with paragraph (a) of this section, a request for certification shall also include the following, as applicable:

(1) A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

(2) The specific location of any discharge(s) that may result from the proposed activity;

(3) A map or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, and highways;

(4) A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;

(5) The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) when any discharge(s) may commence;

(6) A list of all other Federal, interstate, Tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

(7) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission procedures, unless the pre-filing meeting request requirement was waived.

(c) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified prior to when the request for certification is made.

(d) Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified contents of a request for certification in addition to those identified in paragraph (a) of this section that are relevant to the water quality-related impacts from the activity, the project proponent shall include in the request for certification those additional contents identified in paragraph (b) of this section.

§ 121.6 Reasonable period of time.

(a) The reasonable period of time begins on the date that the certifying authority receives a request for certification, as defined in § 121.5, in accordance with the certifying authority's applicable submission procedures. The certifying authority shall send written confirmation to the project proponent and Federal agency of the date that the request for certification was received.

(b) The Federal agency and the certifying authority may jointly agree in writing to the reasonable period of time for the certifying authority to act on the request for certification, provided the reasonable period of time does not exceed one year from the date that the request for certification was received. Such written agreements may establish categorical reasonable periods of time.

(c) If the Federal agency and the certifying authority do not agree in writing on the length of the reasonable period of time, the reasonable period of time shall be six months.

(d) If a longer period of time is necessary to accommodate the certifying authority's public notice procedures or force majeure events (including, but not limited to, government closure or natural disasters), upon written notification by the certifying authority to the Federal agency prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by public notice procedures or the force majeure event. In such written notification to the Federal agency, the certifying authority shall identify how much additional time is required and provide a justification for such extension. Such an extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

(e) The Federal agency and certifying authority may agree in writing to extend the reasonable period of time for any reason, provided that the extension shall not cause the reasonable period of time to exceed one year from the date that the request for certification was received.

§ 121.7 Certification decisions.

(a) A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

(b) A certifying authority shall act on a request for certification within the scope of certification and within the reasonable period of time.

(c) A grant of certification shall be in writing and should include the following:

- (1) Identification of the decision as a grant of certification;
- (2) Identification of the applicable Federal license or permit;
- (3) A statement that the activity will comply with water quality requirements; and
- (4) An indication that the certifying authority complied with its public

notice procedures established pursuant to Clean Water Act section 401(a)(1).

(d) A grant of certification with conditions shall be in writing and should include the following:

- (1) Identification of the decision as a grant of certification with conditions;
- (2) Identification of the applicable Federal license or permit;
- (3) A statement explaining why each of the included conditions is necessary to assure that the activity will comply with water quality requirements; and
- (4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(e) A denial of certification shall be in writing and should include the following:

- (1) Identification of the decision as a denial of certification;
- (2) Identification of the applicable Federal license or permit;
- (3) A statement explaining why the certifying authority cannot certify that the activity will comply with water quality requirements, including but not limited to a description of any missing water quality-related information if the denial is based on insufficient information; and
- (4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(f) An express waiver shall be in writing and should include the following:

- (1) Identification of the decision as an express waiver of certification;
- (2) Identification of the applicable Federal license or permit;
- (3) A statement that the certifying authority expressly waives its authority to act on the request for certification; and
- (4) An indication that the certifying authority complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1).

(g) If the certifying authority determines that no water quality requirements are applicable to the activity, the certifying authority shall grant certification.

§ 121.8 Extent of Federal agency review.

To the extent a Federal agency verifies compliance with the requirements of Clean Water Act section 401, its review is limited to whether: the appropriate certifying authority issued the certification decision; the certifying authority confirmed it complied with its public notice procedures established pursuant to Clean Water Act section 401(a)(1); and the certifying authority acted on the request for certification within the reasonable period of time.

§ 121.9 Failure or refusal to act.

(a) The certification requirement shall be waived only if a certifying authority fails or refuses to act on a request for certification within the reasonable period of time.

