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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2014–0106]

RIN 0579–AE10

#### Importation of *Phalaenopsis* Spp. Plants for Planting in Approved Growing Media From China to the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations governing the importation of plants for planting to authorize the importation of *Phalaenopsis* spp. plants for planting from China in approved growing media into the continental United States, subject to a systems approach. The systems approach consists of measures that are currently specified in the regulations as generally applicable to all plants for planting authorized for importation into the United States in approved growing media. This rule allows for the importation of *Phalaenopsis* spp. plants for planting from China in approved growing media, while providing protection against the introduction of quarantine plant pests.

**DATES:** Effective March 14, 2016.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lydia E. Colón, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1236; (301) 851–2302.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in 7 CFR part 319 prohibit or restrict the importation of certain plants and plant products into the United States to prevent the introduction of quarantine plant pests.

The regulations contained in “Subpart—Plants for Planting,” §§ 319.37 through 319.37–14 (referred to below as the regulations), prohibit or restrict, among other things, the importation of living plants, plant parts, and seeds for propagation or planting.

The regulations differentiate between prohibited articles and restricted articles. Prohibited articles are plants for planting whose importation into the United States is not authorized due to the risk the articles present of introducing or disseminating quarantine plant pests. Restricted articles are articles authorized for importation into the United States, provided that the articles are subject to mitigation measures to address such risk.

Conditions for the importation into the United States of restricted articles in growing media are found in § 319.37–8. Within that section, the introductory text of paragraph (e) lists taxa of restricted articles that may be imported into the United States in approved growing media, subject to the provisions of a systems approach. Paragraph (e)(1) of § 319.37–8 lists the approved growing media, while paragraph (e)(2) contains the provisions of the systems approach. Within paragraph (e)(2), paragraphs (i) through (viii) contain provisions that are generally applicable to all the taxa listed in the introductory text of paragraph (e), while paragraphs (ix) through (xii) contain additional, taxon-specific provisions.

In response to a request from the national plant protection organization (NPPO) of China, on June 1, 2015, in a proposed rule<sup>1</sup> published in the **Federal Register** (80 FR 30959–30961, Docket No. APHIS–2014–0106), we proposed to amend the introductory text of paragraph (e) of § 319.37–8 to add *Phalaenopsis* spp. plants for planting from China to the list of taxa authorized for importation into the United States in approved growing media. We also proposed to add a paragraph (e)(2)(xii) to § 319.37–8 that would specify that such plants for planting may only be imported into the continental United States.

We solicited comments concerning our proposal for 60 days ending July 31, 2015. We received eight comments by

that date. They were from the NPPO of China, two State departments of agriculture, an organization representing State departments of agriculture, an organization representing horticulture in the State of Hawaii, a plant pathologist specializing in *Phalaenopsis* spp. plants for planting, and private citizens.

One commenter suggested we finalize the rule, as written. The remaining commenters had questions and comments regarding the rule and its supporting documents. We discuss the comments that we received below, by topic.

#### Comments Regarding the Pest Risk Assessment and Risk Management Document

In response to the NPPO of China’s request, we prepared a pest risk assessment (PRA), titled “Importation of *Phalaenopsis* spp. Orchids in Growing Media from China into the Continental United States: A Pathway-Initiated Risk Assessment,” to analyze the potential pest risk associated with the importation of *Phalaenopsis* spp. plants for planting in approved growing media into the continental United States from China. We also prepared a risk management document (RMD), titled “Importation of *Phalaenopsis* spp. Orchids in Approved Growing Media from China into the Continental United States,” to identify the phytosanitary measures necessary to ensure the safe importation into the continental United States of *Phalaenopsis* spp. plants for planting in approved growing media from China.

One commenter stated that the PRA did not consider the possibility that viral pathogens of *Phalaenopsis* spp. plants for planting could be introduced into the continental United States through the importation of *Phalaenopsis* spp. plants for planting in approved growing media from China.

In developing our PRAs, we first prepare a list of pests of the commodity that we have determined to occur in the particular foreign region. We then determine whether the pests are quarantine pests, which the regulations define as plant pests that are of potential economic importance to the United States and not yet present in the United States, or present but not widely distributed and being officially controlled. If the pests are quarantine pests, we then assess whether they

<sup>1</sup>To view the proposed rule, its supporting documents, or the comments that we received, go to <http://www.regulations.gov/#:docketDetail;D=APHIS-2014-0106>.

could be introduced into the United States through the importation of the commodity.

The PRA identified five viral pathogens of *Phalaenopsis* spp. plants for planting that we have determined to occur in China. However, none of these pathogens are quarantine pests. Accordingly, we did not assess whether they are likely to follow the pathway on *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States.

One commenter pointed out that, in the PRA, the list of plant pests of *Phalaenopsis* spp. plants for planting that are known to occur in China did not include *Dickeya dieffenbachiae*, a bacterial pathogen, and *Colletotrichum karstii*, a pathogenic fungus. The commenter stated that these pests occur in China and could follow the pathway on *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States. The commenter concluded that the pests therefore should be added to the PRA, and mitigation measures specific to the pests should be added to the RMD and rule.

*D. dieffenbachiae* and *C. karstii* were detected in China after the PRA and RMD were drafted, and we agree with the commenter that they could follow the pathway on *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States. However, we do not consider it necessary to revise the RMD or rule to specify mitigation measures for these pests. We reserve pest-specific mitigation measures for quarantine pests. Neither *D. dieffenbachiae* nor *C. karstii* is a quarantine pest: Both are present in the United States, and neither pest is under official control.

Two commenters pointed out that the PRA identified four quarantine pests that could follow the pathway on *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States: *Spodoptera litura*, *Thrips palmi*, *Cylindrosporium phalaenopsidis*, and *Lissachatina fulica*. The commenters stated that, if these pests became established throughout the United States, they could result in significant economic losses for domestic producers. For this reason, the commenters did not support the proposed rule.

We agree that, if the quarantine pests identified by the PRA were to become established throughout the United States, they could cause economic losses for domestic producers. However, for the reasons specified in the RMD and the proposed rule itself, if the provisions of this rule are adhered to,

we have determined that they will mitigate the plant pest risk associated with the importation of *Phalaenopsis* spp. plants for planting in approved growing media from China.

Because we had identified more pests that could follow the pathway on orchids from Taiwan to the United States than from China to the continental United States, one commenter surmised that we were establishing more favorable trading conditions for China than for Taiwan regarding the export of orchids to the United States.

The commenter's assumption is incorrect. There are more quarantine pests of *Oncidium* spp. known to occur in Taiwan that could follow the pathway on *Oncidium* spp. plants for planting in approved growing media from Taiwan to the United States than there are of *Phalaenopsis* spp. known to occur in China that could follow the pathway on *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States.

Finally, one commenter asked whether we were confident that the PRA had identified all the plant pests of *Phalaenopsis* spp. plants for planting in China, given China's size.

We are confident. In the PRA, we took into consideration China's size and relied on multiple sources to identify pests of *Phalaenopsis* spp. plants for planting in China.

#### Comments Regarding Movement to Hawaii

One commenter noted that the rule only proposed to authorize the importation of *Phalaenopsis* spp. plants for planting in approved growing media from China to the continental United States, and did not propose to authorize such importation to Hawaii or the territories of the United States. The commenter asked whether, once *Phalaenopsis* spp. plants for planting in approved growing media from China enter the continental United States, they subsequently may be shipped to Hawaii or the territories. If the rule does not authorize such reshipment, the commenter asked how we intended to prevent it from occurring.

This rule expressly prohibits such reshipment, and we will use inspections to prevent it from occurring.

#### Comments Regarding the Proposed Systems Approach

We proposed that the *Phalaenopsis* spp. plants for planting would have to be grown in a greenhouse in which sanitary procedures adequate to exclude quarantine pests are always employed.

We proposed that, at a minimum, the greenhouse would have to be free from sand and soil, have screenings with openings of not more than 0.6 mm on all vents and openings except entryways, have entryways equipped with automatic closing doors, regularly clean and disinfect floors, benches, and tools, and use only rainwater that has been boiled or pasteurized, clean well water, or potable water to water the plants.

One commenter stated that plant pest population densities can vary significantly within a foreign region. The commenter expressed concern that sanitary procedures that are adequate to exclude quarantine pests from a greenhouse in one region of China may not be adequate to do so in another region.

Growers must employ sanitary procedures that are adequate to exclude quarantine pests from the *Phalaenopsis* spp. plants for planting grown at the greenhouse that are intended for export to the United States. These sanitary procedures must therefore correspond to the quarantine pest risk associated with the area in which the greenhouse is located. Accordingly, if the greenhouse is located in an area of China with particularly high population densities of a certain quarantine pest, the grower may need to employ additional safeguards to exclude that pest from affecting plants for planting at the greenhouse. The NPPO of China will make this determination regarding whether additional safeguards are necessary, and will communicate the safeguards needed to the greenhouse in an agreement with the grower. The grower must enter into such an agreement with the NPPO in order to export *Phalaenopsis* spp. plants for planting in approved growing media to the United States.

Another commenter expressed concern that screenings with openings of 0.6 mm would not preclude *T. palmi* from entering the greenhouses. The commenter cited studies indicating that 40 to 50 percent of *T. palmi* that attempt to pass through such an opening can do so.

We agree that screenings with openings of 0.6 mm may not preclude all *T. palmi* from entering the greenhouse. However, as we mentioned above, in order to comply with the provisions of the systems approach, growers will have to employ sanitary procedures that are sufficient to exclude quarantine pests from the *Phalaenopsis* spp. intended for export to the United States. Accordingly, growers in areas where *T. palmi* are present will be expected to develop a pest management

plan for *T. palmi* to address incursions of this pest into the greenhouse; the plan must have sufficient safeguards to prevent *Phalaenopsis* spp. plants for planting intended for export to the United States from becoming infested with *T. palmi*. The agreement that the grower enters into with the NPPO of China will specify the additional safeguards that the grower will use.

In the proposed rule, we proposed to add a condition restricting the importation of *Phalaenopsis* spp. from China in approved growing media to the continental United States to § 319.37–8 as paragraph (e)(2)(xii). In this final rule, it is added as paragraph (e)(2)(xiii).

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the change discussed in this document.

#### Executive Order 12866 and Regulatory Flexibility Act

This 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 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

APHIS is amending the regulations in 7 CFR 319.37–8(e) to allow the importation from China into the continental United States of orchids of the genus *Phalaenopsis* established in an approved growing medium, subject to specified growing, inspection, and certification requirements.

Prior to this rule, *Phalaenopsis* spp. imported from China were required to be bare-rooted. Eliminating this requirement is expected to increase the number and quality of orchids imported from China by U.S. producers, who then finish the plants for the retail market. This change could result in cost savings for these U.S. producers, which may or may not be passed on to U.S. buyers. The amended regulations could also result in the importation of market-ready *Phalaenopsis* spp. in approved growing media from China that would directly compete at wholesale and retail levels with U.S. finished potted orchids. The latter scenario is considered unlikely, given the technical challenges and additional marketing costs incurred when shipping finished plants in pots.

While many of the U.S. entities that will be affected by the rule such as orchid producers and importers may be small by Small Business Administration standards, we expect economic effects for these entities to be modest.

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

#### National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this final rule. The environmental assessment provides a basis for the conclusion that the importation of *Phalaenopsis* spp. plants for planting from China, subject to a required systems approach, will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment and finding of no significant impact may be viewed on the Regulations.gov Web site. Copies of the environmental assessment and finding of no significant impact are also available for public inspection at USDA, Room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

#### Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information

collection or recordkeeping requirements included in this final rule, which were filed under 0579–0439, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

#### 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 final rule, please contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2727.

#### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

#### PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Section 319.37–8 is amended as follows:

■ a. In paragraph (e) introductory text, in the entry for “*Phalaenopsis* spp. from Taiwan”, add the words “and the People’s Republic of China” after the word “Taiwan”.

■ b. Add paragraph (e)(2)(xiii).

■ c. Revise the OMB citation at the end of the section.

The addition and revision read as follows:

#### § 319.37–8 Growing media.

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \*

(xiii) Plants for planting of *Phalaenopsis* spp. from the People’s Republic of China may only be imported into the continental United States, and may not be imported or moved into Hawaii or the territories of the United States.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0266, 0579-0431, and 0579-0439)

Done in Washington, DC, this 5th day of February 2015.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2016-02822 Filed 2-10-16; 8:45 am]

**BILLING CODE 3410-34-P**

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 702

RIN 3133-AE44

#### Capital Planning and Stress Testing—Schedule Shift

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule; correcting amendment.

**SUMMARY:** The NCUA Board (Board) published a final rule in the **Federal Register** on August 11, 2015, regarding the capital planning and stress testing provisions in NCUA's regulations. This amendment corrects the regulations by reinstating a provision that was inadvertently removed by the August 2015 final rule.

**DATES:** This correcting amendment is effective February 11, 2016.

**FOR FURTHER INFORMATION CONTACT:** Marvin Shaw, Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria VA 22314 or telephone (703) 518-6553.

**SUPPLEMENTARY INFORMATION:** NCUA is correcting a technical error in the final rule NCUA published in the **Federal Register** on August 11, 2015 (80 FR 48012). This amendment corrects § 702.504(a) of NCUA's regulations by reinstating § 702.504(a)(2) which was inadvertently removed by the August 2015 final rule.

#### List of Subjects in 12 CFR Part 702

Capital, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on February 5, 2016.

**Gerard Poliquin,**

*Secretary of the Board.*

For the reasons discussed above, the National Credit Union Administration amends part 702 as follows:

#### PART 702—CAPITAL ADEQUACY

■ 1. The authority citation for part 702 continues to read as follows:

**Authority:** 12 U.S.C. 1766(a), 1790d.

■ 2. In § 702.504, revise paragraph (a) to read as follows:

#### § 702.504 Capital planning.

(a) *Annual capital planning.* (1) A covered credit union must develop and maintain a capital plan. It must submit this plan and its capital policy to NCUA by May 31 each year, or such later date as directed by NCUA. The plan must be based on the credit union's financial data as of December 31 of the preceding calendar year, or such other date as directed by NCUA. NCUA will assess whether the capital planning and analysis process is sufficiently robust in determining whether to accept a credit union's capital plan.

(2) A covered credit union's board of directors (or a designated committee of the board) must at least annually, and prior to the submission of the capital plan under paragraph (a)(1) of this section:

(i) Review the credit union's process for assessing capital adequacy;

(ii) Ensure that any deficiencies in the credit union's process for assessing capital adequacy are appropriately remedied; and

(iii) Approve the credit union's capital plan.

\* \* \* \* \*

[FR Doc. 2016-02740 Filed 2-10-16; 8:45 am]

**BILLING CODE 7535-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 25

[Docket No. FAA-2015-5877; Special Conditions No. 25-610-SC]

#### Special Conditions: The Boeing Company, Model 737-8 Airplanes; Design Roll-Maneuver Requirements

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for Boeing Model 737-8 airplanes. These airplanes will have a novel or unusual design feature associated with an electronic flight-control system that provides roll control of the airplane through pilot inputs to the flight computers. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level

of safety equivalent to that established by the existing airworthiness standards.

**DATES:** This action is effective on the Boeing Company on February 11, 2016. We must receive your comments by March 28, 2016.

**ADDRESSES:** Send comments identified by docket no. FAA-2015-5877 using any of the following methods:

- *Federal eRegulations 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:* The FAA will post all comments it receives, without change, to <http://www.regulations.gov/>, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477-19478), as well as at <http://DocketsInfo.dot.gov/>.

*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 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:** Mark Freisthler, FAA, Airframe and Cabin Safety Branch, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057-3356; telephone 425-227-1119; facsimile 425-227-1232.

**SUPPLEMENTARY INFORMATION:** The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions is impracticable because these procedures

would significantly delay issuance of the design approval and thus delivery of the affected airplane.

In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon publication in the **Federal Register**.

#### Comments Invited

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

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

#### Background

On January 27, 2012, The Boeing Company applied for an amendment to Type Certificate No. A16WE to include a new Model 737-8 airplane. The Model 737-8 airplane is a narrow-body, transport-category airplane that is a derivative of the Model 737-800 airplane with two CFM LEAP-1B wing-mounted engines.

The Model 737-8 airplane will include electronic flight controls that affect maneuvering.

The current design roll-maneuver requirements in Title 14, Code of Federal Regulations (14 CFR) part 25 are inadequate for addressing an airplane with electronic flight controls that affect maneuvering. These special conditions adjust the current roll-maneuver requirement, § 25.349, to take into account the effects of an electronic flight-control system.

#### Type Certification Basis

Under the provisions of § 21.101, The Boeing Company must show that the Model 737-8 series airplanes meet the applicable provisions of the regulations listed in type certificate no. A16WE, or the applicable regulations in effect on the date of application for the change except for earlier amendments as agreed upon by the FAA.

The regulations listed in the type certificate are commonly referred to as the "original type-certification basis." The regulations listed in type certificate no. A16WE are as follows:

14 CFR part 25, effective February 1, 1965, including Amendments 25-1 through 25-134. In addition, the

certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model 737-8 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

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

In addition to the applicable airworthiness regulations and special conditions, the Model 737-8 series airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

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

#### Novel or Unusual Design Features

The Model 737-8 series airplanes will incorporate the following novel or unusual design features:

The airplanes are equipped with an electronic flight-control system that provides control through pilot inputs to the flight computer. Current part 25 airworthiness regulations account for control laws for which aileron deflection is proportional to control-stick deflection. They do not address nonlinearities or other effects on aileron actuation that electronic flight controls may cause. Because this type of system may affect flight loads, and therefore the structural capability of the airplanes, special conditions are needed to address these effects.

#### Discussion

These special conditions differ from current requirements in that they require that the roll maneuver is based on defined actuation of the cockpit roll control as opposed to defined deflections of the aileron itself. Also, the special conditions require an additional load condition at  $V_A$ , in which the cockpit roll control is returned to neutral following the initial roll input.

These special conditions differ from similar special conditions applied on previous programs. These special conditions are limited to the roll axis only, whereas previous special conditions also included the pitch and yaw axes. Special conditions are no longer needed for the pitch or yaw axes, because Amendment 25-91 takes into account the effects of an electronic flight-control system in those axes (§ 25.331 for pitch and § 25.351 for yaw). On the Model 737-8 series airplanes, only the flight spoilers are fly-by-wire.

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

#### Applicability

As discussed above, these special conditions are applicable to the Boeing Model 737-8 series airplanes. Should Boeing apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well.

#### Conclusion

This action affects only certain novel or unusual design features on Boeing Model 737-8 series airplanes. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon publication in the **Federal Register**. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

#### List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

## The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Boeing Model 737-8 series airplanes.

### Design Roll Maneuver Condition

In lieu of compliance to § 25.349(a):

The following conditions, speeds, and cockpit roll-control motions (except as the motions may be limited by pilot effort) must be considered in combination with an airplane load factor of zero and of two-thirds of the positive maneuvering factor used in design. In determining the resulting control-surface deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b):

1. The applicant must investigate conditions corresponding to steady rolling velocities. In addition, conditions corresponding to maximum angular acceleration must be investigated for airplanes with engines or other weight concentrations outboard of the fuselage. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time-history investigation of the maneuver.

2. At  $V_A$ , sudden movement of the cockpit roll control up to the limit is assumed. The position of the cockpit roll control must be maintained until a steady roll rate is achieved and then must be returned suddenly to the neutral position.

3. At  $V_C$ , the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than that obtained in Special Condition 2, above.

4. At  $V_D$ , the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than one third of that obtained in Special Condition 2, above.

Issued in Renton, Washington, on January 20, 2016.

**Michael Kaszycki,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2016-02762 Filed 2-10-16; 8:45 am]

BILLING CODE 4910-13-P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2015-3967; Airspace Docket No. 15-ASW-12]

### Establishment of Class E Airspace; Clinton AR

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace extending upward from 700

feet above the surface at Clinton Municipal Airport, Clinton, AR, to accommodate new Standard Instrument Approach Procedures (SIAPs) for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also corrects the state identifier in the legal airspace description.

**DATES:** Effective 0901 UTC, May 26, 2016. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at [http://www.faa.gov/air\\_traffic/publications](http://www.faa.gov/air_traffic/publications). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 29591; telephone: 202-267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202-741-6030, or go to [http://www.archives.gov/federal\\_register/code\\_of\\_federal-regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html).

FAA Order 7400.9, Airspace Designations and Reporting Points is published yearly and effective on September 15.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Shelby, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone: 817-222-5857.

#### SUPPLEMENTARY INFORMATION:

##### Authority for This Rulemaking

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

Class E airspace at Clinton Municipal Airport, Clinton, AR.

#### History

On November 30, 2015, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class E airspace extending upward from 700 feet above the surface at Clinton Municipal Airport, Clinton, AR. (80 FR 74736). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. The FAA also notes that in the NPRM, the state identifier was incorrectly written as LA, and is corrected in the airspace description to AR.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

#### Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

#### The Rule

This action amends Title 14, Code of Federal Regulations (14 CFR), Part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Clinton Municipal Airport, Clinton, AR, to accommodate new Standard Instrument Approach Procedures for IFR operations at the airport. Also, the correct state identifier is noted in the airspace description, changing it from LA to AR.

#### Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44

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

#### Environmental Review

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

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

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

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

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

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

##### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

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

\* \* \* \* \*

#### ASW AR E5 Clinton, AR [New]

Clinton Municipal Airport, AR  
(Lat. 35°35'52" N., long. 092°27'06" W.)

That airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Clinton Municipal Airport.

Issued in Fort Worth, TX, on February 3, 2016.

**Vonnie Royal,**

*Acting Manager, Operations Support Group,  
ATO Central Service Center.*

[FR Doc. 2016–02672 Filed 2–10–16; 8:45 am]

**BILLING CODE 4910–13–P**

## FEDERAL TRADE COMMISSION

### 16 CFR Part 305

**RIN 3084–AB03**

#### Energy Labeling Rule

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Trade Commission (“Commission”) amends its Energy Labeling Rule (“Rule”) by publishing new ranges of comparability for required EnergyGuide labels on clothes washers.