(b) If the Federal agency determines that the certifying authority did not act on a request for certification within the reasonable period of time, the Federal agency shall promptly notify the certifying authority and project proponent in writing that the certification requirement has been waived in accordance with § 121.8. Such notice shall satisfy the project proponent's requirement to obtain certification.

§ 121.10 Modification to a grant of certification.

(a) Provided that the Federal agency and the certifying authority agree in writing that the certifying authority may modify a grant of certification (with or without conditions), the certifying authority may modify only the agreed-upon portions of the certification. The certifying authority is not required to obtain the Federal agency's agreement on the language of the modification.

(b) The certifying authority shall not, through a modification pursuant to paragraph (a) of this section:

- (1) Revoke a grant of certification (with or without conditions); or
- (2) Change a grant of certification (with or without conditions) into a denial or waiver of certification.

§ 121.11 Requirements for Indian Tribes to administer a water quality certification program.

(a) The Regional Administrator may accept and approve a Tribal application for purposes of administering a water quality certification program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 121.1(d) and (e);

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(3) The water quality certification program to be administered by the Indian Tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality certification program in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations in this chapter.

(b) Requests by an Indian Tribe for administration of a water quality certification program should be submitted to the appropriate EPA Regional Administrator. The application shall include the following information, provided that where the Tribe has previously qualified for eligibility or "treatment as a state" under another EPA-administered program, the Tribe need only provide the required information that has not been submitted in a previous application:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; and

(ii) A statement by the Tribe's legal counsel or equivalent official that describes the basis for the Tribe's assertion of authority and may include copies of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality certification program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience that may include the administration of

programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and implementing a water quality certification program; and

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality certification program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(c) The procedure for processing a Tribe's application is as follows:

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to paragraph (b) of this section in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

(2) Except as provided in paragraph (c)(4) of this section, within 30 days after receipt of the Tribe's application, the Regional Administrator shall provide appropriate notice. The notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters;

(ii) Be provided to all appropriate governmental entities; and

(iii) Provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(3) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has

adequately demonstrated that it meets the requirements of paragraph (a)(3) of this section.

(4) Where, after November 27, 2023, EPA has determined that a Tribe qualifies for treatment in a similar manner as a state for the Clean Water Act section 303(c) Water Quality Standards Program, Clean Water Act section 303(d) Impaired Water Listing and Total Maximum Daily Loads Program, Clean Water Act section 402 National Pollutant Discharge Elimination System Program, or Clean Water Act section 404 Dredge and Fill Permit Program, and has provided notice and an opportunity to comment on the Tribe's assertion of authority to appropriate governmental entities as part of its review of the Tribe's prior application, no further notice to governmental entities, as described in paragraph (c)(2) of this section, shall be provided with regard to the same Tribe's application for the water quality certification program, unless the application presents to the EPA Regional Administrator different jurisdictional issues or significant new factual or legal information relevant to jurisdiction.

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, they shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the water quality certification program.

(d) An Indian Tribe may submit a Tribal application for purposes of administering only the Clean Water Act section 401(a)(2) portion of a water quality certification program.

Subpart B—Neighboring Jurisdictions

§ 121.12 Notification to the Regional Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the appropriate Regional Administrator.

(1) The notification shall include a copy of the certification or waiver and the application for the Federal license or permit.

(2) The notification shall also contain a general description of the proposed project, including but not limited to the Federal license or permit identifier, project location (*e.g.*, latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing

comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification.

(b) If the Regional Administrator determines there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to Clean Water Act section 401(a)(2), the Regional Administrator may make a written request to the Federal agency that such information be provided in a timely manner for EPA's determination, and the Federal agency shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe.

(c) The Regional Administrator may enter into an agreement with a Federal agency regarding the manner of this notification process and the provision of supplemental information.

§ 121.13 Determination of effects on neighboring jurisdictions.

(a) Within 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the project may affect water quality in a neighboring jurisdiction.

(b) If the Regional Administrator determines that the discharge from the project may affect water quality in a neighboring jurisdiction, within 30 days after receiving notice in accordance with § 121.12(a), the Regional Administrator shall notify the neighboring jurisdiction, the Federal agency, and the project proponent in accordance with paragraph (c) of this section.