**DATES:** The amendments announced in this document will become effective May 11, 2016.

**FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, Attorney, Division of Enforcement, Federal Trade Commission, Washington, DC 20580 (202–326–2889).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Commission issued the Energy Labeling Rule in 1979, 44 FR 66466 (Nov. 19, 1979) pursuant to the Energy Policy and Conservation Act of 1975 (“EPCA”).<sup>1</sup> The Rule covers several categories of major household products, including clothes washers. It requires manufacturers of covered products to disclose specific energy consumption or efficiency information (derived from Department of Energy (“DOE”) test procedures) at the point-of-sale. In addition, each label must include a “range of comparability” indicating the highest and lowest energy consumption or efficiencies for comparable models. The Commission updates these ranges periodically.

##### II. Range Updates for Clothes Washers

The Commission amends its comparability ranges for clothes washers in the Rule based on manufacturer model data derived from the DOE test procedures and submitted to DOE (<https://www.regulations.doe.gov/ccms>).<sup>2</sup> The

<sup>1</sup> 42 U.S.C. 6294. EPCA also requires the Department of Energy (“DOE”) to set minimum efficiency standards and develop test procedures to measure energy use.

<sup>2</sup> Previously, the Commission announced its intention to update the clothes washer ranges based

amendments update the ranges in Appendix F1 and F2 and the sample labels in Appendix L of the Rule. The amendments also include conforming changes to sections 305.7, 305.10, and 305.11 to remove obsolete regulatory text applicable to models produced before March 7, 2015. Manufacturers have until May 11, 2016 to begin using the updated ranges on their labels. As indicated in section 305.10(a) of the Rule, products that have been labeled prior to this effective date need not be relabeled.

##### III. Administrative Procedure Act

The amendments published in this document involve routine, technical and minor, or conforming changes to the labeling requirements in the Rule. Accordingly, the Commission has good cause under section 553(b)(B) of the APA to forgo notice-and comment procedures for these rule amendments. 5 U.S.C. 553(b)(B). These technical amendments merely provide a routine, conforming change to the range information required on EnergyGuide labels. The Commission therefore finds for good cause that public comment for these technical, procedural amendments is impractical and unnecessary.

##### IV. Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to a Regulatory Flexibility Act analysis (5 U.S.C. 603–604) are not applicable to this proceeding because the amendments do not impose any new obligations on entities regulated under the Energy Labeling Rule. These technical amendments merely provide a routine change to the range information required on EnergyGuide labels. Thus, the amendments will not have a “significant economic impact on a substantial number of small entities.”<sup>3</sup> The Commission has concluded, therefore, that a regulatory flexibility analysis is not necessary, and certifies, under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the amendments announced today will not have a significant economic impact on a substantial number of small entities.

##### V. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (OMB)

on test data derived from updated DOE test requirements. See 80 FR 67351, 67355, n. 29 (Nov. 2, 2015).

<sup>3</sup> 5 U.S.C. 605.

regulations that implement the Paperwork Reduction Act (PRA). OMB has approved the Rule's existing information collection requirements through May 31, 2017 (OMB Control No. 3084 0069). The amendments now being adopted do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

Accordingly, 16 CFR part 305 is amended as follows:

PART 305—[AMENDED]

■ 1. The authority citation for Part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

■ 2. In § 305.7, revise paragraph (g) to read as follows:

§ 305.7 Determinations of capacity.

\* \* \* \* \*

(g) Clothes washers. The capacity shall be the tub capacity as determined according to Department of Energy test procedures in 10 CFR part 430, subpart B, expressed in terms of "Capacity (tub volume)" in cubic feet, rounded to the nearest one-tenth of a cubic foot, and the capacity class designations "standard" or "compact."

\* \* \* \* \*

■ 3. In § 305.10, revise paragraph (b) to read as follows:

§ 305.10 Ranges of comparability on the required labels.

\* \* \* \* \*

(b) Representative average unit energy cost. The Representative Average Unit Energy Cost figures to be used on labels as required by § 305.11 are listed in appendix K to this part. The Commission shall publish revised Representative Average Unit Energy Cost figures in the Federal Register in 2017. When the cost figures are revised, all information disseminated after 90 days following the publication of the

revision shall conform to the new cost figure.

\* \* \* \* \*

■ 4. In § 305.11, revise paragraphs (f)(5), (f)(6), and (f)(9)(ii), remove paragraph (f)(9)(viii), redesignate paragraphs (f)(9)(ix) and (x) as (f)(9)(viii) and (ix) respectively, and revise redesignated paragraph (f)(9)(viii) to read as follows:

§ 305.11 Labeling for refrigerators, refrigerator-freezers, freezers, dishwashers, clothes washers, water heaters, room air conditioners, and pool heaters.

\* \* \* \* \*

(f) \* \* \*

(5) Unless otherwise indicated in this paragraph, estimated annual operating costs for refrigerators, refrigerator-freezers, freezers, clothes washers, dishwashers, room air conditioners, and water heaters are as determined in accordance with §§ 305.5 and 305.10. Thermal efficiencies for pool heaters are as determined in accordance with § 305.5. Labels for clothes washers and dishwashers must disclose estimated annual operating cost for both electricity and natural gas as illustrated in the sample labels in appendix L.

(6) Unless otherwise indicated in this paragraph, ranges of comparability for estimated annual operating costs or thermal efficiencies, as applicable, are found in the appropriate appendices accompanying this part. For refrigerators, refrigerator-freezers, and freezers manufactured on or after September 15, 2014, the range information shall match the text and graphics in sample labels 1A of Appendix L.

\* \* \* \* \*

(9) \* \* \*

(ii) For refrigerators, refrigerator-freezers, and freezers manufactured on or after September 15, 2014 and clothes washers manufactured after March 7, 2015, the label shall contain the text and graphics illustrated in sample labels 1A and 2 of Appendix L, including the statement:

Compare ONLY to other labels with yellow numbers.

Labels with yellow numbers are based on the same test procedures.

\* \* \* \* \*

(viii) For clothes washers, the label shall contain the text and graphics

illustrated in the prototype and sample labels in Appendix L, including the following statements (fill in the blanks with the appropriate capacity type and energy cost):

Your cost will depend on your utility rates and use.

Cost range based only on [compact/standard] capacity models.

Estimated operating cost based on six wash loads a week and a national average electricity cost of \_\_\_ cents per kWh and natural gas cost of \$ \_\_\_ per therm.

\* \* \* \* \*

■ 5. Appendix F1 to Part 305 is revised to read as follows:

Appendix F1 to Part 305—Standard Clothes Washers

Range Information

"Standard" includes all household clothes washers with a tub capacity of 1.6 cu. ft. or more.

Table with 3 columns: Capacity, Range of estimated annual operating costs (dollars/year), Low, High. Row: Standard ..... \$8 \$51

■ 6. Appendix F2 to Part 305 is revised to read as follows:

Appendix F2 to Part 305—Compact Clothes Washers

Range Information

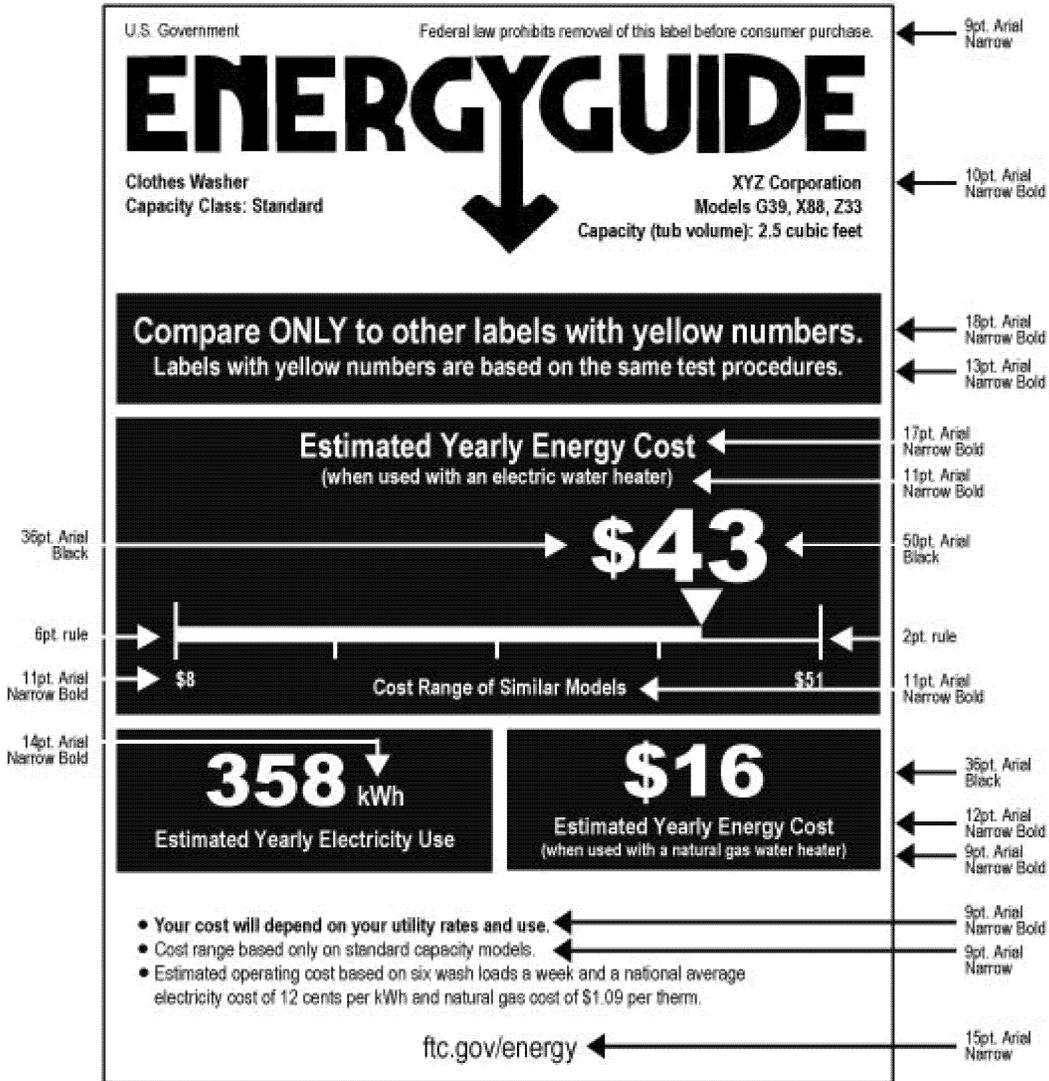
"Compact" includes all household clothes washers with a tub capacity of less than 1.6 cu. ft.

Table with 3 columns: Capacity, Range of estimated annual operating costs (dollars/year), Low, High. Row: Compact ..... \$10 \$24

■ 7. In Appendix L to Part 305, revise Prototype Label 2 and Sample Label 2 and remove Sample Label 2A to read as follows:

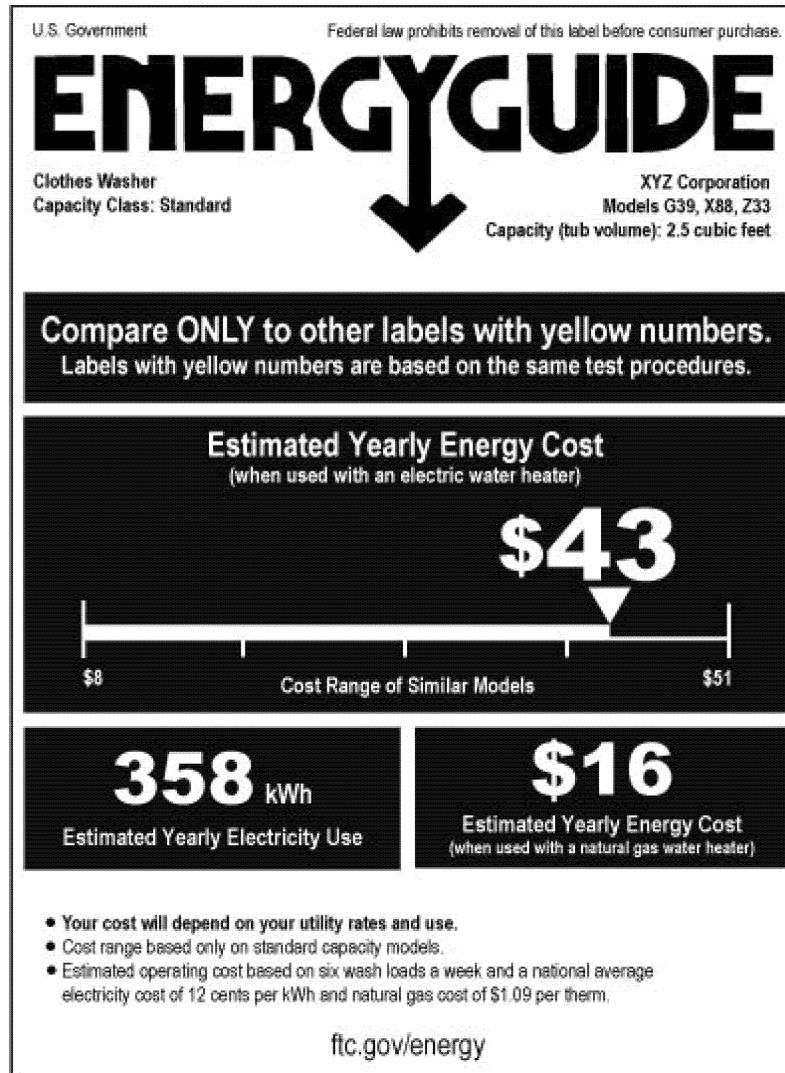
Appendix L to Part 305—Sample Labels

\* \* \* \* \*



Prototype Label 2 – Clothes Washer

\* \* \* \* \*



## Sample Label 2 - Clothes Washer

\* \* \* \* \*

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

[FR Doc. 2016-02744 Filed 2-10-16; 8:45 am]

BILLING CODE 6750-01-C

### COMMODITY FUTURES TRADING COMMISSION

#### 17 CFR Part 30

#### Foreign Futures and Options Transactions

**AGENCY:** Commodity Futures Trading  
Commission.

**ACTION:** Order.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is granting an exemption to certain member firms designated by the Korea Exchange (“KRX”) from the application of certain of the Commission’s foreign futures and option regulations based upon substituted compliance with certain comparable regulatory and self-regulatory requirements of a foreign regulatory authority consistent with conditions specified by the Commission, as set forth herein. This Order is issued pursuant to Commission Regulation 30.10, which permits persons to file a petition with the Commission for exemption from the application of certain of the Regulations

set forth in Part 30 and authorizes the Commission to grant such an exemption if such action would not be otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. The Commission notes that this Order does not pertain to any transaction in swaps, as defined in Section 1a(47) of the Commodity Exchange Act (“Act”).

**DATES:** Effective February 11, 2016.

**FOR FURTHER INFORMATION CONTACT:**  
Andrew V. Chapin, Associate Director,  
(202) 418-5465, [achapin@cftc.gov](mailto:achapin@cftc.gov), or  
Scott W. Lee, Special Counsel, (202)  
418-5090, [slee@cftc.gov](mailto:slee@cftc.gov), Division of  
Swap Dealer and Intermediary  
Oversight, Commodity Futures Trading

Commission, 1155 21st Street NW., Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** The Commission has issued the following Order:

**Order Under CFTC Regulation 30.10 Exempting Firms Designated by the Korea Exchange (KRX) From the Application of Certain of the Foreign Futures and Option Regulations as of the Later of the Date of Publication of the Order Herein in the Federal Register or After Filing of Consents by Such Firms and KRX, as Appropriate, to the Terms and Conditions of the Order Herein; and Confirming That Designated Members of KRX May Engage in Limited Marketing Conduct With Qualified Customers Located in the U.S., as Set Forth in Prior Commission Orders**

Commission Regulations governing the offer and sale of commodity futures and option contracts traded on or subject to the regulations of a foreign board of trade to customers located in the U.S. are contained in Part 30 of the Commission's regulations.<sup>1</sup> These regulations include requirements for intermediaries with respect to registration, disclosure, capital adequacy, protection of customer funds, recordkeeping and reporting, and sales practice and compliance procedures that are generally comparable to those applicable to transactions on U.S. markets.

In formulating a regulatory program to govern the offer and sale of foreign futures and option products to customers located in the U.S., the Commission, among other things, considered the desirability of ameliorating the potential impact of such a program. Based upon these considerations, the Commission determined to permit persons located outside the U.S. and subject to a comparable regulatory structure in the jurisdiction in which they were located to seek an exemption from certain of the requirements under Part 30 of the Commission's regulations based upon substituted compliance with the regulatory requirements of the foreign jurisdiction.<sup>2</sup>

Appendix A to Part 30—Interpretative Statement With Respect to the Commission's Exemptive Authority Under § 30.10 of Its Rules ("Appendix A"), generally sets forth the elements the Commission will evaluate in determining whether a particular

regulatory program may be found to be comparable for purposes of exemptive relief pursuant to Regulation 30.10.<sup>3</sup> These elements include: (1) Registration, authorization or other form of licensing, fitness review or qualification of persons that solicit and accept customer orders; (2) minimum financial requirements for those persons who accept customer funds; (3) protection of customer funds from misapplication; (4) recordkeeping and reporting requirements; (5) sales practice standards; (6) procedures to audit for compliance with, and to take action against those persons who violate, the requirements of the program; and (7) information sharing arrangements between the Commission and the appropriate governmental and/or self-regulatory organization to ensure Commission access on an "as needed" basis to information essential to maintaining standards of customer and market protection within the U.S.

Moreover, the Commission specifically stated in adopting Regulation 30.10 that no exemption of a general nature would be granted unless the persons to whom the exemption is to be applied: (1) Submit to jurisdiction in the U.S. by designating an agent for service of process in the U.S. with respect to transactions subject to Part 30 and filing a copy of the agency agreement with the National Futures Association ("NFA"); (2) agree to provide access to their books and records in the U.S. to the Commission and Department of Justice representatives; and (3) notify NFA of the commencement of business in the U.S.<sup>4</sup>

On January 23, 2009, KRX petitioned the Commission on behalf of its member firms, located and conducting a financial investment business in the Republic of Korea, for an exemption from the application of the Commission's Part 30 Regulations to those firms. KRX amended its petition on May 3, 2013 with additional information. In support of its petition, KRX stated that granting such an exemption with respect to such firms that it has authorized to conduct foreign futures and option transactions on behalf of customers located in the U.S. would not be contrary to the public interest or to the purposes of the provisions from which the exemption is sought because such firms are subject to a regulatory framework comparable to that imposed by the Act and the regulations thereunder.

Based upon a review of the petition and supplementary materials filed by KRX, the Commission has concluded that the standards for relief set forth in Regulation 30.10 and, in particular, Appendix A thereof, have been met and that compliance with applicable Korean law and KRX rules may be substituted for compliance with those sections of the Act and regulations thereunder more particularly set forth herein.

By this Order, the Commission hereby exempts, subject to specified conditions, those firms identified to the Commission by KRX as eligible for the relief granted herein from:

- Registration with the Commission for firms and for firm representatives;
- The requirement in Commission Regulation 30.6(a) and (d), 17 CFR 30.6(a) and (d), that firms provide customers located in the U.S. with the risk disclosure statements in Commission Regulation 1.55(b), 17 CFR 1.55(b), and Commission Regulation 33.7, 17 CFR 33.7, or as otherwise approved under Commission Regulation 1.55(c), 17 CFR 1.55(c);
- The separate account requirement contained in Commission Regulation 30.7, 17 CFR 30.7;
- Those sections of Part 1 of the Commission's financial regulations that apply to foreign futures and options sold in the U.S. as set forth in Part 30; and
- Those sections of Part 1 of the Commission's regulations relating to books and records which apply to transactions subject to Part 30, based upon substituted compliance by such persons with the applicable statutes and regulations in effect in Korea.

This determination to permit substituted compliance is based on, among other things, the Commission's finding that the regulatory framework governing persons in Korea who would be exempted hereunder provides:

(1) A system of qualification or authorization of firms who deal in transactions subject to regulation under Part 30 that includes, for example, criteria and procedures for granting, monitoring, suspending and revoking licenses, and provisions for requiring and obtaining access to information about authorized firms and persons who act on behalf of such firms;

(2) Financial requirements for firms including, without limitation, a requirement for a minimum level of working capital and daily mark-to-market settlement and/or accounting procedures;

(3) A system for the protection of customer assets that is designed to

<sup>1</sup> Commission regulations referred to herein are found at 17 CFR Chapter I.

<sup>2</sup> "Foreign Futures and Foreign Options Transactions," 52 FR 28290 (Aug. 5, 1987).

<sup>3</sup> 52 FR 28990, 29001.

<sup>4</sup> 52 FR 28980, 28981 and 29002.

preclude the use of customer assets to satisfy house obligations and requires separate accounting for such assets;

(4) Recordkeeping and reporting requirements pertaining to financial and trade information;

(5) Sales practice standards for authorized firms and persons acting on their behalf that include, for example, required disclosures to prospective customers and prohibitions on improper trading advice;

(6) Procedures to audit for compliance with, and to redress violations of, the customer protection and sales practice requirements referred to above, including, without limitation, an affirmative surveillance program designed to detect trading activities that take advantage of customers, and the existence of broad powers of investigation relating to sales practice abuses; and

(7) Mechanisms for sharing of information between the Commission, KRX and the Korean regulatory authorities on an "as needed" basis including, without limitation, confirmation data, data necessary to trace funds related to trading futures products subject to regulation in Korea, position data, and data on firms' standing to do business and financial condition.

Commission staff has concluded, upon review of the petition of KRX and accompanying exhibits, that KRX's regulation of financial futures and options intermediaries is comparable to that of the U.S. in the areas specified in Appendix A of Part 30, as described above.