(c) Notification from the Regional Administrator shall be in writing and shall include:

(1) A statement that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality;

(2) A copy of the Federal license or permit application and related certification or waiver; and

(3) A statement that the neighboring jurisdiction has 60 days after such notification to notify the Regional Administrator and the Federal agency, in writing, if it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency.

(d) A Federal license or permit shall not be issued pending the conclusion of the process described in this section, and §§ 121.14 and 121.15.

§ 121.14 Objection from notified neighboring jurisdiction and request for a public hearing.

(a) If a neighboring jurisdiction notified by the Regional Administrator pursuant to § 121.13(b) determines that a discharge from the project will violate any of its water quality requirements, it shall notify the Regional Administrator and the Federal agency in accordance with paragraph (b) of this section within 60 days after receiving such notice from the Regional Administrator.

(b) Notification from the notified neighboring jurisdiction shall be in writing and shall include:

(1) A statement that the notified neighboring jurisdiction objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the notified neighboring jurisdiction's determination that the discharge from the project will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on the notified neighboring jurisdiction's objection.

(c) The notified neighboring jurisdiction may withdraw its objection prior to the public hearing. If the notified neighboring jurisdiction withdraws its objection, it shall notify the Regional Administrator and the Federal agency, in writing, of such withdrawal.

§ 121.15 Public hearing and Federal agency evaluation of objection.

(a) Upon a request for hearing from a notified neighboring jurisdiction in accordance with § 121.14(b), the Federal agency shall hold a public hearing on the notified neighboring jurisdiction's objection to the Federal license or permit, unless the objection is withdrawn in accordance with § 121.14(c).

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing to interested parties, including but not limited to the notified neighboring jurisdiction, the certifying authority, the project proponent, and the Regional Administrator.

(c) At the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the notified

neighboring jurisdiction and the Regional Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional Federal license or permit conditions may be necessary to ensure that any discharge from the project will comply with the neighboring jurisdiction's water quality requirements. If such conditions may be necessary, the Federal agency shall include them in the Federal license or permit.

(e) If additional Federal license or permit conditions cannot ensure that the discharge from the project will comply with the notified neighboring jurisdiction's water quality requirements, the Federal agency shall not issue the Federal license or permit.

Subpart C—Certification by the Administrator

§ 121.16 When the Administrator certifies.

(a) Certification or waiver by the Administrator is required where no state, Tribe, or interstate agency has authority to give such a certification.

(b) When acting pursuant to this section, the Administrator shall comply with the requirements of Clean Water Act section 401 and this part.

§ 121.17 Public notice and hearing.

(a) Within 20 days of the date that the request for certification was received, the Administrator shall provide public notice of the request for certification. Following such public notice, the Administrator shall provide an opportunity for public comment.

(b) If the Administrator determines that a public hearing on a request for certification is appropriate, the Administrator shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means.

Subpart D—Review and Advice

§ 121.18 Review and advice.

Upon the request of any Federal agency, certifying authority, or project proponent, the Administrator shall provide any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

Subpart E—Severability**§ 121.19 Severability.**

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 2. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 3. Amend § 122.4 by revising paragraph (b) to read as follows:

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of the CWA and that certification has not been obtained or waived;

* * * * *

■ 4. Amend § 122.44 by revising paragraph (d)(3) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) * * *

(3) Conform to the conditions in a State certification under section 401 of the CWA when EPA is the permitting authority;

* * * * *

■ 5. Amend § 122.62 by revising paragraph (a)(3)(iii) to read as follows:

§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25).

* * * * *

(a) * * *

(3) * * *

(iii) For changes based upon modified State certifications of NPDES permits, see § 121.10 of this chapter.

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 6. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

■ 7. Amend § 124.53 by revising paragraphs (b) through (e) to read as follows:

§ 124.53 State certification.

* * * * *

(b) Consistent with the requirements set forth in §§ 121.4 and 121.5 of this chapter, applications for individual permits may be forwarded by the Regional Administrator to the certifying State agency with a request to act on the request for certification consistent with § 121.7 of this chapter.