This Order does not provide an exemption from any provision of the Act or regulations thereunder not specified herein, such as the antifraud provision in Regulation 30.9. Moreover, the relief granted is limited to brokerage activities undertaken on behalf of customers located in the U.S. with respect to transactions entered on or subject to the rules of KRX for products that customers located in the U.S. may trade.<sup>5</sup> The relief does not extend to regulations relating to trading, directly or indirectly, on U.S. exchanges, and does not pertain to any transaction in swaps, as defined in Section 1a(47) of the Act. For example, a KRX member trading in U.S. markets for its own account would be subject to the Commission's large trader reporting requirements.<sup>6</sup> Similarly, if such a firm were carrying positions on a U.S. exchange on behalf of foreign clients and submitted such transactions for

clearing on an omnibus basis through a firm registered as a futures commission merchant under the Act, it would be subject to the reporting requirements applicable to foreign brokers.<sup>7</sup> The relief herein is inapplicable where the firm solicits or accepts orders from customers located in the U.S. for transactions on U.S. markets. In that case, the firm must comply with all applicable U.S. laws and regulations, including the requirement to register in the appropriate capacity.

The eligibility of any firm to seek relief under this exemptive Order is subject to the following conditions:

(1) The regulatory or self-regulatory organization responsible for monitoring the compliance of such firms with the regulatory requirements described in the Regulation 30.10 petition must represent in writing to the Commission that:

(a) Each firm for which relief is sought is registered, licensed or authorized, as appropriate, and is otherwise in good standing under the standards in place in Korea; such firm is engaged in business with customers located in Korea as well as in the U.S.; and such firm and its principals and employees who engage in activities subject to Part 30 would not be statutorily disqualified from registration under Section 8a(2) of the Act, 7 U.S.C. 12a(2);

(b) It will monitor firms to which relief is granted for compliance with the regulatory requirements for which substituted compliance is accepted and will promptly notify the Commission or NFA of any change in status of a firm that would affect its continued eligibility for the exemption granted hereunder, including the termination of its activities in the U.S.;

(c) All transactions with respect to customers located in the U.S. will be made subject to the regulations of KRX, and the Commission will receive prompt notice of all material changes to the relevant laws in Korea, any rules promulgated thereunder and KRX rules;

(d) Customers located in the U.S. will be provided no less stringent regulatory protection than Korea customers under all relevant provisions of Korean law; and

(e) It will cooperate with the Commission with respect to any inquiries concerning any activity subject to regulation under the Part 30 Regulations, including sharing the information specified in Appendix A on an "as needed" basis and will use its best efforts to notify the Commission if it becomes aware of any information that in its judgment affects the financial

or operational viability of a member firm doing business in the U.S. under the exemption granted by this Order.

(2) Each firm seeking relief hereunder must represent in writing that it:

(a) Is located outside the U.S., its territories and possessions and, where applicable, has subsidiaries or affiliates domiciled in the U.S. with a related business (e.g., banks and broker/dealer affiliates) along with a brief description of each subsidiary's or affiliate's identity and principal business in the U.S.;

(b) Consents to jurisdiction in the U.S. under the Act by filing a valid and binding appointment of an agent in the U.S. for service of process in accordance with the requirements set forth in Regulation 30.5;

(c) Agrees to provide access to its books and records related to transactions under Part 30 required to be maintained under the applicable statutes and regulations in effect in Korea upon the request of any representative of the Commission or U.S. Department of Justice at the place in the U.S. designated by such representative, within 72 hours, or such lesser period of time as specified by that representative as may be reasonable under the circumstances after notice of the request;

(d) Has no principal or employee who solicits or accepts orders from customers located in the U.S. who would be disqualified under Section 8a(2) of the Act, 7 U.S.C. 12a(2), from doing business in the U.S.;

(e) Consents to participate in any NFA arbitration program that offers a procedure for resolving customer disputes on the papers where such disputes involve representations or activities with respect to transactions under Part 30, and consents to notify customers located in the U.S. of the availability of such a program; *provided, however*, that the firm may require its customers located in the U.S. to execute a consent concerning the exhaustion of certain mediation or conciliation procedures made available by KRX prior to bringing an NFA arbitration proceeding; and

(f) Undertakes to comply with the applicable provisions of Korean laws and KRX rules that form the basis upon which this exemption from certain provisions of the Act and regulations thereunder is granted.

As set forth in the Commission's September 11, 1997 Order delegating to NFA certain responsibilities, the written representations set forth in paragraph (2) shall be filed with NFA.<sup>8</sup> Each firm

<sup>5</sup> See, e.g., Sections 2(a)(1)(C) and (D) of the Act.

<sup>6</sup> See, e.g., 17 CFR part 18.

<sup>7</sup> See, e.g., 17 CFR parts 17 and 21.

<sup>8</sup> 62 FR 47792, 47793 (Sept. 11, 1997). Among other duties, the Commission authorized NFA to

seeking relief hereunder has an ongoing obligation to notify NFA should there be a material change to any of the representations required in the firm's application for relief.

The Commission also confirms that KRX members that receive confirmation of relief set forth herein may engage in limited marketing conduct with respect to certain qualified customers located in the U.S. from a non-permanent location in the U.S., subject to the terms and conditions set forth in prior Commission Orders.<sup>9</sup> The Commission notes that any firm and their employees or other representatives which engage in marketing conduct pursuant to this relief are deemed to have consented to the Commission's jurisdiction over such marketing activities by their filing of a valid and binding appointment of an agent in the U.S. for service of process.

This Order will become effective as to any designated KRX firm the later of the date of publication of the Order in the **Federal Register** or the filing of the consents set forth in paragraphs (2)(a)–(f). Upon filing of the notice required under paragraph (1)(b) as to any such firm, the relief granted by this Order may be suspended immediately as to that firm. That suspension will remain in effect pending further notice by the Commission, or the Commission's designee, to the firm and KRX.

This Order is issued pursuant to Regulation 30.10 based on the representations made and supporting material provided to the Commission and the recommendation of the staff, and is made effective as to any firm granted relief hereunder based upon the filings and representations of such firms required hereunder. Any material changes or omissions in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the standards for relief set forth in Regulation 30.10 and, in particular, Appendix A, have been met. Further, if experience demonstrates that the continued effectiveness of this Order in general, or with respect to a particular firm, would be contrary to public policy

receive requests for confirmation of Regulation 30.10 relief on behalf of particular firms, to verify such firms' fitness and compliance with the conditions of the appropriate Regulation 30.10 Order and to grant exemptive relief from registration to qualifying firms.

<sup>9</sup> See 57 FR 49644 (Nov. 3, 1992) (permitted limited marketing of foreign futures and foreign options products to certain governmental and institutional customers located in the U.S.); 59 FR 42156 (Aug. 17, 1994) (expanding the relief set forth in the 1992 release to conduct directed towards "accredited investors", as defined in the Securities and Exchange Commission's Regulation D issued pursuant to the Securities Act of 1933).

or the public interest, or that the systems in place for the exchange of information or other circumstances do not warrant continuation of the exemptive relief granted herein, the Commission may condition, modify, suspend, terminate, withhold as to a specific firm, or otherwise restrict the exemptive relief granted in this Order, as appropriate, on its own motion.

The Commission will continue to monitor the implementation of its program to exempt firms located in jurisdictions generally deemed to have a comparable regulatory program from the application of certain of the foreign futures and option regulations and will make necessary adjustments if appropriate.

Issued in Washington, DC, on February 8, 2016, by the Commission.

**Christopher J. Kirkpatrick**,  
*Secretary of the Commission.*

#### Appendix to Foreign Futures and Options Transactions—Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

[FR Doc. 2016–02795 Filed 2–10–16; 8:45 am]

**BILLING CODE 6351–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 117

[Docket No. USCG–2016–0018]

#### Drawbridge Operation Regulation; Des Allemands Bayou, Des Allemands, LA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulation.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Burlington Northern Santa Fe Railroad swing span drawbridge across Des Allemands Bayou, mile 14.0, at Des Allemands, St. Charles and Lafourche Parishes, Louisiana. The deviation is necessary to perform a swing span change out to the bridge. This deviation allows the bridge to remain closed-to-navigation continuously for 42 days.

**DATES:** This deviation is effective from February 21, 2016 through April 1, 2016.

**ADDRESSES:** The docket for this deviation, [USCG–2016–0018] is available at <http://www.regulations.gov>.

Type the docket number in the "SEARCH" box and click "SEARCH". Click on Open Docket Folder on the line associated with this deviation.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Donna Gagliano, Bridge Specialist, Coast Guard; telephone 504–671–2128, email [Donna.Gagliano@uscg.mil](mailto:Donna.Gagliano@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Burlington Northern Santa Fe Railroad company requested a temporary deviation from the operating schedule for the swing span drawbridge across Des Allemands Bayou, mile 14.0, at Des Allemands, St. Charles and Lafourche Parishes, Louisiana. The deviation was requested to accommodate a necessary swing span replacement. The draw currently operates under 33 CFR 117.440(b).

For purposes of this deviation, the bridge will remain closed to navigation from 6 a.m. February 21, 2016 through 11:59 p.m. April 1, 2016. During this 42-day deviation, vessels will not be allowed to pass through the bridge. The bridge has a vertical clearance of three feet above mean high water in the closed-to-navigation position and unlimited in the open-to-navigation position. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational craft.

The Coast Guard will also inform the users of the waterway through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge. The bridge will not be able to open for emergencies and there is no immediate alternate route for vessels to pass.

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

Dated: February 5, 2016.

**David M. Frank**,  
*Bridge Administrator, Eighth Coast Guard District.*

[FR Doc. 2016–02778 Filed 2–10–16; 8:45 am]

**BILLING CODE 9110–04–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG-2016-0088]

**Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Galveston, TX**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of deviation from drawbridge regulations.

**SUMMARY:** The Coast Guard has issued a temporary deviation from the operating schedule that governs the Galveston Causeway Railroad Vertical Lift Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas. The deviation is necessary to conduct maintenance on the bridge. This deviation allows the bridge to remain temporarily closed to navigation for two four-hour periods, on five consecutive days during day-light hours.

**DATES:** This deviation is effective from March 7 through March 11, 2016.

**ADDRESSES:** The docket for this deviation, [USCG-2016-0088] is available at <http://www.regulations.gov>. Type the docket number in the "SEARCH" box and click "SEARCH". Click on Open Docket Folder on the line associated with this deviation.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary deviation, call or email Jim Wetherington, Bridge Administration Branch, Coast Guard; telephone 504-671-2128, email [james.r.wetherington@uscg.mil](mailto:james.r.wetherington@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Burlington Northern Santa Fe Railway Company requested a temporary deviation from the operating schedule of the Galveston Causeway Railroad Vertical Lift Bridge across the Gulf Intracoastal Waterway, mile 357.2 west of Harvey Locks, at Galveston, Galveston County, Texas. This deviation was requested to allow the bridge owner to complete cable lubing and scheduled semi-annual maintenance. This bridge is governed by 33 CFR 117.5.

This deviation allows the vertical lift bridge to remain closed to navigation from 7 a.m. to 11 a.m. and then again from 1 p.m. to 5 p.m., daily, beginning March 7 through March 11, 2016. The bridge has a vertical clearance of 8.0 feet above mean high water, elevation 3.0 feet (NAVD88), in the closed-to-navigation position and 73 feet above mean high water in the open-to-navigation position. Navigation at the

site of the bridge consists mainly of tows with barges and some recreational pleasure craft.

Vessels able to pass through the bridge in the closed position may do so at any time and should pass at the slowest safe speed. The bridge can open in case of emergency. No alternate routes are available.

The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge.

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

Dated: February 5, 2016.

**David M. Frank,**

*Bridge Administrator, Eighth Coast Guard District.*

[FR Doc. 2016-02777 Filed 2-10-16; 8:45 am]

**BILLING CODE 9110-04-P**

**POSTAL SERVICE**

**39 CFR PART 955**

**Rules of Practice Before the Postal Service Board of Contract Appeals**

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** This document revises a portion of the rules of practice before the Postal Service Board of Contract Appeals to clarify that the Associate Judicial Officer is not required to serve as the Board's Vice Chairman.

**DATES:** *Effective:* February 11, 2016.

**ADDRESSES:** Correspondence regarding this document may be addressed to: Postal Service Judicial Officer Department, 2101 Wilson Boulevard, Suite 600, Arlington, VA 22201-3078.

**FOR FURTHER INFORMATION CONTACT:** Judicial Officer Gary E. Shapiro, (703) 812-1910.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Contract Disputes Act of 1978, as amended, established the Postal Service Board of Contract Appeals (PSBCA), and prescribed that its members consist of judges appointed by the Postmaster General, who shall meet the qualifications of and serve in the same manner as the members of the Civilian Board of Contract Appeals. (See 41 U.S.C. 7105(d)). The Board's current rules of practice state at 39 CFR

955.1(b)(2) that the Board consists of the Judicial Officer as Chairman, the Associate Judicial Officer as Vice Chairman, and the Judges of the Board, as appointed by the Postmaster General in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 7101-7109, which reflected the Board's structure at the time the rules were implemented. While the Judicial Officer is appointed in accordance with the provisions of 39 U.S.C. 204, and serves as Chairman of the PSBCA, there is no statutory or other legal requirement that the Associate Judicial Officer serve as Vice Chairman.

**B. Explanation of Changes**

Accordingly, to enhance the efficiency and operational flexibility of the PSBCA, this document amends § 955.1(b)(2) by removing the statement reflecting the PSBCA's previously existing structure where the Associate Judicial Officer served as Vice Chairman of the Board, thus allowing any Judge of the Board to serve in that capacity. No other changes to the rules have been made.

**List of Subjects in 39 CFR Part 955**

Administrative practice and procedure, Government contracts.

Accordingly, for the reasons stated, the Postal Service hereby amends 39 CFR part 955 as follows:

**PART 955—RULES OF PRACTICE BEFORE THE POSTAL SERVICE BOARD OF CONTRACT APPEALS**

■ 1. The authority citation for 39 CFR part 955 continues to read as follows:

**Authority:** 39 U.S.C. 204, 401; 41 U.S.C. 7101-7109.

■ 2. In § 955.1, revise the first sentence of paragraph (b)(2) to read as follows:

**§ 955.1 Jurisdiction, procedure, service of documents.**

\* \* \* \* \*

(b) \* \* \*

(2) The Board consists of the Judicial Officer as Chairman, and the Judges of the Board, as appointed by the Postmaster General in accordance with the Contract Disputes Act of 1978, 41 U.S.C. 7101-7109. \* \* \*

\* \* \* \* \*

**Stanley F. Mires,**

*Attorney, Federal Compliance.*

[FR Doc. 2016-02741 Filed 2-10-16; 8:45 am]

**BILLING CODE 7710-12-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R09–OAR–2016–0028; FRL–9942–03–Region–09]

**Approval of Air Plan Revisions; Arizona; Rescissions and Corrections**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the Arizona State Implementation Plan (SIP) under the Clean Air Act. These revisions include rescissions of certain statutory provisions, administrative and prohibitory rules, and test methods. The EPA is also taking direct final action to correct certain errors in previous actions on prior revisions to the Arizona SIP and to make certain other corrections. The intended effect is to rescind unnecessary provisions from the applicable SIP and to correct certain errors in previous SIP actions.

**DATES:** This rule is effective on April 11, 2016 without further notice, unless the EPA receives adverse comments by March 14, 2016. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R09–OAR–2016–0028 at <http://www.regulations.gov>, or via email to Andrew Steckel, Rules Office Chief, at [Steckel.Andrew@epa.gov](mailto:Steckel.Andrew@epa.gov). For comments submitted at Regulations.gov, follow the

online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. For either manner of submission, the EPA will publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Kevin Gong, EPA Region IX, (415) 972–3073, [Gong.Kevin@epa.gov](mailto:Gong.Kevin@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, “we,” “us,” and “our” refer to the EPA.

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**I. The State’s Rescissions**

*A. Which SIP provisions has the state rescinded?*

On March 10, 2015 and January 13, 2016, the Arizona Department of Environmental Quality (ADEQ) submitted rescissions of certain statutory and regulatory provisions from the applicable Arizona State Implementation Plan (SIP). The rescissions relate to certain statutory provisions, administrative and prohibitory rules, and test methods. In the January 13, 2016 submittal, ADEQ included evidence of public notification of the rescissions (including the rescissions submitted on March 10, 2015), provision of a 30-day comment period, and opportunity for public hearing. See appendix A to the January 13, 2016 SIP revision submittal for documentation of ADEQ’s public process prior to adoption and submittal of the revision to the EPA.

Table 1 lists the statutory and regulatory provisions that ADEQ has rescinded,<sup>1</sup> the dates on which the EPA approved the provisions as part of the SIP, and the dates on which ADEQ submitted the rescissions to the EPA. Under section 110(k)(3) of the Clean Air Act (CAA or “Act”), the EPA is obligated to approve, disapprove, or conditionally approve SIPs and SIP revisions, including rescissions.

TABLE 1—ARIZONA SIP STATUTORY AND REGULATORY PROVISIONS THAT ADEQ HAS RESCINDED

Statutory or regulatory provision	Title	EPA Approval	Rescission submittal date
ARS 36–1700 .....	Declaration of Policy .....	37 FR 10842 (May 31, 1972); 37 FR 15080 (July 27, 1972); 47 FR 26382 (June 18, 1982).	January 13, 2016.
ARS 36–1801 .....	Jurisdiction over Indian Lands .....	37 FR 15080 (July 27, 1972).	January 13, 2016.
Chapter 2, section 2.9 of “The State of Arizona Air Pollution Control Implementation Plan”.	Legal Authority—Jurisdiction over Indian Lands.	37 FR 15080 (July 27, 1972).	January 13, 2016.
Rule 7–1–9.1 .....	Policy and legal authority .....	37 FR 15080 (July 27, 1972).	January 13, 2016.
Rule R9–3–1001 .....	Policy and legal authority .....	43 FR 34470 (August 4, 1978).	January 13, 2016.
Rule 7–1–4.3 .....	Sulfite Pulp Mills .....	37 FR 15080 (July 27, 1972).	January 13, 2016.

<sup>1</sup> In addition to the provisions listed in table 1, ADEQ also submitted the rescission of R9–3–310, approved by the EPA at 49 FR 41026 (October 19,

1984). However, the EPA has already acted to approve the rescission of that particular provision from the Arizona SIP (see 80 FR 67319 (November

2, 2015)), and thus we will be taking no further action on that provision.

TABLE 1—ARIZONA SIP STATUTORY AND REGULATORY PROVISIONS THAT ADEQ HAS RESCINDED—Continued

Statutory or regulatory provision	Title	EPA Approval	Rescission submittal date
Rule 7–1–4.3 (R9–3–403)	Sulfur Emissions: Sulfite Pulp Mills	43 FR 33245 (July 31, 1978).	January 13, 2016.
AAC R9–3–511	Standards of Performance for Existing Secondary Lead Smelters.	47 FR 42572 (September 28, 1982); 47 FR 17483 (April 23, 1982).	March 10, 2015.
AAC R9–3–512	Standards of Performance for Existing Secondary Brass and Bronze Ingot Production Plants.	47 FR 17483 (April 23, 1982).	March 10, 2015.
AAC R9–3–513	Standards of Performance for Existing Iron and Steel Plants.	47 FR 42572 (September 28, 1982); 47 FR 17483 (April 23, 1982).	March 10, 2015.
AAC R9–3–517	Standards of Performance for Steel Plants; Existing Electric Arc Furnaces (EAF).	47 FR 42572 (September 28, 1982); 47 FR 17483 (April 23, 1982).	March 10, 2015.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.01.	Method 1 Sample and Velocity Traverses for Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.02.	Method 2 Determination of Stack Gas Velocity and Volumetric Flow Rate (Type S Pitot Tube).	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.02.	Method 2A Direct Measurement of Gas Volume Through Pipes and Small Ducts.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.02.	Method 2B Determination of Exhaust Gas Volume Flow Rate from Gasoline Vapor Incinerators.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.03.	Method 3 Gas Analysis for Carbon Dioxide, Excess Air, Dry Molecular Weight.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.03.	Method 3A Determination of Oxygen and Carbon Dioxide Concentrations in Emissions from Stationary Sources (Instrumental Analyzer Procedure).	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.04.	Method 4 Determination of Moisture in Stack Gases.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.05.	Method 5 Determination of Particulate Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.06.	Method 6 Determination of Sulfur Dioxide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.07.	Method 7 Determination of Nitrogen Oxide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.08.	Method 8 Determination of Sulfuric Acid Mist and Sulfur Dioxide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.09.	Method 9 Visual Determination of the Opacity of Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.10.	Method 10 Determination of Carbon Monoxide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.11.	Method 11 Determination of Hydrogen Sulfide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.13.	Method 13B Determination of Total Fluoride Emissions from Stationary Sources—Specific Ion Electrode Method.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.13.	Method 13 Determination of Total Fluoride Emissions from Stationary Sources—SOADNS Zirconium Lake Method.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.14.	Method 14 Determination of Total Fluoride Emissions from Potroom Roof Monitors for Primary Aluminum Plants.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.15.	Method 15 Determination of Hydrogen Sulfide, Carbonyl Sulfide, and Carbon Disulfide Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.16.	Method 16 Semicontinuous Determination of Sulfur Emissions from Stationary Sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.17.	Method 17 Determination of Particulate Emissions from Stationary Sources (In-Stack Filtration Method).	47 FR 17483 (April 23, 1982).	January 13, 2016.

TABLE 1—ARIZONA SIP STATUTORY AND REGULATORY PROVISIONS THAT ADEQ HAS RESCINDED—Continued

Statutory or regulatory provision	Title	EPA Approval	Rescission submittal date
Arizona Testing Manual for Air Pollutant Emissions, Section 3.19.	Method 19 Determination of Sulfur Dioxide, Removal Efficiency and Particulate, Sulfur Dioxide and Nitrogen Oxides Emission Rates from Electric Utility Steam Generators.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 3.20.	Method 20 Determination of Nitrogen Oxides, Sulfur Dioxide, and Diluent Emissions from Stationary Gas Turbines.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 4.01.	Performance Specification 1: Performance specifications and specification test procedures for transmissometer systems for continuous measurement of the opacity of stack emissions.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 4.02.	Performance Specification 2: Performance specifications and specification test procedures for monitors of SO <sub>2</sub> and NO <sub>x</sub> from stationary sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.
Arizona Testing Manual for Air Pollutant Emissions, Section 4.03.	Performance Specification 3: Performance specifications and specification test procedures for monitors of CO <sub>2</sub> and O <sub>2</sub> from stationary sources.	47 FR 17483 (April 23, 1982).	January 13, 2016.

### B. How is the EPA evaluating the rescissions?

Generally, SIP requirements must be enforceable (see section 110(a) of the Act), and SIP revisions must not modify the SIP inconsistent with sections 110(l) and 193. Section 110(l) prohibits the EPA from approving a revision to a SIP if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA. Section 193 states that no control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before November 15, 1990, in any area which is a nonattainment area for any pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emissions reductions of such air pollutant.

In today's action, we review, evaluate, and approve ADEQ's submittals dated March 10, 2015 and January 13, 2016 of revisions to the Arizona SIP involving rescissions of certain statutory and regulatory provisions that fall into four categories: (1) Declarations of policy and legal authority, (2) jurisdiction over Indian lands, (3) prohibitory rules, and (4) test methods and performance test specifications.

#### 1. Declarations of Policy and Legal Authority

The EPA approved ARS section 36–1700 (“Declaration of Policy”) in May 1972 as part of the original Arizona SIP, and then approved it again in July 1972, and then again, as amended, in June

1982. See table 1 above. ARS section 36–1700 is a general statement of policy by the Arizona Legislature and sets forth the intent of the Legislature in establishing an air pollution control program in the state. As such, ARS section 36–1700 does not provide specific authority to any administrative agency to fulfill any particular regulatory function, nor does it establish any type of emissions standard or address any particular requirement for SIPs under the CAA. As such, we find that ARS section 36–1700 need not be retained in the Arizona SIP and thus find the state's corresponding rescission to be acceptable.

As shown in table 1, the EPA approved Arizona air pollution control rule 7–1–9.1 (“Policy and legal authority”) in July 1972 and then again as amended and renumbered (as R9–3–1001) in August 1978. Arizona rule 7–1–9.1 (R9–3–1001) cites the legal authority under which the rules relating to motor vehicle inspection and maintenance are adopted and also includes a general statement of policy. The specific statutory provisions cited by rule 7–1–9.1 (R9–3–1001) have been approved into the applicable SIP and, as discussed above, general statements of policy are not required for SIPs. As such, we find no need to retain rule 7–1–9.1 or its renumbered version R9–3–1001 in the applicable Arizona SIP. Therefore, we find the state's rescission of the two rules from the Arizona SIP to be acceptable.

#### 2. Jurisdiction Over Indian Lands

The EPA approved chapter 2, section 2.9 (“Legal authority—Jurisdiction over

Indian Lands”) and ARS section 36–1801 (“Jurisdiction over Indian Lands”) in July 1972. As described in chapter 2, section 2.9 of the Arizona SIP, under ARS section 36–1801, the State of Arizona assumed jurisdiction relating to air pollution control on all lands within the state including Indian tribal lands, reservations, and allotments.

ARS section 36–1801 was recodified as ARS section 49–561 in 1986, but is no longer found in Arizona law. More importantly, the state's assumption of jurisdiction relating to air pollution control on Indian reservations conflicts with federal law. See generally CAA section 301(d) and the EPA's tribal authority rule at 40 CFR part 49 (“Indian country: air quality planning and management”). More specifically, within the boundaries of an Indian reservation and any other area for which the EPA or a tribe has demonstrated that a tribe has jurisdiction, the EPA or authorized tribe has regulatory jurisdiction under the Clean Air Act. See *Oklahoma Department of Environmental Quality v. EPA*, 740 F.3d 185 (D.C. Cir. 2014). As such, ARS section 36–1801 should not be retained, and the EPA finds the state's corresponding rescissions of chapter 2, section 2.9 and ARS section 36–1801 from the Arizona SIP to be appropriate.

#### 3. Prohibitory Rules

On March 10, 2015, the ADEQ submitted rescissions of the following rules from the Arizona SIP because there are no secondary lead smelters, secondary brass and bronze ingot productions plants, iron and steel

plants, or electric arc furnaces (EAF) under the ADEQ's jurisdiction:

- R9-3-511, Standards of Performance for Existing Secondary Lead Smelters,
- R9-3-512, Standards of Performance for Existing Secondary Brass and Bronze Ingot Production Plants,
- R9-3-513, Standards of Performance for Existing Iron and Steel Plants, and
- R9-3-517, Standards of Performance for Steel Plants; Existing Electric Arc Furnaces (EAF).

To determine that there are no operating facilities in the state that fall under one of the specified source categories, ADEQ reviewed its permit and emissions inventory systems and consulted with knowledgeable staff. As a result of these searches, ADEQ determined that there are no operating facilities within ADEQ's jurisdiction that fall under these source categories.

On January 13, 2016, ADEQ also submitted a rescission of another rule, Arizona air pollution control rule 7-1-4.3 ("Sulfur Pulp Mills"), which was approved by the EPA in July 1972 and again in July 1978 as rule 7-1-4.3 (R9-3-403) ("Sulfur Emissions: Sulfite Pulp Mills"). Like the four prohibitory rules discussed above, no facilities remain in operation in Arizona that are subject to the requirements of rule 7-1-4.3. Therefore, we find the ADEQ's rescissions of the prohibitory rules discussed above from the Arizona SIP to be acceptable.

#### 4. Test Methods and Performance Specifications

In April 1982, the EPA approved sections 3 and 4 of the Arizona Testing Manual for Air Pollutant Emissions ("Arizona Testing Manual") as a revision to the Arizona SIP. Section 3 of the Arizona Testing Manual includes certain test methods from 40 CFR part 60, appendix A, and section 4 of the Arizona Testing Manual includes certain performance test specifications from 40 CFR part 60, appendix B. Both the test methods and performance test methods approved into the Arizona SIP date from the 1970s.

Over the years, the EPA's test methods and performance specifications in 40 CFR part 60 have been revised, and thus, the versions of the test methods and performance test specifications approved as part of the Arizona SIP are outdated. Also, in recent years, the EPA has approved two state rules that in effect incorporate more recent versions of the EPA's test methods and performance specifications into the Arizona SIP. See Arizona

Administrative Code (AAC) R18-2-311 ("Test Methods and Procedures") and appendix 2 ("Test Methods and Protocols") for AAC, title 18, chapter 2.<sup>2</sup> See 80 FR 67319 (November 2, 2015) and 79 FR 56655 (September 23, 2014). As such, the outdated test methods and performance test specifications approved as part of the Arizona Testing Manual need not be retained in the Arizona SIP. Thus, we find ADEQ's rescission of them to be acceptable.

#### C. Do the rescissions meet all applicable requirements?

The EPA has evaluated all the submittal documentation and has determined that the rescission of the statutory and regulatory provisions listed in table 1 is approvable because (1) the statements of policy and legal authority are not necessary to fulfill any CAA SIP purpose; (2) the provisions asserting jurisdiction over Indian reservations conflict with federal law; (3) ADEQ has adequately demonstrated that there are no existing sources subject to the listed prohibitory rules; and (4) the test methods and performance test specifications are outdated and other SIP provisions provide for use of more up-to-date procedures. Furthermore, with respect to the subject prohibitory rules, the emissions from any new facilities of the type that would have been subject to these rules will be subject to applicable New Source Review rules and New Source Performance Standards, which can reasonably be assumed to result in more stringent emission limits than would apply under these rules.

Therefore, rescission of the statutory provisions and rules listed in table 1 would not interfere with attainment or maintenance of any of the national ambient air quality standards or any other requirements of the Clean Air Act and would not affect emissions of nonattainment pollutants. As such, the rescission would comply with sections 110(l) and 193 of the Clean Air Act. For these reasons, we approve ADEQ's rescissions of the statutory and regulatory provisions listed in table 1 from the Arizona SIP.

#### II. Error Corrections

Section 110(k)(6) of the CAA provides in relevant part that, whenever the EPA determines that the EPA's action

<sup>2</sup> R18-2-311 provides that applicable procedures and testing methods contained in, among other references, 40 CFR part 60, appendices A through F, shall be used to determine compliance with state requirements for stationary sources. Appendix 2 for AAC, title 18, chapter 2 incorporates by reference 40 CFR part 60 appendices revised as of July 1, 2006.

approving, disapproving, or promulgating any SIP or SIP revision was in error, the EPA may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the state. In today's action, we are correcting four errors made in previous rulemakings approving revisions to the Arizona SIP.

First, on July 31, 1978 (43 FR 33245), we approved certain state prohibitory rules as a revision to the Arizona SIP. Among the rules listed as approved was R9-3-301 ("Visible emissions—General"). However, the preamble of our July 31, 1978 final rule clearly indicates that the EPA did not intend to take action on this rule (see 43 FR 33245, at 33246) but mistakenly listed R9-3-301 as approved in the regulatory portion of the final rule. In this action, we are correcting the error in our July 31, 1978 final rule by removing the entry for R9-3-301 from the relevant paragraph in 40 CFR 52.120 ("Identification of plan").

Second, on October 10, 1980 (45 FR 67345), we approved the state's January 26, 1979 request to redesignate the Air Quality Control Regions (AQCRs) in Arizona as a revision to the Arizona SIP. However, the state's request for redesignation of the Arizona AQCRs was made under section 107, not section 110, of the CAA, and while the EPA appropriately made certain administrative changes to 40 CFR part 52 ("Approval and promulgation of implementation plans"), subpart D ("Arizona") and 40 CFR part 81 ("Designation of areas for air quality planning purposes"), subpart B ("Designation of air quality control regions"), the redesignation request itself was not a SIP revision. As such, we erred in listing the state's January 26, 1979 redesignation request as an approved revision to the Arizona SIP in 40 CFR part 52 ("Approval and promulgation of implementation plans"), subpart D ("Arizona"), section 52.120 ("Identification of plan"), paragraph 52.120(c)(30). In today's action, we are removing the entry of the state's January 26, 1979 redesignation request from 40 CFR 52.120.

Third, on June 18, 1982 (47 FR 26382), we approved certain statutory provisions as a revision to the Arizona SIP. In so doing, we approved Arizona Revised Statutes (ARS) section 36-1720.02 ("Defenses"). However, the correct citation for this particular statutory provision was ARS section 36-1720.01, not ARS section 36-1720.02. In today's action, we are correcting the citation to this statutory provision in the relevant paragraph in 40 CFR 52.120 ("Identification of plan").

Fourth, on March 10, 2005 (70 FR 11882), we approved a request submitted on September 13, 2004 by the ADEQ to clarify the description of the air quality planning area for the Phoenix PM<sub>10</sub> nonattainment area. In our March 10, 2005 final rule, we revised the PM<sub>10</sub> table in 40 CFR part 81 (“Designation of areas for air quality planning purposes”), subpart C (“Section 107 attainment status designations”), section 81.303 (“Arizona”) accordingly, but we also listed the state’s September 13, 2004 boundary clarification request as an approval of a revision to the Arizona SIP. However, the state’s September 13, 2005 request was submitted under CAA section 107, not as a revision to the SIP under section 110, and thus our listing of it as part of the SIP in 40 CFR 52.120 (“Identification of plan”) was in error. In today’s action, we are removing the entry of the ADEQ’s September 13, 2004 boundary clarification request from 40 CFR 52.120.

Lastly, in a final rule published by the Federal Communications Commission at 63 FR 16441 (April 3, 1998), 40 CFR 52.111 (“Toll free number assignment”) was inadvertently added to subpart D (“Arizona”) of part 52 (“Approval and promulgation of implementation plans”). The provisions now found at 40 CFR 52.111 were intended to be promulgated in title 47, not title 40, and have nothing to do with SIPs. In today’s action, we are correcting this error by removing 40 CFR 52.111 from the CFR.

### III. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, the EPA is approving the state’s rescission of the statutory and regulatory provisions listed in table 1 from the Arizona SIP because we believe they are no longer necessary to retain. Under section 110(k)(6), we are also correcting errors in certain previous actions by the EPA on prior Arizona SIP revisions. The error corrections relate to an inadvertent listing of a rule on which the EPA did not take action in the Arizona SIP, a typographical error, and erroneous approvals of non-SIP submittals as part of the SIP.

We do not think anyone will object to these actions, so we are finalizing them without proposing them in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing rescission of the same provisions and correction of the same errors. If we receive adverse comments by March 14, 2016, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action

based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on April 11, 2016.

### IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely rescinds state statutes, rules, and test methods as unnecessary to retain in the applicable SIP and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide the EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this rule 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 11, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today’s **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that the EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: January 25, 2016.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart D—Arizona

§ 52.111 [Removed]

■ 2. Remove § 52.111.

■ 3. Section 52.120 is amended by:

■ a. Adding paragraphs (b)(1)(i), (c)(3)(ii) introductory text and (c)(3)(ii)(A), and (c)(6)(i) introductory text and (c)(6)(i)(A);

■ b. Revising paragraph (c)(19);

■ c. Adding paragraphs (c)(20)(i) introductory text and (c)(20)(i)(A), (c)(27)(i)(D), and (c)(29)(i)(B);

■ d. Removing and reserving paragraph (c)(30);

■ e. Adding paragraphs (c)(43)(i)(D) and (c)(45)(i)(E);

■ f. Revising paragraph (c)(50)(ii)(B);

■ g. Adding paragraphs (c)(50)(ii)(D) and (c)(54)(i)(I); and

■ h. Removing and reserving paragraph (c)(120).

The additions and revisions read as follows:

§ 52.120 Identification of plan.

\* \* \* \* \*

(b) \* \* \*

(1) Arizona State Department of Health.

(i) Previously approved on May 31, 1972 in paragraph (b) of this section and now deleted without replacement: Arizona Revised Statutes section 36-1700 (“Declaration of Policy”)

(c) \* \* \*

(3) \* \* \*

(ii) Arizona State Department of Health.

(A) Previously approved on July 27, 1972 in paragraph (c)(3) of this section and now deleted without replacement: Chapter 2 (“Legal Authority”), Section 2.9 (“Jurisdiction over Indian lands”); Arizona Revised Statutes sections 36-1700 (“Declaration of Policy”) and 36-1801 (“Jurisdiction over Indian Lands”); and Arizona State Department of Health, Rules and Regulations for Air Pollution Control 7-1-4.3 (“Sulfite Pulp Mills”) and 7-1-9.1 (“Policy and Legal Authority”).

\* \* \* \* \*

(6) \* \* \*

(i) Arizona State Department of Health.

(A) Previously approved on July 31, 1978 in paragraph (c)(6) of this section and now deleted without replacement: Arizona Air Pollution Control Regulation 7-1-4.3 (R9-3-403) (“Sulfur Emissions: Sulfite Pulp Mills”).

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(19) Arizona Air Pollution Control Regulations, submitted on September 16, 1975: R9-3-102 (Definitions), R9-3-108 (Test Methods and Procedures), R9-3-302 (Particulate Emissions: Fugitive Dust), R9-3-303 (Particulate Emissions: Incineration), R9-3-304 (Particulate Emissions: Wood Waste Burners), R9-3-305 (Particulate Emissions: Fuel Burning Equipment), R9-3-307 (Particulate Emissions: Portland Cement Plants); and R9-3-308 (Particulate Emissions: Heater-Planers), submitted on September 16, 1975.

(20) \* \* \*

(i) Arizona State Department of Health.

(A) Previously approved on August 4, 1978 in paragraph (c)(20) of this section and now deleted without replacement: Arizona Air Pollution Control Regulation R9-3-1001 (“Policy and Legal Authority”).

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(27) \* \* \*

(i) \* \* \*

(D) Previously approved on April 23, 1982, in paragraph (c)(27)(i)(B) of this section and now deleted without replacement: R9-3-511 (Paragraph B), R9-3-512 (Paragraph B), R9-3-513 (Paragraphs B and C), and R9-3-517 (Paragraphs B and C).

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(29) \* \* \*

(i) \* \* \*

(B) Previously approved on April 23, 1982, in paragraph (c)(29)(i)(A) of this section and now deleted without replacement: Arizona Testing Manual for Air Pollutant Emissions, Sections 3.0 and 4.0.

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(43) \* \* \*

(i) \* \* \*

(D) Previously approved on April 23, 1982, in paragraph (c)(43)(i)(B) of this section and now deleted without replacement: R9-3-511 (Paragraph A.1 to A.5), R9-3-512 (Paragraph A.1 to A.5), R9-3-513 (Paragraph A.1 to A.5), and R9-3-517 (Paragraph A.1 to A.5).

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(45) \* \* \*

(i) \* \* \*

(E) Previously approved on April 23, 1982, in paragraph (c)(45)(i)(B) of this section and now deleted without

replacement: R9-3-511 (Paragraph A); R9-3-512 (Paragraph A); R9-3-513 (Paragraph A); R9-3-517 (Paragraph A); Section 3, Method 11; Section 3.16, Method 16; Section 3.19, Method 19; and Section 3.20, Method 20.

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(50) \* \* \*

(ii) \* \* \*

(B) Arizona State: Chapter 14, Air Pollution, Article 1. State Air Pollution Control, Sections 36-1700 to 36-1702, 36-1704 to 36-1706, 36-1707 to 36-1707.06, 36-1708, 36-1720.01, and 36-1751 to 36-1753.

\* \* \* \* \*

(D) Previously approved on June 18, 1982, in paragraph (c)(50)(ii)(B) of this section and now deleted without replacement: Arizona Revised Statutes section 36-1700.

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(54) \* \* \*

(i) \* \* \*

(I) Previously approved on September 28, 1982, in paragraph (c)(54)(i)(C) of this section and now deleted without replacement: R9-3-511 (Paragraph A to A.1 and A.2), R9-3-513 (Paragraph A to A.1 and A.2), and R9-3-517 (Paragraph A to A.1).

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[FR Doc. 2016-02714 Filed 2-10-16; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS-R9-ES-2011-0072; Docket No. 120106026-4999-03]

RIN 1018-AX88; 0648-BB80

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the “Services” or “we,” revise a regulatory definition that is

integral to our implementation of the Endangered Species Act of 1973, as amended (Act or ESA). The Act requires Federal agencies, in consultation with and with the assistance of the Services, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. On May 12, 2014, we proposed to revise the definition for “destruction or adverse modification” in our regulations as this definition had been found to be invalid by two circuit courts. In response to public comments received on our proposed rule, we have made minor revisions to the definition. This rule responds to section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

**DATES:** Effective March 14, 2016.

**ADDRESSES:** Supplementary information used in the development of this rule, including the public comments received and the environmental assessment may be viewed online at <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0072 or at Docket No. NOAA-NMFS-2014-0093.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Schultz, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427-8443; facsimile 301/713-0376; or Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041; telephone 703/358-2171; facsimile 703/358-1735. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, 24 hours a day, and 7 days a week.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 7(a)(2) of the Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species (16 U.S.C. 1536(a)(2)). The Act defines critical habitat as the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of

section 4 of the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that 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 (16 U.S.C. 1532(3)). The Act does not define “destruction or adverse modification.” The Services carry out the Act via regulations in title 50 of the Code of Federal Regulations (CFR).

In 1978, the Services promulgated regulations governing interagency cooperation under section 7(a)(2) of the Act that defined “destruction or adverse modification” in part as a “direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include but are not limited to those diminishing the requirements for survival and recovery . . . .” (43 FR 870, January 4, 1978). In 1986, the Services amended the definition to read “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical” (51 FR 19926, June 3, 1986; codified at 50 CFR 402.02). In 1998, the Services provided a clarification of usage of the term “appreciably diminish the value” in the Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Act (*i.e.*, the Handbook; [http://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf)) as follows: “to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.”

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 definition and found it exceeded the Service’s discretion by requiring an action to appreciably diminish a species’ survival and recovery to trigger a finding of “destruction or adverse modification.”

*Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001). As stated in the decision (*Sierra Club*, at 441–42 (citations omitted) (emphasis in original)):

The ESA defines ‘critical habitat’ as areas which are ‘essential to the conservation’ of listed species. ‘Conservation’ is a much broader concept than mere survival. The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species. Indeed, in a different section of the ESA, the statute distinguishes between ‘conservation’ and ‘survival.’ Requiring consultation only where an action affects the value of critical habitat to both the recovery and survival of a species imposes a higher threshold than the statutory language permits.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 definition and found portions of the definition to be facially invalid. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). The Ninth Circuit, following similar reasoning set out in the *Sierra Club* decision, determined that Congress viewed conservation and survival as “distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both conservation and survival.” *Gifford Pinchot Task Force*, at 1070. Specifically, the court found that “the purpose of establishing ‘critical habitat’ is for the government to designate habitat that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Id.* “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species’ recovery even if there remains sufficient critical habitat for the species’ survival.” *Id.*

After the Ninth Circuit’s decision, the Services each issued guidance to discontinue the use of the 1986 definition (FWS Acting Director Marshall Jones Memo to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Act, 2004;” NMFS Assistant Administrator William T. Hogarth Memo to Regional Administrators, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Act, 2005”). Specifically, in evaluating an action’s effects on critical habitat as part of interagency consultation, the Services began directly applying the definition of “conservation” as set out in the Act. The guidance instructs the Services’ biologists, after examining the baseline and the effects of the action, to determine whether critical habitat

would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, upon implementation of the Federal action under consultation. "Primary constituent elements" was a term introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of "physical or biological features," which are referenced in the statutory definition of "critical habitat"; the Services have proposed to remove the term "primary constituent elements" and return to the statutory term "physical or biological features." See 79 FR 27066, May 12, 2014.

On May 12, 2014, the Services proposed the following regulatory definition to address the relevant case law and to formalize the Services' guidance: "*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery." See 79 FR 27060, May 12, 2014. In the preamble to the proposed rule, we explained that the proposed definition was intended to align with the conservation purposes of the Act. The first sentence captured the role that critical habitat should play for the recovery of listed species. The second sentence acknowledged that some physical or biological features may not be present or may be present in suboptimal quantity or quality at the time of designation.