(c) If State certification has not been requested by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency a request for certification consistent with § 121.5 of this chapter and include a copy of the draft permit.

(d) State certification shall be granted or denied within the reasonable period of time as required under CWA section 401(a)(1). The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards.

■ 8. Amend § 124.54 by revising paragraphs (a) and (b) to read as follows:

§ 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify

the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a copy of the certification required under CWA section 401(a)(1) to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section 301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision to the State. If the State fails to deny or grant certification and concurrence under paragraph (a) of this section within the reasonable period of time provided in CWA section 401(a)(1), certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

* * * * *

■ 9. Amend § 124.55 by:

■ a. Revising paragraph (a);

■ b. Removing paragraph (b);

■ c. Redesignating paragraphs (c) through (f) as paragraphs (b) through (e), respectively; and

■ d. Revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1), no final permit shall be issued:

(1) If certification is denied; or

(2) Unless the final permit incorporates the conditions specified in the certification.

(b) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

(c) A condition in a draft permit may be changed during agency review in any manner consistent with a corresponding certification. No such changes shall require EPA to submit the permit to the State for recertification.

* * * * *

[FR Doc. 2023–20219 Filed 9–26–23; 8:45 am]

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Part III

The President

Memorandum of September 15, 2023—Delegation of Authority Under Section 404(c) of the Child Soldiers Prevention Act of 2008
Presidential Determination No. 2023–11 of September 15, 2023—
Presidential Determination and Certification With Respect to the Child Soldiers Prevention Act of 2008
Presidential Determination No. 2023–12 of September 15, 2023—
Presidential Determination on Major Drug Transit or Major Drug Illicit Countries for Fiscal Year 2024

Presidential Documents

Title 3—

Memorandum of September 15, 2023

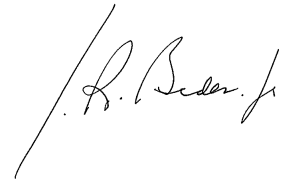
The President

Delegation of Authority Under Section 404(c) of the Child Soldiers Prevention Act of 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of State for Fiscal Year 2024 the authority under section 404(c)(1) of the Child Soldiers Prevention Act of 2008 (22 U.S.C. 2370c–1(c)(1)) (CSPA) to waive the application of the prohibition in section 404(a) of the CSPA with respect to Rwanda, to waive the application of the prohibition in section 404(a) of the CSPA with respect to Turkey to allow for the provision of Foreign Military Financing and Excess Defense Articles, and to make the determination and certification necessary for such waivers. I hereby also delegate to the Secretary of State the authority under section 404(c)(2) of the CSPA to notify the appropriate congressional committees of such waivers and the justification for granting such waivers, and to publish the determination for such waivers in the *Federal Register*.

You are hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, September 15, 2023

Presidential Documents

Presidential Determination No. 2023–11 of September 15, 2023

Presidential Determination and Certification With Respect to the Child Soldiers Prevention Act of 2008

Memorandum for the Secretary of State

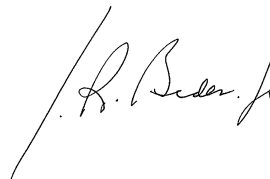
Pursuant to section 404 of the Child Soldiers Prevention Act of 2008 (22 U.S.C. 2370c–1) (CSPA), I hereby:

Determine that it is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Egypt; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Turkey to allow for the provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance, the issuance of direct commercial sales (DCS) licenses, and support provided pursuant to 10 U.S.C. 331 and 10 U.S.C. 333, to the extent that the CSPA would restrict such assistance or support; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Libya and Somalia to allow for the provision of IMET and PKO assistance and support provided pursuant to 10 U.S.C. 331 and 10 U.S.C. 333, to the extent that the CSPA would restrict such assistance or support; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to the Democratic Republic of the Congo to allow for the provision of IMET and PKO assistance and the issuance of DCS licenses in connection with the reexport of transport aircraft, to the extent that the CSPA would restrict such assistance; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to the Central African Republic and Yemen to allow for the provision of IMET and PKO assistance, to the extent that the CSPA would restrict such assistance; and to waive the application of the prohibition in section 404(a) of the CSPA to allow for the issuance of DCS licenses related to other United States Government assistance for the above countries and, with respect to the Russian Federation, solely for the issuance of DCS licenses in connection with the International Space Station; and

Certify that the governments of the above countries are taking effective and continuing steps to address the problem of child soldiers.

Accordingly, I hereby waive such applications of section 404(a) of the CSPA.

You are authorized and directed to submit this determination and certification to the Congress, along with the Memorandum of Justification, and to publish this determination in the *Federal Register*.

A handwritten signature in black ink, appearing to read "J. R. Biden Jr.", is positioned in the upper right quadrant of the page.

THE WHITE HOUSE,
Washington, September 15, 2023

Presidential Documents

Presidential Determination No. 2023–12 of September 15, 2023

Presidential Determination on Major Drug Transit or Major Drug Illicit Countries for Fiscal Year 2024

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107–228) (FRAA), I hereby identify the following countries as major drug transit or major illicit drug producing countries: Afghanistan, The Bahamas, Belize, Bolivia, Burma, the People's Republic of China (PRC), Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela.

A country's presence on the foregoing list is not necessarily a reflection of its government's counterdrug efforts or level of cooperation with the United States. Consistent with the statutory definition of a major drug transit or major illicit drug producing country set forth in sections 481(e)(2) and 481(e)(5) of the Foreign Assistance Act of 1961, as amended (Public Law 87–195) (FAA), the reason countries are placed on the list is the combination of geographic, commercial, and economic factors that allow drugs to be transited or produced, even if a government has engaged in robust and diligent narcotics control and law enforcement measures.

The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (Public Law 117–263) amended the definition of major drug source countries to include source countries of precursor chemicals used to produce illicit drugs significantly affecting the United States. For countries with large chemical and pharmaceutical industries, preventing precursor chemicals from being diverted to the production of illicit drugs is a particularly difficult challenge, including for the United States and other countries with strict regulatory regimes to prevent diversion. The PRC has been identified as a major source country due to this change in legislation, and the United States strongly urges the PRC and other chemical source countries to tighten chemical supply chains and prevent diversion.

Pursuant to section 706(2)(A) of the FRAA, I hereby designate Bolivia, Burma, and Venezuela as having failed demonstrably during the previous 12 months to both adhere to their obligations under the international counternarcotics agreements and to take the measures required by section 489(a)(1) of the FAA. Included with this determination are justifications for the designations of Bolivia, Burma, and Venezuela, as required by section 706(2)(B) of the FRAA. I have also determined, in accordance with provisions of section 706(3)(A) of the FRAA, that United States programs that support Bolivia, Burma, and Venezuela are vital to the national interests of the United States.

Although the rate of drug overdose deaths in the United States is flattening after years of sharp increases, more than 109,000 lives were lost to drug overdoses in 2022, according to preliminary data from the Centers for Disease Control and Prevention. This remains unacceptably high, and my Administration is deploying unprecedented resources and building new partnerships to confront this public health and security crisis. Domestically, in the last fiscal year alone, the United States allocated more than \$24 billion to expand evidence-based prevention and treatment, including harm reduction and

recovery support services, with targeted investments to meet the needs of populations at greatest risk for overdose and substance use disorder. Beyond these additional resources, my Administration expanded access to Naloxone, which can reverse opioid-related overdoses, and made this life-saving medicine available over-the-counter. My Administration has also removed barriers to treatment, including by working with the Congress on bipartisan legislation. My Fiscal Year 2024 Budget calls for an even greater historic investment of \$46.1 billion for National Drug Control Program agencies, a more than \$2 billion increase from what was enacted during the previous year. This request also includes significant investments in reducing the supply of illicit drugs originating from beyond our borders.