We solicited comments on the proposed rule for a total of 150 days. We received 176 comments.

#### **Summary of Changes From the Proposed Definition**

This final rule aligns the regulatory definition of "destruction or adverse modification" with the conservation purposes of the Act and the Act's definition of "critical habitat." It continues to focus on the role that critical habitat plays for the conservation of listed species and acknowledges that the development of physical and biological features may be necessary to enable the critical habitat to support the species' recovery. Though we made minor changes to clarify our intent, these changes do not alter the overall meaning of the proposed definition. We do not expect this final rule to alter the section 7(a)(2)

consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated in light of this rule.

In our final definition, to avoid unnecessary confusion and more closely track the statutory definition of critical habitat, we replaced two "terms of art" introduced in the proposed definition with language that explained the intended meanings. In addition, we modified the second sentence of the definition to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition.

First, as described in detail under the Summary of Comments section below, many commenters suggested that we replace two terms, "conservation value" and "life-history needs," in the proposed definition with simpler language more clearly conveying their intended meanings. After reviewing the comments, we agreed that use of these terms was unnecessary and led to unintended confusion. We modified the proposed definition accordingly. Specifically, we replaced "conservation value of critical habitat for listed species" with "the value of critical habitat for the conservation of a listed species." We also replaced "physical or biological features that support life-history needs of the species for recovery" in the second sentence with "physical or biological features essential to the conservation of a listed species." These revisions avoid introducing previously undefined terms without changing the meaning of the proposed definition. Furthermore, these revisions better align with the conservation purposes of the Act, by using language from the statutory definition of "critical habitat" (*i.e.*, "physical or biological features essential to the conservation of the species").

Second, commenters also expressed concern that, in their perception, the Services proposed a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. We did not intend the proposed definition to signal such a shift in focus. Rather, we believed the first sentence of the proposed definition captured both types of alteration: those of existing features as well as those that would preclude or delay future development of such features. We intended the second sentence of the proposed definition to merely emphasize this latter type of alteration because of its less obvious nature. Because the second sentence of the 1986 definition expressly refers to

alterations adversely modifying physical or biological features and to avoid any perceived shift in focus, we revised the proposed definition to explicitly reference alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features.

#### **Final Definition**

After considering public comments, Congressional intent, relevant case law, and the Services' collective experience in applying the "destruction or adverse modification" standard over the last three decades, we finalize the following regulatory definition: *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

As described in the preamble to the proposed rule, the "destruction or adverse modification" definition focuses on how Federal actions affect the quantity and quality of the physical or biological features in the designated critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the critical habitat itself. Specifically, the Services will generally conclude that a Federal action is likely to "destroy or adversely modify" designated critical habitat if the action results in an alteration of the quantity or quality of the essential physical or biological features of designated critical habitat, or that precludes or significantly delays the capacity of that habitat to develop those features over time, and if the effect of the alteration is to appreciably diminish the value of critical habitat for the conservation of the species. If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

As also described in the preamble to the proposed rule, the Services may consider other kinds of impacts to designated critical habitat. For example, some areas that are currently in a degraded condition may have been designated as critical habitat for their potential to develop or improve and eventually provide the needed ecological functions to support species' recovery. Under these circumstances, the Services generally conclude that an

action is likely to “destroy or adversely modify” the designated critical habitat if the action alters it to prevent it from improving over time relative to its pre-action condition. It is important to note that the “destruction or adverse modification” definition applies to all physical or biological features; as described in the proposed revision to the current definition of “physical or biological features” (50 CFR 424.12), “[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions” (79 FR 27066, May 12, 2014).

### Summary of Comments

In our proposed rule (79 FR 27060, May 12, 2014), we requested written comments from the public for 60 days, ending July 11, 2014. We received several requests to extend the public comment period, and we subsequently published a notice (79 FR 36284, June 26, 2014) extending the comment period by an additional 90 days, through October 9, 2014.

During the public comment period, we received approximately 176 comments. We received comments from Tribes, State and local governments, industry, conservation organizations, private citizens, and others.

We considered all substantive information provided during the comment period and, as appropriate, incorporated suggested revisions into this final rule. Here, we summarize the comments, grouped by issue, and provide our responses.

**Comment on “conservation” versus “recovery”:** A few commenters suggested that conservation is not recovery. One commenter suggested that Congress intended critical habitat to mean areas that are essential to the continued existence of the species, *i.e.*, its survival.

**Our Response:** We disagree with the commenter that “conservation” means “survival.” Instead, we agree with the courts that Congress intended critical habitat to focus on conservation, which addresses more than mere survival. While we recognize the distinction between “conservation” and “recovery,” we also acknowledge that the courts and the Services often use the terms synonymously.

The statutory definition of critical habitat includes the phrase “essential to [or for] the conservation of the species” twice; it does not include the word “survival” or the phrase, “the continued existence of the species” (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that 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 (16 U.S.C. 1532(3)). The statutory definition does not include the word “survival” or the phrase, “the continued existence of the species.” This does not appear to be an oversight. Congress used the word “survival” in other places in the Act; they also used the phrase “continued existence of a species” elsewhere and specifically in reference to the jeopardy standard under section 7(a)(2) of the Act.

In 2001, the Fifth Circuit concluded that “‘conservation’ is a much broader concept than mere survival” and “speaks to the recovery” of species: “Indeed, in a different section of the ESA, the statute distinguishes between ‘conservation’ and ‘survival.’” *Sierra Club*, at 441–42. In 2004, the Ninth Circuit added, “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species’ recovery even if there remains sufficient critical habitat for the species’ survival.” Further, the Ninth Circuit indicated that the 1986 definition “fails to provide protection of habitat when necessary only for species’ recovery.” *Gifford Pinchot Task Force*, at 1070.

Throughout these decisions, the courts used the words “recovery” and “conservation” interchangeably.

The Services view “conservation” as the process used to achieve “recovery,” that is, the improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act (50 CFR 402.02). In the proposed regulatory definition of “conserve, conserving, and conservation,” the Services included the phrase “*i.e.*, the species is recovered” to clarify the link between conservation and recovery of the species. See 79 FR 27066, May 12, 2014 (proposing revisions to 50 CFR 424.02). Despite the distinction between the two terms, we often use the terms interchangeably in practice. We believe that this is consistent with Congress’s intent for “conservation” to encompass the procedures necessary to achieve “recovery.”

**Comments on “appreciably diminish”:** We received 63 comments regarding our use and explanation of the term “appreciably diminish.” Many commenters considered the explanation of the term vague, confusing, and giving too much discretion to the Services. Some suggested that “appreciably diminish” should apply only to the reduction in quality, significance, magnitude, or worth of the physical or

biological features that were the basis for determining the habitat to be critical. Others suggested alternatives to “appreciably,” including significantly, measurably, and considerably. Several commenters suggested simply removing the words “both the survival and” from the clarification of usage in the Services’ Handbook. Some commenters believed the Services were “lowering the bar,” while others felt that the Services were “raising the bar” with the definition. Commenters disagreed on whether the Services should consider every perceptible diminishment to critical habitat to be destruction or adverse modification.

**Our Response:** In the proposed rule, the Services requested comments on whether the phrase “appreciably diminish” is clear and can be applied consistently across consultations. Though this phrase has been part of the definition of “destruction or adverse modification” since 1978, we invited the public to suggest any alternative phrases that might improve clarity and consistency. Though several commenters responded that phrase is unclear or unable to be consistently applied, they did not present clearer alternatives or examples of inconsistent application.

The courts have not identified problems with the clarity or consistent application of the “appreciably diminish” standard. Though the Fifth (2001) and Ninth Circuits (2004) invalidated the existing regulatory definition because it included the phrase “both the survival and recovery,” they did not comment unfavorably on the word “appreciably” or the term “appreciably diminish.” In 2010, the Ninth Circuit expressly noted that its decision in *Gifford Pinchot* “did not alter the rule that an ‘adverse modification’ occurs only when there is ‘a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.’” *Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis in original).

Commenters generally agreed that “diminish” means to reduce; however, several commenters disagreed with our use of the word “appreciably” and suggested we use alternative qualifiers (*i.e.*, significantly, measurably, or considerably). In the preamble of the proposed rule, we discussed the word “appreciably,” as well as the suggested alternatives, which are similar in meaning to the word “appreciably” but also have multiple possible meanings. In light of all the comments received, our review of case law, and our previous experience with the term, we have

concluded that no alternative has a sufficiently clear meaning to warrant changing this longstanding term in the regulation. Without a clearly superior alternative, the Services retain the phrase “appreciably diminish” in the definition of “destruction or adverse modification.”

In the preamble to the proposed rule, we further clarified the meaning of “appreciably diminish” by explaining that the relevant question is whether the reduction has some relevance because we can recognize or grasp its quality, significance, magnitude, or worth in a way that negatively affects the value of the critical habitat as a whole for the conservation of a listed species. Some commenters objected to this clarification and advocated for the retention of the Handbook language, with edits to remove the phrase “both the survival and.”

Courts have looked to the Handbook as guidance for interpreting the “appreciably diminish” standard. In 2008, the U.S. District Court for the Eastern District of California held that the Handbook’s definition of “appreciably diminish” is reasonable and therefore would be applied by the court as guidance. See *Pacific Coast Federation of Fishermen’s Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1208–09 (E.D. Cal. 2008) (accorded deference to the agencies’ interpretation under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)). The court thus applied “appreciably diminish” as meaning “considerably reduce.” Other district courts have similarly applied the “considerably reduce” language contained in the Handbook’s definition of “appreciably diminish the value.” See *Wild Equity Institute v. City and County of San Francisco*, No. C 11–00958 SI, 2011 WL 5975029, \*7 (N.D. Cal. Nov. 29, 2011) (unreported) (noting that, in *Gutierrez*, “The court accepted the FWS’ definition of ‘appreciably diminish’ to mean ‘considerably reduce’”); *Forest Guardians v. Veneman*, 392 F.Supp.2d 1082, 1092 (D. Ariz. 2005) (applying the handbook’s definition of “appreciably diminish” as guidance for interpreting “reduce appreciably” as used in section 7(a)(2)’s jeopardy standard).

In the preamble to the proposed rule, we acknowledged that the Handbook’s language referring to “both the survival and recovery” as part of its definition of “appreciably diminish the value” is no longer valid. We also indicated that the term “considerably,” taken alone, may lead to disparate outcomes because it can mean “large in amount or extent,” “worthy of consideration,” or

“significant.” In light of the comments urging the Services to retain the Handbook clarification, the Services take this opportunity to clarify that the term “considerably,” in this context, means “worthy of consideration” and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat. We believe that this clarification will allow the Services to reach consistent outcomes, and we reiterate that the Handbook reference to “both the survival and” is no longer in effect.

We disagree with commenters who suggest that every diminishment, however small, should constitute destruction or adverse modification. We find it necessary to qualify the word “diminish” to exclude those adverse effects on critical habitat that are so minor in nature that they do not impact the conservation of a listed species. It is appropriate for the Services to consider the biological significance of a reduction when conducting a section 7(a)(2) consultation. The U.S. District Court for the Eastern District of California rejected as “overly expansive” the plaintiff’s suggestion that “appreciably” means “perceptible”. *Gutierrez*, 606 F.Supp.2d at 1208–09. The guidance issued by the Services in 2004 and 2005 directed the Services to discuss the “significance of anticipated effects to critical habitat,” which the U.S. District Court for the Northern District of California found appropriate and “sufficient to implement an ‘appreciably diminish’ standard.” *In re Consolidated Salmonid Cases*, 791 F. Supp.2d 802, 872 (E.D. Cal. 2011) (applying NMFS’ 2005 guidance), *affirmed in part, reversed in part on other grounds, San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (9th Cir. 2014). Similarly, in the context of applying the jeopardy standard from section 7(a)(2) of the Act, which also includes the term “appreciably” (in the phrase “appreciably reduce”), the U.S. District Court for the District of Columbia rejected the argument that the Services are required to recognize every reduction in the likelihood of survival or recovery that is capable of being perceived or measured; the court instead held that the Services have discretion to evaluate a reduction to determine if it is “meaningful from a biological perspective.” *Oceana, Inc. v. Pritzker*, F.Supp.3d, No. 08–1881, 2014 WL 7174875, \*8–9 (D.D.C. December 17, 2014).

Thus, our explanation in this final rule of the meaning of “appreciably diminish” is consistent with previous usage; “the bar” for determining

whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this rule. A Federal action may adversely affect critical habitat in an action area without appreciably diminishing the value of the critical habitat for the conservation of the species. In such cases, a conclusion of destruction or adverse modification would not be appropriate. Conversely, we would conclude that a Federal action would result in destruction or adverse modification if it appreciably diminishes the value of critical habitat for the conservation of the species, even if the size of the area affected by the Federal action is small.

In summary, the Services have applied the term “appreciably diminish” from the definition of “destruction or adverse modification” for decades (43 FR 870, January 4, 1978). With the clarifications of usage in this rule, we find no basis in either the comments received or in court decisions to abandon this well-established language.

*Comments on “conservation value”:* We received 68 comments on the term “conservation value,” suggesting that the term was vague, unnecessary, and confusing.

*Our Response:* In the proposed rule, the Services requested comments on whether the phrase “conservation value” is clear and can be applied consistently across consultations. We invited the public to suggest alternatives that might improve clarity and consistency in implementing the “destruction or adverse modification” standard.

Upon reviewing the comments, we agreed that inclusion of a new, undefined term, “conservation value,” was unnecessary. We wish to clarify that by introducing the term “conservation value” in the proposed definition, we did not intend to introduce a new concept but rather to reiterate that critical habitat is designated because it has been found to contribute to the conservation of the species, in keeping with the statutory definition of critical habitat. However, to avoid any confusion, we revised the first sentence of the final definition to replace the term “conservation value” with a phrase that conveys its intended meaning, *i.e.*, “the value of critical habitat for the conservation of a listed species.” This minor revision retains the meaning of “conservation value” without introducing a new term. Like the statutory definition of critical habitat, it emphasizes the role of critical habitat in the conservation of a species.

*Comments on “survival or recovery”:* Several commenters suggested that the Services should simply substitute “or” for “and” in the phrase “survival and recovery” from the 1986 definition.

*Our Response:* The Services find that simply changing “and” to “or” in the existing regulatory definition would not go far enough to incorporate the refined understanding we now have regarding the role of critical habitat. The Services’ regulations introduced the term “survival” into the 1978 definition; the statutory definition of critical habitat focuses on conservation, which the courts have explained emphasizes recovery. (See *Sierra Club*, at 441: “The ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species.”) The Ninth Circuit further indicates that “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species’ recovery even if there remains sufficient critical habitat for the species’ survival” (*Gifford Pinchot Task Force*, at 1070).

In *Gifford Pinchot*, the Ninth Circuit supported the use of “or” in place of “and”; however, this in no way limits our discretion to revise the definition to more clearly implement Congressional intent. In its definition of critical habitat, Congress uses the word “conservation” and not “survival”; therefore, it is appropriate for the Services to revise the definition to unambiguously emphasize the value of critical habitat for conservation. By doing so, we have produced a regulatory definition that is less confusing, less susceptible to misinterpretation, and more consistent with the intent of Congress than by merely substituting “or” for “and.”

*Comments on linking the definition to existing physical and biological features:* We received a few comments requesting that the definition explicitly include alterations of existing physical and biological features.

*Our Response:* In the proposed definition, we did not intend to disregard the alteration of existing physical or biological features; rather, our goal was to highlight certain types of alterations that may not be as evident as direct alterations, specifically those that preclude or significantly delay development of features. We reiterate and reaffirm that the first sentence of our final definition (*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.) is meant to encompass all potential types of alterations if they reduce the

value of the habitat for conservation, including alterations of existing features.

In response to comments and to avoid further confusion, we revise the second sentence to specifically reference alterations of existing physical and biological features (as does the 1986 definition), in addition to those that preclude or significantly delay development of essential physical or biological features, as examples of effects that may constitute destruction or adverse modification of critical habitat. We believe that the revised sentence provides clarity and transparency to the definition and its implementation while retaining the core idea of the proposed definition.

*Comments on “may include, but are not limited to”:* We received three comments on the use of the phrase “may include, but are not limited to.” Commenters found this language “overbroad” and thought the definition should be less vague or narrowed or both. One commenter thought it allowed a “catch-all provision” too favorable to the Federal Government, against prospective good-faith challengers.

*Our Response:* The phrase, “may include, but are not limited to” emphasizes that the types of direct or indirect alterations that appreciably diminish the value of critical habitat for listed species include not only those that affect physical or biological features, but also those that may affect the value of critical habitat itself. The concept of non-exhaustive inclusion is not new to the regulatory definition of “destruction or adverse modification.” Both 1978 and 1986 definitions included the phrase. This language has not proven problematic in application. Indeed, this phrase is commonly used by the Services to account for the variation that occurs in biological entities and ecological systems, and to preserve the role of the inherent discretion and professional judgment the Services must use to evaluate all relevant factors when making determinations regarding such entities and systems.

We retain the phrase in our final definition, as we believe its meaning is clear and that it serves an important function in the definition. It allows that there may be impacts to an area of critical habitat itself that are not impacts to features. This is particularly important for unoccupied habitat, for which no physical or biological features may have been identified (because physical or biological features are not required to be present in order to designate such an area as critical habitat under the second part of the statutory

definition of “critical habitat”). For occupied habitat, the Services must retain the flexibility to address impacts to the area itself, such as those that would impede access to or use of the habitat. As noted in the proposed rule, a destruction or adverse modification analysis begins with impacts to the features but does not end there (79 FR 27060, May 12, 2014). For these reasons, we retain this phrase in the final definition.

*Comments on “life-history needs”:* We received 12 comments regarding the phrase “physical or biological features that support the life-history needs.” The commenters considered the phrase to be vague and poorly defined. Some commenters felt that the phrase misinterpreted or “lowered the bar” from that intended by the statutory language “physical or biological features essential to the conservation of a species.” Commenters recommended describing the physical and biological features as “essential” or “necessary.”

*Our Response:* We did not intend the phrase, “physical or biological features that support the life-history needs” to “lower the bar” for identifying physical and biological features, as established in the statutory definition of critical habitat. Rather, our intent was to explain that physical or biological features provide for the life-history needs, which are essential to the conservation of the species.

However, based on review of the public comments on this issue, we recognized the confusion caused by introducing a new “term of art” in the proposed definition. To avoid confusion, we revised the second sentence of the definition to replace the phrase, “support the life-history needs,” with its intended meaning, “essential to the conservation of a species.” In accordance with the statutory definition of critical habitat, the revision emphasizes our focus on those physical or biological features that are essential to the conservation of the species. We believe that the revised sentence, which aligns more closely to the statutory language, provides clarity and transparency to the definition and its implementation.

*Comments on “preclude or significantly delay”:* We received many comments regarding the terms “preclude or significantly delay” in the proposed definition. Commenters believed these concepts are vague, undefined, and allow for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted

with E.O. 13604 (Improving Performance of Federal Permitting and Review of Infrastructure Projects).

*Our Response:* Our proposed definition of “destruction or adverse modification” expressly included effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery. Although we have revised the definition in minor respects from the proposed rule (see Summary of Changes from the Proposed Definition, above), we retain its forward-looking aspect.

Our determination of “destruction or adverse modification” is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further support for the conservation of the species. While occupied critical habitat would always contain at least one or more of the physical or biological features essential to the conservation of the listed species, an area of critical habitat may be in a degraded condition or less than optimal successional stage and not contain all physical or biological features at the time it is designated or those features may be present but in a degraded or less than optimal condition. The area may have been designated as critical habitat, however, because of the potential for some of the features not already present or not yet fully functional to be developed, restored, or improved and contribute to the species’ recovery. The condition of the critical habitat would be enhanced as the physical or biological features essential to the conservation of the species are developed, restored, or improved, and the area is able to provide the recovery support for the species on which the designation is based. The value of critical habitat also includes consideration of the likely capability of the critical habitat to support the species’ recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, a proposed action that alters habitat conditions to preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability (relative to that which would occur without the proposed action undergoing consultation), where the change appreciably diminishes the value of critical habitat for the conservation of the species, would likely result in destruction or adverse modification.

This is not a new concept or expansion of authority. The Services have previously recognized and articulated the need for this forward-looking aspect in the analysis of destruction or adverse modification of critical habitat. As discussed in the Background section, each Service issued substantially identical guidance following the decisions of the Fifth and Ninth Circuits invalidating the current regulatory definition (FWS 2004; NMFS 2005). For the past 10 years, the Services have evaluated whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. As noted above, “primary constituent elements” was a term introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of “physical or biological features.” On May 12, 2014, the Services proposed to revise these regulations to remove the use of the term “primary constituent elements” and replace it with the statutory term “physical or biological features” (79 FR 27066). However, the shift in terminology does not change the approach used in conducting a “destruction or adverse modification” analysis, which is the same regardless of whether the original designation identified primary constituent elements, physical or biological features, or both.

Several commenters asserted that assessing the projected condition of the habitat and projected development of physical and biological features would be inconsistent with the Act. The Services disagree. The Act defines critical habitat to include both areas occupied at the time of listing that contain features “essential to the conservation” of the species, as well as unoccupied areas that are “essential for the conservation” of listed species. Unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated. Yet, the obligation to preserve the value of critical habitat for the conservation of listed species applies to all designated critical habitat. At some point in the recovery process, habitat must supply features that are essential to the conservation of the species. It is thus important to recognize not only the features that are already present in the habitat, but the potential of the habitat to naturally develop the features over

time. Therefore, the Services believe it is necessary (and consistent with the Act) to examine a project’s effects on the natural development of physical and biological features essential to the conservation of a species.

“Preclusion” prevents the features from becoming established. The phrase “significantly delay” requires more explanation. We intend this phrase to encompass a delay that interrupts the likely natural trajectory of the development of physical and biological features in the designated critical habitat to support the species’ recovery. That trajectory is viewed in the context of the current status of the designated critical habitat and with respect to the conservation needs of the listed species.

If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

*Comments on “foreseeable future:”* We received many comments regarding the term “foreseeable future,” as used in the preamble to the proposed rule. Commenters believed this concept is vague and undefined, and requires speculation on the part of the Services.

*Our Response:* In the preamble to the proposed rule (79 FR 27060, May 12, 2014), we used the term “foreseeable future” to explain and provide context for the forward-looking aspect of the destruction or adverse modification analysis; we explained that the conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species’ recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the value of critical habitat for the conservation of the species relative to that which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.

In the proposed rule, we used the language “foreseeable future” not as specifically used in the definition of the term “threatened species” but as a generally understood concept; that is, in regards to critical habitat, we consider its future capabilities only so far as we are able to make reliable projections with reasonable confidence. The Services do not speculate when

evaluating whether a Federal action would preclude or significantly delay the development of features. As required by the Act, we rely on the best scientific and commercial data available to determine whether the action is likely to destroy or adversely modify critical habitat (16 U.S.C. 1536(a)(2)). This rule formalizes in regulation the forward-looking aspect of the destruction or adverse modification analysis adopted in the 2004 and 2005 guidance.

*Additional comments relating to forward-looking aspect of definition:* Several commenters felt that considerations regarding “precluding” or “significant delay” and “foreseeable future” would result in more consultations and longer review times.

*Our Response:* As noted above and in the proposed rule, the Services have applied these concepts since the 2004 and 2005 guidance documents, and no significant increase in the number of consultations or review times has occurred as a result. The Services do not believe that adopting this approach in our regulations will result in more or lengthier consultations.

*Comments on defining “destruction or adverse modification” instead of defining “destruction” and “adverse modification” separately:* We received three comments requesting that we define “destruction” and “adverse modification” independently.

*Our Response:* “Destruction or adverse modification of critical habitat” was not defined in the statute. The Services defined the term in the 1978 regulations and amended the definition in 1986. The Services have thus applied the term as a singular concept for many years without difficulty.

Independently defining “destruction” and “adverse modification” is unnecessary and would not alter the outcome of section 7(a)(2) consultations. If, through consultation, the Services determine that a proposed Federal action likely would result in the destruction or adverse modification of critical habitat, we would, if possible, provide a reasonable and prudent alternative to the action. Such alternative must not violate section 7(a)(2) of the Act, must be economically and technologically feasible, must be capable of being implemented in a manner consistent with the intended purpose of the action, and must be capable of being implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction (16 U.S.C. 1536(b)(3)(A); 50 CFR 402.14(h); 50 CFR 402.02 (defining “reasonable and prudent alternatives”).

Independently defining “destruction” and “adverse modification” would

unnecessarily complicate the process without improving it or changing the outcome. The key distinction is whether the action appreciably diminishes the value of critical habitat for the conservation of the species, not whether the action destroys critical habitat or adversely modifies it. The time and effort applied to determine whether the action destroyed or adversely modified critical habitat would be better spent on the identification of reasonable and prudent alternatives to the proposed action. Therefore, we do not independently define “destruction” and “adverse modification.”

*Comments on the need for a quantitative definition:* Eight commenters suggested the need for a quantitative definition that minimizes the Services’ discretion.

*Our Response:* We did not receive any examples of a quantitative definition. We are not able to provide such a definition because Federal actions, species, and critical habitat designations are complex and differ considerably. Our analyses of the actions and their effects on critical habitat require case-by-case consideration that does not fit neatly into a mathematical formula. Congress anticipated the need for the Services to use their professional judgment by requiring us to provide our opinion, detailing how the action affects species and critical habitat. This opinion must be based on the best available scientific and commercial information available for a particular action and species. The level of specificity and precision in available data will vary across actions and across species, and therefore a one-size-fits-all standard would not be workable.

Further, the U.S. Court of Appeals for the Ninth Circuit has specifically held that nothing in the Act or current regulations requires that the analysis of destruction or adverse modification be quantitative in nature. *Butte Environmental Council*, 620 F.3d at 948 (agency not required to calculate rate of loss of habitat). See also *San Luis & Delta-Mendota Water Authority v. Salazar*, 760 F.Supp.2d 855, 945 (E.D. Cal. 2010) (Services not required to set threshold for determining destruction or adverse modification), *affirmed in part, reversed in part on other grounds sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

Therefore, we find that attempting to specify a quantitative threshold is neither feasible nor required.

*Comments on the scale of analysis:* Many commenters expressed confusion or concern regarding the scale at which the determination of destruction or

adverse modification of critical habitat is made. Some commenters agreed with the Services’ interpretation of the statute and the existing implementing regulations at 50 CFR 402.14, as described in the preamble to the proposed rule, that determinations on destruction or adverse modification are based on critical habitat as a whole, not just on the areas where the action takes place or has direct impacts. These commenters requested clarification of the process used to make such determinations or thought that the language, “critical habitat, as a whole,” should be included in the rule and not just the preamble. Other commenters disagreed with the Services’ interpretation that the destruction or adverse modification determination should be based on critical habitat as a whole and recommended that the Services evaluate destruction or adverse modification at the smallest scale relevant to determining whether the species has met its recovery criteria.

*Our Response:* As explained in the preambles to this rule and the proposed rule, the determination of “destruction or adverse modification” will be based on the effect to the value of critical habitat for the conservation of a listed species. In other words, the question is whether the action will appreciably diminish the value of the critical habitat as a whole, not just in the action area (*i.e.*, all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action; 50 CFR 402.02).

The section 7 process involves multiple determinations, made by the action agency or the Services or both, regarding critical habitat. Where critical habitat has already been designated, section 7(a)(2) of the Act applies. Under the implementing regulations, the Federal agency first determines if its proposed action may affect critical habitat. If such a determination is made, formal consultation is required unless the Federal agency determines, with the written concurrence of the Services, that the action is not likely to adversely affect critical habitat. In accordance with the Act, our implementing regulations at 50 CFR 402.14(g)(1) through (g)(4), and the 2004 and 2005 guidance documents issued by FWS and NMFS (see the Background section), the formal consultation process generally involves four components: (1) The status of critical habitat, which evaluates the condition of critical habitat that has been designated for the species in terms of physical or biological features, the factors responsible for that condition, and the intended conservation role of the

critical habitat overall; (2) the environmental baseline, which evaluates the current condition of the critical habitat in the action area, the factors responsible for that condition, and the relationship of the affected critical habitat in the action area to the entire critical habitat with respect to the conservation of the listed species; (3) the effects of the action, which includes the direct and indirect effects of the action (and the effects of any interrelated or interdependent activities) and describes how those effects alter the value of critical habitat within the action area; and (4) cumulative effects (as defined at 50 CFR 402.02), which evaluates the effects of future, non-Federal activities in the action area and describes how those effects are expected to alter the value of critical habitat within the action area. After synthesizing and integrating these four components, the Services make their final determination regarding the impact of the action on the overall value of the critical habitat designation. The Services conclude whether critical habitat would remain functional (or retain the current ability for the features to be functionally established in areas of currently unoccupied but capable habitat) to fulfill its value for the conservation of the species, or whether the action appreciably reduces the value of critical habitat for the conservation of the species.

Where critical habitat has only been proposed for designation, a distinct but related process applies under section 7(a)(4) of the Act. The action agency must initiate a conference with the Services on the effects of its proposed action when the action is likely to result in destruction or adverse modification of the proposed critical habitat (50 CFR 402.10(b)). Although a conference generally will consist of informal discussions leading to advisory recommendations, action agencies have the option of conducting the conference under the same procedures that apply to formal consultations so that a conference opinion is produced (and later adopted as a biological opinion upon finalization of the critical habitat designation, provided certain conditions are met; 50 CFR 402.10(c) and (d)). While there are important differences between the consultation and conference processes, the same analytical steps as described in the paragraph above apply in the Services' evaluation of impacts to critical habitat.

Adverse effects to critical habitat within the action area may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. The

Handbook expressly provides that adverse effects to single elements or segments of critical habitat generally do not result in destruction or adverse modification unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. Courts have concurred that a proposed action may result in destruction of some areas of critical habitat and still not necessarily result in a finding of "destruction or adverse modification." See *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057 (9th Cir. 2013) ("Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area."); *Butte Environmental Council*, 620 F.3d at 948 (applying the Handbook provision to support the conclusion that "[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.>").

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a small affected area of habitat is particularly important in its ability to support the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a small area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Because the existing consultation process already ensures that destruction or adverse modification of critical habitat is analyzed at the appropriate scale, the Services decline to include language referring to determinations based on critical habitat "as a whole" in the definition of "destruction or adverse modification."

*Comments on aggregate effects:* Several commenters expressed concern

that aggregate adverse impacts to critical habitat are not adequately addressed in the Services' analyses and that the proposed rule should be revised to expressly require the evaluation of aggregate effects to critical habitat that multiple actions will have on a species' recovery. One commenter urged the Services to develop a system to track the aggregate effects that destroy or degrade critical habitat.

*Our Response:* The Services' biological opinion provides an assessment of the status of the critical habitat (including threats and trends), the environmental baseline of the action area (describing all past and present impacts), and cumulative effects. Under the implementing regulations of the Act, cumulative effects are defined as those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02). Following the definition, we only consider cumulative effects within the action area. The effects of any particular action are evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only insignificant adverse effects but, over time, the aggregate effects of these actions would erode the conservation value of the critical habitat.

*Comments on the role of mitigation in "destruction or adverse modification" findings:* Four commenters thought the "net effects" of an action, including consideration of "mitigation and offsetting beneficial" measures, should be considered in the revised regulatory definition. One commenter suggested that the Services should develop an explicit framework for allowing project proponents to avoid a destruction or adverse modification finding by restoring the same biological or physical feature of critical habitat that they degrade, provided there is evidence the restoration is likely to succeed.

*Our Response:* As stated in the Services' 2004 and 2005 guidance, conservation activities (e.g., management, mitigation, etc.) outside of designated critical habitat should not be considered when evaluating effects to critical habitat. However, conservation activities within critical habitat, included as part of a proposed action to mitigate the adverse effects of the action on critical habitat, are considered by the Services' in formulating our biological opinion as to whether an action is likely to result in the destruction or adverse

modification of critical habitat. This consideration of beneficial actions is consistent with the implementing regulations at 50 CFR 402.14(g)(8), which set forth that in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. The Services welcome the inclusion of beneficial conservation activities as part of proposed actions. However, because the question of whether beneficial actions can compensate for impacts to critical habitat is complicated and must be evaluated on a case-by-case basis, it would be advisable for Federal agencies and applicants to coordinate closely with the Services on such activities.

*Comments on continuation of current uses:* Two commenters discussed current land practices and other uses on areas that may be designated as critical habitat. One commenter specifically requested that the final rule indicate that continuation of current uses does not constitute destruction or adverse modification.

*Our Response:* There is nothing in the Act to suggest that previously ongoing activities are or may be exempted from analysis during section 7(a)(2) consultations. Accordingly, our longstanding regulatory framework does not distinguish between ongoing and other actions. "Action" is defined broadly at 50 CFR 402.02 to include all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. The applicability provision of the regulations further explains that section 7(a)(2) obligations arise so long as there is discretionary Federal involvement or control (50 CFR 402.03). It would be unsupported and beyond the scope of the definition of "destruction or adverse modification" to change these well-established principles.

*Comments regarding the use of recovery documents as a basis for a destruction or adverse modification determination:* We received three comments requesting that the Services clarify that criteria, goals, or programs established in recovery plans are not enforceable and may not be used as a basis for a destruction or adverse modification decision.

*Our Response:* The Services agree that recovery plans convey guidance and are not regulatory documents that compel any action to occur. In addition, section

7(a)(2) of the Act describes a standard of prohibition rather than a mandate to further recovery. However, criteria, goals, and programs for recovery that are established in these plans may be used in our evaluation of whether, with implementation of the proposed action, critical habitat would retain its value for the conservation of the species. Recovery plans, in addition to critical habitat rules, may provide the best scientific and commercial information available on the value of critical habitat to the conservation of the species, thus assisting the Services with evaluating the effects of a proposed action on critical habitat.

*Comments on undue burden:* We received 14 comments regarding the perceived potential for undue burden on Tribes, State and local governments, and various industries. The commenters suggested that the proposed definition would prevent the issuance of permits or impose unwarranted restrictions and requirements on permit applicants, resulting in additional costs for project redesign, reductions in productivity, and increases in the time and effort required to submit permit applications. Some commenters predicted an increase in the number of section 7(a)(2) consultations, especially formal consultations. Others predicted that the Services would conclude destruction or adverse modification of critical habitat more frequently.

*Our Response:* Because the final regulatory definition largely formalizes existing guidance that FWS and NMFS have implemented since 2004 and 2005, respectively, we conclude that the section 7(a)(2) consultation process will not significantly change. The final definition does not "raise the bar" in any way. We will not reinitiate consultations as a result of this rule. We will consult on ongoing actions in a similar manner as we have since the issuance of the guidance. Therefore, we do not anticipate changes in the costs related to section 7(a)(2) consultations or the frequency at which the Services conclude destruction or adverse modification of critical habitat. The decision to consult is made prior to and independent of our analysis of destruction or adverse modification of critical habitat (*i.e.*, by a Federal agency applying the "may affect" standard of 50 CFR 402.14(a) to determine whether their action may affect designated critical habitat). If a Federal agency determines, with the written concurrence of the Services, that the proposed action is not likely to adversely affect critical habitat, formal consultation is not required (50 CFR 402.14(b)), and the Services would not

perform an analysis of destruction or adverse modification of critical habitat. Therefore, the number of section 7(a)(2) consultations, and formal consultations in particular, is not likely to be affected by this rule.

*Comments on Tribe, State, and local coordination:* We received five comments from Tribes, State and local governments, and industry groups indicating that we should consult or coordinate with Tribes, States, and local governments to finalize the proposed rule.

*Our Response:* The Services have undertaken numerous efforts to ensure that our State, Tribal, and other partners had full notice and opportunity to provide input into the development of this rule. We reached out to industry groups, environmental organizations, intergovernmental organizations, and Federal agencies. We worked with the Association of Fish and Wildlife Agencies and the Native American Fish and Wildlife Society to distribute information to Tribes, States, and local governments about the proposed rule. The Services notified their respective Tribal liaisons, who sent letters to Tribes regarding this rule. We also hosted a webinar for the States on May 23, 2014. We considered all submitted comments, which included comments from Tribes, States, and local governments, and, as warranted, applied suggestions to the final rule.

*Comments on NEPA:* We received 11 comments suggesting that a categorical exclusion from the NEPA was not appropriate for the proposed rule and that the Services should analyze the environmental impacts of this action.

*Our Response:* The Services believe this rule likely would qualify for one or more categorical exclusions adopted by the Department of the Interior and the National Oceanic and Atmospheric Administration, respectively. Nevertheless, in an abundance of caution, the Services have completed an environmental assessment, which is available at the Federal e-rulemaking portal: <http://www.regulations.gov> (see **ADDRESSES**).

*Comments on Energy Supply, Distribution, and Use (E.O. 13211), Takings (E.O. 12630), and Economic Analyses (E.O. 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act):* We received comments that the Services should prepare a Statement of Energy Effects (E.O. 13211, 1 comment), a regulatory flexibility analysis (2 comments), and an economic analysis (2 comments).

*Our Response:* This rule clarifies existing requirements for Federal agencies under the Act. Based on

procedures applied through existing agency guidance, the rule is substantially unlikely to lead to different conclusions in section 7(a)(2) consultations. The rule clarifies the standard by which we will evaluate the effect of agency actions on critical habitat pursuant to section 7(a)(2) of the Act. For further information, please see the relevant sections under Required Determinations, below.

*Comments on extension of the comment period:* Many commenters requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

*Our Response:* On June 26, 2014 (79 FR 36284), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was therefore open for 150 days, which provided adequate time for all interested parties to submit comments and information.

*Comments on the proposed rule being "beyond the scope of the Act":* We received 25 comments stating that the proposed definition exceeded the authority of the Act. Some commenters wrote that it was beyond the scope of the Act. Some expressed concern that the proposed definition implied an affirmative conservation requirement or mandate for recovery.

*Our Response:* As the agencies charged with administering the Act, it is within our authority to promulgate and amend regulations to ensure transparent and consistent implementation. Under general principles of administrative law, an agency may resolve ambiguities and define or clarify statutory language as long as the agency's interpretation is a permissible interpretation of the statute. The term "destruction or adverse modification" was not defined by Congress. Consequently, the Services first promulgated a regulatory definition in 1978, and then later in 1986. As previously mentioned, the "survival and recovery" standard of our earlier definitions was invalidated by courts. We believe that this revised definition comports with the language and purposes of the Act.

As explained in the preamble to the proposed rule, section 7(a)(2) only applies to discretionary agency actions and does not create an affirmative duty for action agencies to recover listed species (79 FR 27060, May 12, 2014). Similarly, the definition of "destruction or adverse modification" is a prohibitory standard only. The

definition does not, and is not intended to, create an affirmative conservation requirement or a mandate for recovery. Consistent with the Ninth Circuit's opinion, in the context of describing an action that "jeopardizes" a species, in *National Wildlife Federation v. NMFS*, 524 F.3d 917 (9th Cir. 2008), the Services believe that an action that "destroys" or "adversely modifies" critical habitat must cause a deterioration in the value of critical habitat, which includes its ability to provide recovery support to the species based on ongoing ecological processes. Section 7(a)(2) of the Act requires Federal agencies to insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Under this section of the Act, Federal agencies are not required to recover species; however, they must insure that their actions are not likely to prevent or impede the recovery of the species through the destruction or adverse modification of critical habitat. To be clear, Federal actions are not required to improve critical habitat, but they must not reduce its existing capacity to conserve the species over time. Section 7(a)(2) and the definition of "destruction or adverse modification" are implemented independent of section 7(a)(1), which directs Federal agencies to utilize their authorities to carry out affirmative conservation programs for listed species.

*Comments suggesting revision or withdrawal of the rule:* We received 15 comments requesting that we revise or withdraw the proposed rule.

*Our Response:* In order to administer the Act, the Services need a regulatory definition of "destruction or adverse modification." The Fifth and Ninth Circuits found the current regulatory definition to be invalid over a decade ago because it required that both the survival and the recovery of listed species be impacted. As discussed previously, in 2004 and 2005, the Services issued internal guidance instructing their biologists to discontinue use of the regulatory definition and to instead consider whether critical habitat would continue to contribute (or have the potential to contribute) to the conservation of the species. After several years of implementation, the Services herein formalize this guidance by modifying the regulatory definition. In response to public comments, we have made minor revisions to the proposed definition; however, the meaning and implementation of the standard remains unchanged. The final definition is clear,

implementable, and consistent with the Act.

### Required Determinations

#### *Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action and has reviewed this rule under E.O. 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rule clarifies existing requirements for Federal agencies under the Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBREFA's size standards. No other entities are directly affected by this rule.

This rule will be applied in determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Based on procedures applied through existing agency guidance, this rule is unlikely to affect our determinations. The rule provides clarity to the standard with which we will evaluate agency actions pursuant to section 7(a)(2) of the Act.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not “significantly or uniquely” affect small governments. We have determined and certify under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the regulation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year (*i.e.*, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act). This regulation would not impose any additional management or protection requirements on the States or other entities.

*Takings (E.O. 12630)*

In accordance with E.O. 12630, we have determined the rule does not have significant takings implications.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. Indeed, this regulation provides broad program direction for the Services’ application of section 7(a)(2) in consultations on future proposed Federal actions and does not itself result in any particular action concerning a specific property. Further, this rule substantially advances a legitimate government interest (conservation and recovery of listed species) and does not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with E.O. 13132, we have considered whether this rule will have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to determinations of Federal agency compliance with section 7(a)(2) of the Act, and 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.

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

This rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule clarifies how the Services will make determinations on whether a Federal agency has ensured that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat.

*Government-to-Government Relationship With Tribes*

In accordance with Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”, November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on Federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for conducting consultations on Federal agency actions under section 7(a)(2) of the Act, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate and coordinate with Tribes on issues related to Federally listed species and their habitats and work with them as appropriate as we engage in individual section 7(a)(2) consultations. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

*Paperwork Reduction Act of 1994*

This rule does not contain any collections of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule does not impose recordkeeping or reporting requirements on Tribes, State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (NEPA)*

In the proposed rule, we invited the public to comment on whether and how the regulation may have a significant effect upon the human environment, including any effects identified as

extraordinary circumstances at 43 CFR 46.215. After considering the comments received and further evaluating whether there is any arguable basis to require preparation of an environmental assessment, we analyzed this rule in accordance with the criteria of the National Environmental Policy Act, the Department of the Interior regulations on Implementation of the NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1–6 and 8), and National Oceanographic and Atmospheric Administration Administrative Order 216–6. This analysis was undertaken in an abundance of caution only, as we believe the rule would qualify for one or more categorical exclusions. Based on a review and evaluation of the information contained in the Environmental Assessment, we made a determination that the Final Definition for the phrase “destruction or adverse modification” of critical habitat will not have a significant effect on the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended).

*Energy Supply, Distribution or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this document is available upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

**List of Subjects in 50 CFR Part 402**

Endangered and threatened species.

**Regulation Promulgation**

Accordingly, we amend part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

**PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED**

■ 1. The authority citation for part 402 continues to read as follows:

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

■ 2. In § 402.02, revise the definition for “*Destruction or adverse modification*” to read as follows:

**§ 402.02 Definitions.**

\* \* \* \* \*

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

\* \* \* \* \*

Dated: January 29, 2016.

**Michael J. Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.*

Dated: January 29, 2016.

**Samuel D. Rauch III,**

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

[FR Doc. 2016-02675 Filed 2-10-16; 8:45 am]

BILLING CODE 4333-15-P; 3510-22-P

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 424**

[Dockets FWS-R9-ES-2011-0104 and 120206102-5603-03; 4500030114]

RIN 1018-AX87; 0648-BB82

**Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act**

**AGENCY:** U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice of final policy.

**SUMMARY:** We, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, (jointly, the “Services”) announce our final policy on exclusions from critical habitat under the Endangered Species Act. This non-binding policy provides the Services’ position on how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy

complements our implementing regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

**DATES:** This policy is effective March 14, 2016.

**ADDRESSES:** You may review the reference materials and public input used in the creation of this policy at <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0104. Some of these materials are also available for public inspection at U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041-3803 during normal business hours.