The vast majority of illicit drugs causing the most damage in the United States originate from beyond our borders, and our most effective means of reducing the availability of these drugs is to expand and improve our cooperation with international partners. Most drug overdose deaths within the United States involve illicit synthetic drugs and particularly synthetic opioids such as fentanyl. These synthetic drugs can be produced anywhere using precursor chemicals widely available for legitimate purposes, at a fraction of the cost and time it takes criminal organizations to produce dangerous drugs from plants.

Every country and region of the globe faces its own challenges from synthetic drugs. In Africa, the synthetic opioid tramadol is driving increasing numbers of injuries and fatalities, especially when mixed with other drugs. In the Middle East, synthetic stimulants are trafficked and sold as counterfeit captagon in large quantities. Ketamine—a synthetic anesthetic with hallucinogenic effects—is increasingly encountered throughout Asia, and it is being found mixed with methamphetamine, which appears to be growing more prevalent and more potent all over the world. And the categories of synthetic drugs are constantly shifting, as drug traffickers adjust formulas to avoid international controls and domestic regulations to create new demand. More than 1,100 new psychoactive substances and designer drugs have been detected and reported to the United Nations over the past decade alone.

To confront this common challenge, the United States launched this past summer a new Global Coalition to Address Synthetic Drug Threats. This diverse coalition of countries and international organizations will share best practices and expand cooperation to prevent the illicit manufacture and trafficking of synthetic drugs, detect emerging drug threats and use patterns, and promote public health interventions to prevent and reduce drug use and promote recovery. The United States welcomes all like-minded governments to participate in the work of this coalition and join efforts against these rapidly evolving global threats.

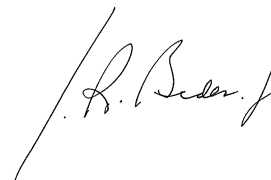
The political commitment of our international partners remains critical to achieving success against illicit drug threats, and no country is more important than Mexico. Under the Bicentennial Framework for Security, Public Health, and Safe Communities, our two countries have cooperated to seize greater volumes of fentanyl and other drugs. We have worked successfully during the last year to improve law enforcement collaboration, prevent the diversion of precursor chemicals, and arrest key organized crime figures involved in drugs and firearms trafficking, migrant smuggling, and other criminal activity. Sadly, some of these arrests resulted in the loss of lives of Mexican officials, and their sacrifices underscore the shared commitment from both countries to do what is necessary to fight these criminal organizations. To that end and to build on the increased cooperation of the past year, both countries should continue strengthening law enforcement information sharing and collaboration; build capacity to detect and counter drug production and trafficking and diversion of chemicals and drug-related equipment; and improve mechanisms to monitor, prevent, and treat drug substance use disorders.

With our key partners in South America, the United States will continue to support ongoing efforts to reduce coca cultivation and cocaine production,

expand access to justice, and promote alternative livelihoods. Colombia has historically been a strong partner in the fight against the drug trade. Nevertheless, illicit coca cultivation and cocaine production remain at historically high levels, and I urge the Government of Colombia to prioritize efforts to expand its presence in coca-producing regions and achieve sustainable progress against criminal organizations. In Bolivia, I encourage additional steps by the government to safeguard the country's licit coca markets from criminal exploitation, reduce illicit coca cultivation that continues to exceed legal limits under Bolivia's domestic laws for medical and traditional use, and continue to expand cooperation with international partners to disrupt transnational criminal networks.

Afghanistan has been removed from the list of countries determined to have "failed demonstrably" due to progress made within that country over the past year in reducing the cultivation of opium poppy and production of illicit narcotics. However, I remain concerned by the continuation of the illicit drug trade within and originating from Afghanistan, including methamphetamine. The country's drug control efforts must be sustained and expanded to include meaningful steps against drug trafficking and the drug supply chain, including by eliminating illicit drug stockpiles and curbing methamphetamine production. I will reconsider Afghanistan's status during the next annual review based on whether these additional steps are taken, in keeping with Afghanistan's international drug control commitments and in full respect for the human rights of its people.

You are authorized and directed to submit this designation, with the Bolivia, Burma, and Venezuela memoranda of justification, under section 706 of the FRAA, to the Congress, and to publish this determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, September 15, 2023

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