**FOR FURTHER INFORMATION CONTACT:**

Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041-3803; telephone 703/358-2171; facsimile 703/358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427-8469; facsimile 301/713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** Today, we publish in the **Federal Register** three related documents that are final agency actions. This document is one of the three, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of “destruction or adverse modification” of critical habitat. That regulatory definition had been invalidated by several courts for being inconsistent with the Act. This final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RIN) are 1018-AX88 and 0648-BB82, and the final rule may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0072.

- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services’ experience over the years in interpreting and applying the statutory definition of “critical habitat,” highlighted the need to clarify or revise the regulations. This final rule amends 50 CFR part 424. It is

published under RINs 1018-AX86 and 0648-BB79 and may be found on <http://www.regulations.gov> at Docket No. FWS-HQ-ES-2012-0096.

- A final policy pertaining to exclusions from critical habitat and how we may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the final rule amending 50 CFR 424.19 and provides for a predictable and transparent exclusion process. The policy is published under RINs 1018-AX87 and 0648-BB82 and is set forth below in this document. The policy may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0104.

**Background**

The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) are charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), the goal of which is to provide a means to conserve the ecosystems upon which listed species depend and to provide a program for listed species conservation. Critical habitat is one tool in the Act that Congress established to achieve species conservation. In section 3(5)(A) of the Act Congress defined “critical habitat” as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Specifying the geographic location of critical habitat helps facilitate implementation of section 7(a)(1) by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. In addition to serving as an educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the

Services under section 7(a)(2) to insure their actions are not likely to destroy or adversely modify critical habitat.

Section 4 of the Act requires the Services to designate critical habitat, and sets out standards and processes for determining critical habitat. Congress authorized the Secretaries to “exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned” (section 4(b)(2)).

Over the years, legal challenges have been brought to the Services’ process for considering exclusions. Several court decisions have addressed the Services’ implementation of section 4(b)(2). In 2008, the Solicitor of the Department of the Interior issued a legal opinion on implementation of section 4(b)(2) (<http://www.doi.gov/solicitor/opinions.html>). That opinion is based on the text of the Act and principles of statutory interpretation and relevant case law. The opinion explained the legal considerations that guide the Secretary’s exclusion authority, and discussed and elaborated on the application of these considerations to the circumstances commonly faced by the Services (e.g., habitat conservation plans, Tribal lands).

To provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2), the Services announce this final policy regarding several issues that frequently arise in the context of exclusions. This policy on implementation of specific aspects of section 4(b)(2) does not cover the entire range of factors that may be considered as the basis for an exclusion in any given designation, nor does it serve as a comprehensive interpretation of all the provisions of section 4(b)(2).

This final policy sets forth the Services’ position regarding how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The Services intend to apply this policy when considering exclusions from critical habitat. That being said, under the terms of the policy, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat. This policy does not mandate

particular outcomes in future decisions on critical habitat designations.

#### *Changes to the Proposed Policy Elements*

Below are a summary of changes to the proposed policy elements as a result of public comment and review. The final policy elements can be found at the end of this policy.

1. Added language to policy element 2 to make clear that the list presented in this policy is not a list of requirements for non-permitted plans, but rather factors the Services will use to evaluate non-permitted plans and partnerships. This list is not exclusive; all items may not apply to every plan.

2. In policy element 2(c), added text to the criterion in the non-permitted plans policy element to clarify that required determinations may be a factor considered in a discretionary 4(b)(2) exclusion analysis where such determinations are “necessary and appropriate.”

3. Removed the phrase, “not just providing guidelines,” from paragraph 3(c).

4. Made several other minor edits to increase clarity and readability of the policy elements.

#### *Implementation of Section 4(b)(2) of the Act*

On August 28, 2013 (78 FR 53058), the Services published a final rule revising 50 CFR 424.19. In that rule the Services elaborated on the process and standards for implementing section 4(b)(2) of the Act. This final policy is meant to complement those revisions to 50 CFR 424.19, and provides further clarification as to how the Services will implement section 4(b)(2) when designating critical habitat.

Section 4(b)(2) of the Act provides that:

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

In 1982, Congress added this provision to the Act, both to require the Services to consider the relevant impacts of designating critical habitat and to provide a means for the Services to reduce potentially negative impacts

of designation by excluding, in appropriate circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services always consider such impacts, as required under this sentence, for each and every designation of critical habitat. (Although the term “homeland security” was not in common usage in 1982, the Services conclude that Congress intended that “national security” includes what we now refer to as “homeland security.”)

The second sentence of section 4(b)(2) outlines a separate, discretionary process by which the Secretaries may elect to determine whether to exclude an area from the designation, by performing an exclusion analysis. The Services use their consideration of impacts under the first sentence of section 4(b)(2), their consideration of whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2), and any exclusion analysis that the Services undertake, as the primary basis for satisfying the provisions of Executive Orders 12866 and 13563. E.O. 12866 (incorporated by E.O. 13563) requires agencies to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs.

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing the benefits of excluding a particular area from a designation of critical habitat against the benefits of including that area in the designation. If the benefits of exclusion outweigh the benefits of inclusion, the Secretaries may exclude the particular area, unless they determine that the exclusion will result in the extinction of the species concerned. The discretionary 4(b)(2) exclusion analysis is fully consistent with the E.O. requirements in that the analysis permits excluding an area where the benefits of exclusion outweigh the benefits of inclusion, and would not lead to exclusion of an area when the benefits of exclusion do not outweigh the benefits of inclusion.

This policy sets forth specific categories of information that we often consider when we enter into the discretionary 4(b)(2) exclusion analysis and exercise the Secretaries’ discretion to exclude areas from critical habitat. We do not intend to cover in these examples all the categories of

information that may be relevant, or to limit the Secretaries' discretion to consider and assign weight to any relevant benefits as appropriate.

Moreover, our implementing regulations at 50 CFR 424.19 further clarify the exclusion process for critical habitat and address statutory changes and case law. The regulations at 50 CFR 424.19, as well as the statute itself, state that the Secretaries have the discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. Furthermore, the Secretaries may consider any relevant benefits. The weight and consideration given to those benefits is within the discretion of the Secretaries. The regulations at 50 CFR 424.19 provide the framework for how the Services intend to implement section 4(b)(2) of the Act. This policy further details the discretion available to the Services (acting for the Secretaries), and provides detailed examples of how the Services may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process when we undertake a discretionary 4(b)(2) exclusion analysis.

#### *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*

When the Services determine that critical habitat is prudent and determinable for species listed as endangered or threatened species under the Act, they must follow the statutory and regulatory provisions of the Act to designate critical habitat. The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat. First, the Act's definition of "critical habitat" requires the Secretaries to identify areas based on the conservation needs of the species. Second, section 4(b)(2) expressly requires designations to be made based on the best scientific data available. (It is important to note that, once the Secretaries identify specific areas that meet the definition of "critical habitat," the Secretaries do not have the discretion to decline to recognize those areas as potential critical habitat. Only areas subject to an integrated natural resources management plan (INRMP) that meets the requirements of section 4(a)(3)(B)(i) are categorically ineligible for designation.)

Having followed the biologically driven first step of identifying "critical

habitat" for a species, the Secretaries turn to the remaining procedures set forth in section 4(b)(2), which allow for consideration of whether those areas ultimately should be designated as critical habitat. Thus, pursuant to the first sentence of section 4(b)(2), the Secretaries then undertake the mandatory consideration of impacts on the economy and national security, as well as any other impact that the Secretaries determine is relevant.

The Act provides a mechanism that allows the Secretaries to exclude particular areas only upon a determination that the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. The Services call this the discretionary 4(b)(2) exclusion analysis. Neither the Act nor the implementing regulations at 50 CFR 424.19 require the Secretaries to conduct a discretionary 4(b)(2) exclusion analysis (see, e.g., *Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010)). Rather, the Secretaries have discretion as to whether to conduct that analysis. If a Secretary decides not to consider exclusion of any particular area, no additional analysis is required. However, if the Secretary contemplates exclusion of a particular area, an initial screening may be conducted to evaluate potential exclusions. The Secretary may undertake a preliminary evaluation of any plans, partnerships, economic considerations, national-security considerations, or other relevant impacts identified after considering the impacts required by the first sentence of section 4(b)(2). Following the preliminary evaluation, the Secretary may choose to enter into the discretionary 4(b)(2) exclusion analysis for any particular area. If the Secretary does so, the Secretary has broad discretion as to what factors to consider as benefits of inclusion and benefits of exclusion, and what weight to assign to each factor—nothing in the Act, its implementing regulations, or this policy limits this discretion.

When conducting a discretionary 4(b)(2) exclusion analysis, one of the factors that the Secretaries may consider is the effect of existing conservation plans or programs. Those plans and programs can reduce the benefits of including particular areas in a designation of critical habitat. To state this another way, because there are already conservation actions occurring on the ground as a result of the plan or program, the regulatory benefit of overlaying a designation of critical habitat may be reduced, because the designation may be redundant, or may

provide little more conservation benefit compared to what is already being provided through the conservation plan or program. As a result, the existence of these conservation plans or programs reduces the benefits of including an area in critical habitat. As a matter of logic, however, the conservation benefits of an existing conservation plan or program generally cannot be considered benefits of excluding the area it covers from designation as critical habitat. This is because the conservation plan or program neither results from the exclusion being contemplated, nor is its continuation dependent on the exclusion being contemplated. The conservation plan or program is materially unaffected regardless of inclusion or exclusion from critical habitat.

In addition, the Services wish to encourage and foster conservation partnerships, which can lead to future conservation plans that benefit listed species. This is particularly important because partnerships can lead to conservation actions that provide benefits, with respect to private lands, that often cannot be achieved through designation of critical habitat and section 7 consultations. Because conservation partnerships are voluntary, the Services have concluded that excluding areas covered by existing plans and programs can encourage land managers to partner with the Services in the future, by removing any real or perceived disincentives for engaging in conservation activities. Those future partnerships do not necessarily reduce the benefits of including an area in critical habitat now; they may, however, provide a benefit by encouraging future conservation action. That benefit is a benefit of excluding an area from the designation. Thus, an existing plan or program can reduce the benefits of inclusion of an area covered by the plan or program, and at the same time the Secretaries' choice to exclude the area may encourage future conservation partnerships. Moreover, because the fostering and maintenance of partnerships can greatly further the conservation goals of the Act, we generally give great weight to the benefits of excluding areas where we have demonstrated partnerships.

In a discretionary 4(b)(2) exclusion analysis, the Services compare benefits of inclusion with benefits of exclusion. Some examples of benefits of including a particular area in critical habitat include, but are not limited to: (1) The educational benefits of identifying an area as critical habitat (e.g., general increase of awareness of listed species and their designated critical habitat);

and (2) the regulatory benefit of designating an area as critical habitat as realized through an adverse modification analysis in a section 7 consultation. As discussed above, these benefits of inclusion may be reduced by the conservation provisions of a plan or program, in that the educational benefit may have already been realized through development of the plan, and the on-the-ground conservation actions may already provide some or all of the benefit that could be reasonably expected as the outcome of a section 7 consultation. The weights assigned to the benefits of inclusion in any particular case are determined by the Secretaries. Some examples of benefits of excluding a particular area from critical habitat include: (1) Where there is an existing conservation plan or program, the encouragement of additional conservation partnerships in the future; and (2) the avoidance of probable negative incremental impacts from designating a particular area as critical habitat, including economic impacts and impacts to national security and public safety.

The next step in the discretionary 4(b)(2) exclusion analysis is for the Secretaries to determine if the benefits of exclusion outweigh the benefits of inclusion for a particular area. If so, they may exclude that area, unless they determine that the exclusion will result in the extinction of the species concerned. We note that exclusions primarily based on conservation plans will likely maintain the overall level of protection for the species in question, because the plans will have reduced or eliminated the benefit of designating that area, as discussed above. In contrast, exclusions primarily based on economic or national security considerations may result in less overall protection for the species (*i.e.*, forgoing significant benefits of inclusion). However, regardless of conservation outcome as outlined above, the Secretaries may still exclude such areas as long as they conclude that the benefits of exclusion outweigh the benefits of inclusion (and the exclusion itself would not result in extinction of the species).

#### Policy Elements

##### a. The Services' Discretion

The Act affords a great degree of discretion to the Services in implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2) *including whether to enter into the discretionary 4(b)(2) exclusion analysis and the weights assigned to any particular factor*

*used in the analysis.* Most significant is that the decision to exclude is always discretionary, as the Act states that the Secretaries "may" exclude any areas. Under no circumstances is exclusion required under the second sentence of section 4(b)(2).

This policy explains how the Services generally exercise their discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.

##### b. Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Services. In the case of a habitat conservation plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with the Services for the purposes of attaining a permit under section 10 of the Act. See paragraph c, below, for a discussion of HCPs, SHAs, and CCAs.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

(i) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership;

(ii) The extent of public participation in the development of the conservation plan;

(iii) The degree to which there has been agency review and required determinations (*e.g.*, State regulatory requirements), as necessary and appropriate;

(iv) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance was required;

(v) The demonstrated implementation and success of the chosen mechanism;

(vi) The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species;

(vii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

The Services will consider whether a plan or agreement has previously been subjected to public comment, agency review, and NEPA compliance processes because that may indicate the degree of critical analysis the plan or agreement has already received. For example, if a particular plan was developed by a county-level government that had been required to comply with a State-based environmental-quality regulation, the Services would take that into consideration when evaluating the plan. The factors outlined above influence the Services' determination of the appropriate weight that should be given to a particular conservation plan or agreement.

##### c. Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act

HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an "enhancement

of survival” permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition under the agreements. The Services also provide enrollees assurances that we will not impose further land-, water-, or resource-use restrictions, or require additional commitments of land, water, or finances, beyond those agreed to in the agreements.

When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted CCAA/SHA/HCP, and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

1. The permittee is properly implementing the CCAA/SHA/HCP, and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.

2. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

3. The CCAA/SHA/HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion.

The benefits of excluding lands with CCAAs, SHAs, or properly implemented HCPs that have been permitted under section 10 of the Act include relieving landowners, communities, and counties of any additional regulatory burdens that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the unhindered, continued ability to maintain existing partnerships, and the opportunity to seek new partnerships with potential

plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners. Together, these entities can implement conservation actions that the Services would be unable to accomplish without private landowners. These partnerships can lead to additional CCAAs, SHAs, and HCPs. This is particularly important because HCPs often cover a wide range of species, including listed plant species (for which there is no general take prohibition under section 9 of the Act), and species that are not State or federally listed (which do not receive the Act’s protections). Neither of these categories of species are likely to be protected from development or other impacts in the absence of HCPs.

As is the case with conservation plans generally, the protections that a CCAA, SHA, or HCP provide to habitat can reduce the benefits of including the covered area in the critical habitat designation. However, those protections may not eliminate the benefits of critical habitat designation. For example, because the Services generally approve HCPs on the basis of their efficacy at minimizing and mitigating negative impacts to listed species and their habitat, these plans generally offset those benefits of inclusion. Nonetheless, HCPs often allow for development of some of the covered area, and the associated permit provides authorization of incidental take caused by that development (although a properly designed HCP should steer development toward the least biologically important habitat). Thus, designation of the areas specified for development that meet the definition of “critical habitat” may still provide a conservation benefit to the species. In addition, if activities not covered by the HCP are affecting or may affect an area that is identified as critical habitat, then the benefits of inclusion of that specific area may be relatively high, because additional conservation benefits may be realized by the designation of critical habitat in that area. In any case, the Services will weigh the benefits of inclusion against the benefits of exclusion (usually the fostering of partnerships that may result in future conservation actions).

We generally will not exclude from a designation of critical habitat any areas likely to be covered by CCAAs, SHAs, and HCPs that are still under development when we undertake a discretionary 4(b)(2) exclusion analysis. If a CCAA, SHA, or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships

(subsection b, above). In other words, we will consider factors, such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs, and broad public benefits, such as encouraging the continuation of current and development of future conservation efforts with non-Federal partners, as possible benefits of exclusion. However, we will generally give little weight to promises of future conservation actions in draft CCAAs, SHAs, and HCPs; therefore, we will generally find that such promises will do little to reduce the benefits of inclusion in the discretionary 4(b)(2) exclusion analysis, even if they may directly benefit the species for which a critical habitat designation is proposed.

#### d. Tribal Lands

There are several Executive Orders, Secretarial Orders, and policies that relate to working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Services to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both FWS and NMFS, Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: “Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act's definition of "critical habitat." We are directed by the Act to identify areas that meet the definition of "critical habitat" (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

#### e. Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003, provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation." In other words, as articulated in the final revised regulations at 50 CFR 424.12(h), if the Services conclude that an INRMP "provides a benefit" to the species, the area covered is ineligible for designation and thus cannot be designated as critical habitat.

Section 4(a)(3)(B)(i) of the Act, however, may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.*, a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." Nevertheless, when designating critical habitat under section 4(b)(2), the Secretaries must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an

assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

#### f. Federal Lands

We recognize that we have obligations to consider the impacts of designation of critical habitat on Federal lands under the first sentence of section 4(b)(2) and under E.O. 12866. However, as mentioned above, the Services have broad discretion under the second sentence of 4(b)(2) on how to weigh those impacts. In particular, "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." (H.R. Rep. No. 95-1625, at 17 (1978)). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared its policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." (section 2(c)(1)).

Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

We also note that, while the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act. Conversely, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands. Thus, if a project for which there is discretionary Federal involvement or control is likely to adversely affect the critical habitat, a formal section 7 consultation would occur and the Services would consider whether the project would result in the destruction or adverse modification of the critical habitat.

Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: (1) The additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (*e.g.*, permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat. Consistent with the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species, we generally will not consider avoidance of the administrative or transactional costs associated with the section 7 consultation process to be a "benefit" of excluding a particular area from a critical habitat designation in any discretionary 4(b)(2) exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.

Federal lands should be prioritized as sources of support in the recovery of

listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands. We do greatly value the partnership of other Federal agencies in the conservation of listed and non-listed species. However, for the reasons listed above, we will focus our exclusions on non-Federal lands. We are most likely to determine that the benefits of excluding Federal lands outweigh the benefits of including those lands when national-security or homeland-security concerns are present.

#### g. Economic Impacts

The first sentence of section 4(b)(2) of the Act requires the Services to consider the economic impacts (as well as the impacts on national security and any other relevant impacts) of designating critical habitat. In addition, economic impacts may, for some particular areas, play an important role in the discretionary 4(b)(2) exclusion analysis under the second sentence of section 4(b)(2). In both contexts, the Services will consider the probable incremental economic impacts of the designation. When the Services undertake a discretionary 4(b)(2) exclusion analysis with respect to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. The nature of the probable incremental economic impacts and not necessarily a particular threshold level triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts of designating a particular critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.

#### Summary of Comments and Recommendations

On May 12, 2014, we published a document in the *Federal Register* (79 FR 27052) that requested written comments and information from the public on the draft policy regarding implementing section 4(b)(2) of the Act. In that document, we announced that the comment period would be open for

60 days, ending July 11, 2014. We received numerous requests to extend the comment period, and we subsequently published a document on June 26, 2014 (79 FR 36330), extending the comment period to October 9, 2014. Comments we received are grouped into general categories specifically relating to the draft policy.

*Comment (1):* Many commenters, including federally elected officials, requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

*Our Response:* On June 26, 2014 (79 FR 36330), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was, therefore, open for 150 days, which provided adequate time for all interested parties to submit comments and information. Additionally, the Services held numerous outreach initiatives that included briefings and webinars for elected officials, States, potentially affected Federal agencies, and interest groups, both environmental- and industry-focused.

#### Secretarial Discretion

*Comment (2):* We received many comments regarding the Services' delegated discretion from the Secretaries. Commenters expressed concern that the Services' delegated discretion is too broad, the assigning of weight to benefits is subjective, and the proposed policy would greatly extend the Services' discretionary authority and allow for subjective disregard of voluntary State and private conservation efforts.

*Our Response:* This policy does not expand or reduce Secretarial authority. The policy reflects only the discretion expressly provided for in the Act. The word "shall" is used to denote mandatory actions or outcomes, and "may" is used to indicate where there is discretion in particular matters. In the Act, the word "may," as it prefaces the phrase "exclude a particular area," thus clearly provides the Secretaries a choice, the ability to decide whether areas should be excluded based on weighing benefits of inclusion against the benefits of exclusion. The Secretaries may choose to exclude particular areas if those benefits of exclusion outweigh benefits of inclusion, unless the exclusion will result in the extinction of the species concerned. Commenters appear to be questioning the Secretary's ability to

choose whether to enter into the discretionary weighing of benefits. Congress expressly provided the Secretaries discretion to decide whether to enter into the exclusion analysis described in the second sentence of section 4(b)(2). By contrast, the Secretaries do not have discretion when it comes to the requirement to consider the economic impact, impacts to national security, and any other relevant impact of specifying an area as critical habitat, as described in the first sentence of section 4(b)(2).

Finally, this policy generally reflects the practices followed by the Services regarding their implementation of section 4(b)(2), and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

*Comment (3):* Some commenters suggested that the Services need to clarify that the Secretaries have discretion in whether to conduct an exclusion analysis. They stated that, while the draft policy does identify the discretionary nature of exclusions under 4(b)(2), language in other areas of the policy, such as "we will always consider" and "generally exclude," may cause confusion, and appear contradictory. Furthermore, some commenters stated that discussion of the discretionary 4(b)(2) exclusion analysis should clearly state that such analysis occurs only after the Secretary has identified an area she "may" consider for exclusion, based on consideration of the economic impact, the impact on national security, and any other relevant impact (see M-Opinion at 2. Step 2, p. 17).

*Our Response:* We agree with the commenter, and have made edits in the final policy to reflect and clarify what are requirements under the Act and where discretion is provided, in particular with the discretionary 4(b)(2) exclusion analysis.

*Comment (4):* Commenters noted that the Services are required to consider all reasonable requests for exclusion, which is in contrast to the Services' position that they cannot be required to grant an exclusion request, and state that "in no circumstances is exclusion required." The commenters stated that the Services' narrow view of section 4(b)(2) cannot be reconciled with the Act, or the history surrounding the 1978 amendments, and there is nothing in the statute that confers broad discretion. The two sentences of 4(b)(2) require the Services to "consider" economic impacts, and then to consider excluding a particular area from the designation of critical habitat. The commenters suggested that these are not separate

obligations, and that it is illogical for the Services to suggest that Congress intended to require the Services to identify the economic impacts without intending for the Services to apply any consideration of those impacts.

*Our Response:* We disagree with the commenter. Section 4(b)(2) of the Act sets forth a mandatory consideration of impacts and a discretionary consideration of possible exclusions. The commenter is mistaken that the Act requires any particular “action” that must be taken following the consideration of impacts. The text of the Act is clear in the second sentence of section 4(b)(2):

The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Recent court decisions have resoundingly upheld the discretionary nature of the Secretaries’ consideration of whether to exclude areas from critical habitat. *See Bldg. Indus. Ass’n v. U.S. Dept. of Commerce*, 792 F.3d.1027 (9th Cir. 2015), *aff’g* 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012) (unreported); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d. 977 (9th Cir. 2015); *Cape Hatteras Access Pres. Alliance v. DOI*, 731 F. Supp. 2d 15, 28–30 (D.D.C. 2010). The operative word is “may.” There is no requirement to exclude, or even to enter into a discretionary 4(b)(2) exclusion analysis for, any particular area identified as critical habitat. The Services do consider economic impacts, and apply the consideration of those probable incremental economic impacts in considering whether to enter into the discretionary 4(b)(2) exclusion analysis. Based on the results of the economic analysis, the Services may elect not to enter into the discretionary 4(b)(2) exclusion analysis based on economic impact alone. If they engage in a discretionary exclusion analysis, the Services may consider information from different sources (e.g., the economic analysis and conservation plan) in one section 4(b)(2) exclusion analysis.

*Comment (5):* Numerous commenters interpreted the draft policy as a significant change in how the Services will consider exclusions under 4(b)(2).

*Our Response:* The Services are not changing our practice of considering or conducting discretionary 4(b)(2) exclusion analyses. The 2008 Department of the Interior Solicitor’s Section 4(b)(2) memorandum (M–37016, “The Secretary’s Authority to Exclude

Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (Oct. 3, 2008)) (DOI 2008) and the regulations at 50 CFR 424.19 provide general guidance on how to implement section 4(b)(2) of the Act, and form the basis for this policy. This policy generally reflects the practices followed by the Services, and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

#### *Framework for Discretionary 4(b)(2) Exclusion Analysis*

*Comment (6):* A commenter noted that, rather than considering partnership opportunities as a benefit of exclusion, the Services expect that benefits of an existing conservation plan will continue regardless of critical habitat designation and, therefore, do not consider an existing plan when weighing the benefits of exclusion. Furthermore, the Services will consider these benefits to reduce the benefits of inclusion. The commenter expressed concern that this position could serve as a disincentive for voluntary conservation. Furthermore, the commenter suggested that under the new policy, the Services will have to review for potential exclusion each plan on a case-by-case basis, giving the Services broader discretion than previously held.

*Our Response:* Because we received many similar comments, we have added a section, *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, to the preamble of this document to clarify the way we consider and conduct exclusions. Furthermore, this section explains the way in which we consider conservation plans and partnerships when conducting a discretionary 4(b)(2) exclusion analysis. In brief, the commenters appear to misunderstand how we account for the benefits of conservation plans. The accounting that we use (what counts as a benefit of exclusion, and what serves to reduce benefits of inclusion) is the only logical way of parsing the effects of conservation plans consistent with the statute. But in no way does this accounting discount the benefits of conservation plans—it just puts those benefits in the proper context. Therefore, we disagree with the commenters that our accounting will in any way act as a disincentive for voluntary conservation. In fact, one of the primary purposes of this policy is to explain the important role that conservation plans play in our implementation of section 4(b)(2), and

thus, in effect, to explain the existing incentive for land managers to create those plans.

The Services have reviewed and will continue to review each plan for potential exclusion on a case-by-case basis; we are continuing our existing practice, and not broadening our discretion. Adopting a policy that would exclude areas without an analysis and weighing of the benefits of inclusion and exclusion on a case-by-case basis, as the commenters appear to suggest, would not be consistent with the requirements of the Act or our implementing regulations at 50 CFR 424.19.

*Comment (7):* One commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to review and exclude areas covered by existing conservation plans. When determining whether the benefits of exclusion outweigh the benefits of inclusion, the commenter noted that the Services will evaluate a variety of factors; however, no metrics were provided. For example, it is uncertain if each factor must be considered or if only three or four are sufficient. The commenter posed questions such as: will the Services give all factors equal weight or will some be deemed more important, and what evidence must be provided to demonstrate that the thresholds have been met? While the factors provide general direction, the commenter stated the Services provide no indication of how the evaluations will be conducted or what the thresholds might be. Finally, the commenter suggested it is unclear how the Services plan on evaluating whether the agreements are being properly implemented and how the Services will evaluate whether the permittee is expected to continue to properly implement the agreement.

*Our Response:* The Services cannot prescribe which factors should be used when developing a conservation plan that does not have Federal involvement. The list provided in the draft policy and in this final policy is not exhaustive; rather, it is intended to illustrate the types of factors that the Services will use when evaluating such plans.

Conservation plans that lead to the issuance of a permit under section 10 of the Act (including HCPs) go through a rigorous analysis under the Act to qualify for that permit. As discussed above, we will often exclude areas covered by such conservation plans. On the other hand, non-permitted conservation plans may not go through such analysis, and therefore must be more thoroughly analyzed before we

will consider excluding areas covered by these plans.

The list of factors for non-permitted plans is not exclusive, not all factors may apply to every instance of evaluating a plan or partnership, and the listed factors are not requirements of plans or partnerships to be considered for exclusion. Criteria for non-permitted plans differ from criteria for permitted plans because the latter have already undergone rigorous analysis for the issuance of the associated permit and may have been measured or evaluated by additional criteria. For example, NEPA analysis has already been conducted before a permitted plan is finalized and a permit issued.

*Comment (8):* Several commenters suggested that the methodology for exclusion should be defined, and the draft policy grants the agencies much more leeway to include or exclude lands from critical habitat designation, by requiring that each area considered for exclusion be reviewed on a case-by-case basis. Commenters also stated that, although the policy states that the benefits of designation of critical habitat will be weighed against the costs of such designation in a cost/benefit analysis, there is no clearly defined methodology included in the draft policy. Commenters stated that, when exercising their discretion, the Services should explain fully the basis, including the weighing of benefits, for any determination that exclusion is not warranted for any of the areas covered by the policy.

*Our Response:* As discussed in our response to comment (2) above, this policy does not increase the discretion granted to the Secretaries by the Act. Moreover, each area considered for exclusion is unique, and evaluations are highly fact-specific; thus it is not possible to give a simple, formulaic methodology that will be used in all landscapes and situations. Further, it is important that the Secretaries retain discretion in assigning appropriate weight to benefits of inclusion and exclusion. Whenever the Services exclude areas under section 4(b)(2), they will explain the factors considered and the weighing of benefits. If the Services do not exclude an area that has been requested to be excluded through public comment, the Services will respond to this request. However, although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion. (*Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010)).

#### *Blanket or Presumptive Exclusions*

*Comment (9):* Many commenters suggested there is a lack of certainty that areas covered by permitted conservation plans will be excluded. Commenters stated that permitted conservation plans, including HCPs, SHAs, and CCAAs, provide a much greater conservation benefit to private land areas than other programs implemented under the Act. Many commenters asked that the final policy be modified to categorically exclude from critical habitat lands covered by permitted plans, provided that the plan is being properly implemented and the species is a covered species under the plan. Commenters noted that the conservation benefits from such agreements and the investment of effort and collaboration between the private sector and the Services should be acknowledged, and areas covered by conservation agreements developed and approved by the Services should expressly be excluded from designation of critical habitat. Commenters expressed concern that the need for a factual balancing test each time critical habitat is designated for a covered species poses major uncertainties for permittees.

*Our Response:* The Services agree with the goal of providing greater certainty through this policy. However, each plan is different, covers different areas with different objectives, and will likely have differences in implementation and effectiveness, differences in duration, and so forth. Therefore, the Services must consider each plan on a case-by-case basis.

As stated above, the Services do greatly value the commitments of private landowners and conservation partners to conserve species and their habitats. Even so, the Services cannot presumptively exclude particular areas from a designation of critical habitat. Should the Services enter into a discretionary 4(b)(2) exclusion analysis, the Act requires the Services to compare the benefits of including a particular area in critical habitat with the benefits of excluding the particular area. The Secretary may exclude an area if the benefits of exclusion outweigh those of inclusion, as long as the exclusion will not result in extinction of the species. Where they have decided to exclude an area, the Services must provide a reasonable consideration of factors on each side of the balance. The Services' draft policy and this final policy articulate clearly that the Services will give great weight and consideration to partnerships resulting from the development of HCPs, SHAs, and CCAAs. Additionally, the Services will

give great weight to the conservation measures delivered on the ground by the plans mentioned above. The weight of the conservation measures will be applied to reduce the benefits of inclusion of that particular area in critical habitat, and in many cases the benefits of exclusion will outweigh the benefits of inclusion.

However, a permitted plan and a critical habitat designation may further different conservation goals. A permitted plan for a covered species addresses certain specific activities in a discrete area. It is designed to mitigate or minimize impacts from specific projects. By contrast, we designate critical habitat to conserve a species throughout its range (and sometimes beyond) in light of the varying threats facing the species. Thus, in a discretionary 4(b)(2) exclusion analysis, the Services must undertake a thorough balancing analysis for those areas that may be excluded, and cannot presume that the fact pattern is the same for each specific instance of a general category of plans.

*Comment (10):* Despite acknowledging the utility of non-permitted private and non-Federal conservation plans and partnerships, several commenters expressed the concern that the exclusion of these areas is not automatically guaranteed. Instead, the commenters noted that the Services will "sometimes exclude specific areas" from a critical habitat designation based on the existence of these plans or partnerships. In order to be successful, commenters stated private/non-Federal plans must be supported by the Services and automatically excluded from critical habitat designations. If not, future conservation plans may be at risk because applicants will feel uncertainty regarding the utility of their efforts. Commenters requested the Services to codify this change and ensure that land protected through voluntary conservation efforts will not be subjected to critical habitat overlays.

*Our Response:* Please see our response to the previous comment. Just as the Services cannot automatically guarantee exclusion of permitted conservation plans, we cannot presumptively exclude, or automatically exclude, private and non-Federal plans. When undertaking the discretionary 4(b)(2) exclusion analysis, the Services are obligated by section 4(b)(2) to weigh the benefits of inclusion and exclusion. The Services conduct this evaluation on a case-by-case, fact-specific basis. In this context, automatically excluding certain classes of lands or certain classes of agreements would be arbitrary.

However, as noted above, the Services do highly value private and non-Federal conservation plans and partnerships, and our objective is to encourage participation in voluntary conservation planning and collaborative partnerships. When entering into the discretionary 4(b)(2) exclusion analysis, the Services will consider fully the value and benefits of such plans and partnerships. The Services acknowledge that such programs and partnerships can implement conservation actions that the Services would be unable to accomplish without private and non-Federal landowners and partners.

*Comment (11):* Certain States requested the addition of a policy element to categorically or presumptively exclude all lands managed by State wildlife agencies. They stated that the Services should consider partnerships with State wildlife agencies similarly to the way they consider partnerships with Native American Tribes, and exclude lands managed by the State as they do Tribal lands. Whether a State conservation plan has been vetted through the public process should not have any relevance to the exclusion of such lands from critical habitat.

*Our Response:* As noted above, the Services must follow the direction of the Act and identify those lands meeting the definition of “critical habitat,” regardless of landownership. It is only after the identification of lands that meet the definition of “critical habitat” that we can consider other relevant factors. It appears that the commenter is requesting presumptive exclusion of specific State lands without a case-by-case analysis. As discussed above, the Act does not give the Secretaries the authority to exclude areas from critical habitat without first undertaking a discretionary 4(b)(2) exclusion analysis. As we consider areas for potential exclusion, as discussed throughout this policy, we give great weight and consideration to conservation partnerships, including those partnerships with States and Tribes. The Services note that S.O. 3206 has no applicability to State governments or State lands. Even in the context in which it applies, S.O. 3206 does not provide a blanket exclusion or automatic exemption of Tribal lands.

*Comment (12):* To further provide incentives for landowners or local and State governments to enter into conservation plans, agreements, or partnerships, a commenter stated the Services should, if they conduct a discretionary exclusion analysis, always exclude such areas from critical habitat designation if the benefits of exclusion

outweigh the benefits of inclusion. The commenter stated that exclusion may incentivize parties to participate in future conservation plans or partnerships, especially the prelisting conservation measures encouraged by the Fish and Wildlife Service’s recent draft policy regarding voluntary prelisting conservation actions.

*Our Response:* The Services agree that recognition of partnerships through exclusion from critical habitat may serve to remove any real or perceived disincentive that a designation of critical habitat may produce, and encourage parties to further engage in future conservation planning efforts. Should the Services elect to conduct a discretionary 4(b)(2) exclusion analysis, and if the benefits of exclusion outweigh the benefits of inclusion, in almost all situations we expect to exclude that particular area. Although the Services find it necessary to retain some discretion for the Secretaries because we cannot anticipate all fact patterns that may occur in all situations when considering exclusions from critical habitat, it is the general practice of the Services, consistent with E.O. 12866, to exercise this discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. However, the Secretaries may not exclude a particular area if the exclusion will result in the extinction of the species concerned. Please see the section *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, above, for more information regarding the exclusion process.

#### *Plans Permitted Under Section 10 of the Act*

*Comment (13):* One commenter suggested that the draft policy should not contain a categorical rejection of an agreement with “guidelines” for habitat management. Even if the agreement provides guidelines relating to the species’ habitat, rather than specifically addressing habitat, the commenter noted that if those guidelines were followed they may provide a greater benefit to the species than would a critical habitat designation. Finally the commenter noted that each plan should be analyzed individually for its benefit to the species; this would support the Services’ stated policy of encouraging the development of section 10 agreements.

*Our Response:* We agree with the commenter regarding plans with guidelines that, if followed, may provide a greater benefit to a species than would a designation of critical

habitat. However, should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis for a plan that only has guidelines, the Services will evaluate the benefits of inclusion and exclusion based on the specific facts of the plan in question. We have removed the language regarding guidelines from the final policy.

*Comment (14):* One commenter stated that the Services should not designate or exclude mere portions of HCPs. An HCP, taken as a whole, is designed to meet the conservation needs of the species and is specifically developed to meet those needs while still allowing certain development impacts to occur. The commenter suggested the policy would allow the Services to exclude just beneficial parts of an approved HCP, and designate those areas that are less desirable but still an integral component of the HCP.

*Our Response:* If the HCP has been approved and permitted, and if the Services undertake a discretionary 4(b)(2) exclusion analysis and find that the benefits of exclusion outweigh the benefits of inclusion, we intend to exclude the entire area covered by the HCP from the final designation of critical habitat for the species.

*Comment (15):* One commenter stated that the Services should consider excluding areas covered by HCPs and SHAs that are under development, but not yet completed or fully implemented. The draft policy proposes to give very little weight to section 10 agreements that are in process but not formalized. The commenter expressed a concern that not giving weight to developing voluntary conservation plans could greatly reduce incentives for private landowners and other entities to continue these efforts. The Services should analyze in-progress agreements individually. The agreements will vary greatly in scope, coverage, and the level of protections granted to the species and the extent of progress towards a formal agreement. If a comprehensive agreement is close to being formalized at the time of critical habitat designation, the commenter suggested there is no reason for the Services to designate that land as critical habitat and ignore the effort of the parties involved to benefit the species and its habitat. To ignore those efforts would discourage other landowners from pursuing similar plans or partnerships in the future, undermining future cooperation for the benefit of the species. Finally, the commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to efficiently review and exclude areas

covered by conservation plans being developed.

*Our Response:* Should the Services elect to undergo a discretionary 4(b)(2) exclusion analysis of an area in which a voluntary conservation plan is being developed, we will consider the facts specific to the situation. If a draft HCP has undergone NEPA and section 7 analysis, the Services could evaluate that plan under the provisions of this policy that are applicable to conservation plans and partnerships for which no section 10 permit has been issued. The track record of the partnership and the time taken to develop the draft HCP would be considerations in any discretionary 4(b)(2) exclusion analysis. The Services would not ignore ongoing efforts to develop plans. Some of the factors we consider are the degree of certainty that the plan will be implemented, that it will continue into the future, and that it may provide equal or greater protection of habitat than would a critical habitat designation. Therefore, the Services would expect to evaluate draft permitted plans on a case-by-case basis, and may evaluate them under the non-permitted-plans-and-partnerships sections of this policy.

*Comment (16):* A commenter asked the Services to clarify that not every conservation plan will undergo a weighing and balancing process. Paragraph 3 of the draft policy states: "When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met. . . ." The commenter questioned whether the discretionary analysis is triggered by potential "severe" impacts (as described in step 2 of the M Opinion at p. 17: "if [she] deems the impacts of the designation severe enough, [she] will proceed with an exclusion analysis under section 4(b)(2)") on a particular area covered by a CCAA/SHA/HCP, or whether the presence of such conservation plan(s) triggers the discretionary analysis regardless of impacts. If the former, the Services should clarify that only the potentially affected conservation plan(s) will be subjected to the discretionary exclusion analysis. If the latter, the commenter expressed a concern that the result of such a policy is to significantly limit Secretarial discretion.

*Our Response:* The Services are not limiting Secretarial discretion through this policy. The presence of a conservation plan or partnership does not mandate a discretionary 4(b)(2) exclusion analysis. If the Secretary

decides to enter into the discretionary 4(b)(2) exclusion analysis, the Services may consider, among other things, whether a plan is permitted, or whether we receive information during a public comment period that we should consider a certain plan for exclusion. However, it is possible that the Secretaries will not conduct a discretionary 4(b)(2) exclusion analysis for each and every conservation plan. As noted in the final rule revising 50 CFR 424.19, the Secretaries are particularly likely to conduct this discretionary analysis if the consideration of impacts mandated under the first sentence suggests that the designation will have significant incremental impacts.

#### *Tribal Comments*

*Comment (17):* Numerous Tribes have asked to have their lands presumptively or categorically excluded from critical habitat designation. The commenters stated that, absent evidence that exclusion would lead to the extinction of the species, Tribal lands should always be excluded. While the Tribes appreciate the Services giving great weight and consideration to excluding Tribal lands, Tribes would prefer their lands to be categorically excluded.

*Our Response:* While the Services recognize their responsibilities and commitments under Secretarial Order 3206 and in light of Tribal sovereignty, the statute is clear on the process of designating critical habitat, and does not allow for presumptive exclusion of any areas, regardless of ownership, from critical habitat without conducting a discretionary 4(b)(2) exclusion analysis. If we determine that Tribal lands meet the definition of "critical habitat," the statute requires we identify those lands as meeting that definition. However, as discussed in the draft and this final policy, great weight and consideration will be given to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

*Comment (18):* Many commenters expressed that the designation of critical habitat on Tribal lands would have an unfortunate and substantial negative impact on the working relationships the Services and Tribes have established. The Services should state that, when they undertake a discretionary exclusion analysis, they will always consider exclusions of Tribal lands and not designate such areas, unless it is determined such areas are essential to conserve a listed species.

*Our Response:* The Services recognize our trust responsibilities with Tribes, and value our collaborative

conservation partnerships. Secretarial Order 3206, which provides guidance to the Departments in exercising their statutory authorities—but does not modify those authorities—states:

Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

Therefore, the Services generally will not designate critical habitat on Tribal lands if the conservation needs of the listed species can be achieved on other lands. However, if it is determined such areas are essential to conserve the listed species, then, as discussed in the previous comment response, the Services will give great weight and consideration to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

*Comment (19):* Several Tribes expressed a concern that the new policy will result in greater economic and social burdens on Tribes. Tribes bear a disproportionate burden through the consultation process under section 7 of the Act, as compared to State and local governments and private citizens, because so many basic Tribal functions are contingent on actions authorized, funded, or carried out by Federal agencies. Therefore, the commenters stated that, where Tribal lands are designated as critical habitat, the proposed regulations and policies will require an onerous, time-consuming, bureaucratic process that infringes on Tribal sovereignty and treaty rights and frustrates the ability of the Tribe to provide basic government services and achieve wildlife-conservation and economic-development goals.

*Our Response:* While the Services recognize that a critical habitat designation may have real or perceived direct and indirect impacts, the Services are committed to assisting Tribes in conserving listed species and their habitats on Tribal lands, where appropriate. Where collaborative conservation partnerships and programs have been developed with Tribes, many of these real or perceived impacts have been ameliorated or relieved. The revised regulations and new policy are intended to provide clarity, transparency, and certainty regarding the development and designation of critical habitat, and provide for a more predictable and transparent critical-habitat-exclusion process. All three initiatives work together to provide greater clarity to the public and Tribes

as to how the Services develop and implement critical habitat designations.

*Comment (20):* One commenter stated that, as written, the policy fails to acknowledge the sovereignty of Tribes and Tribal self-governance by noting only that “Tribal concerns” will be considered in the discretionary exclusion analysis. These proposed regulations and policies represent a missed opportunity to effectuate the letter and spirit of Secretarial Orders 3206 and 3335, and to ameliorate the potentially harsh consequences on Tribes of the proposed regulatory revisions for designating critical habitat. Of even more concern, the Service completely ignores the fundamental disagreement concerning the applicability of the Endangered Species Act to Tribes.

*Our Response:* Secretarial Order 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order states:

Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

However, S.O. 3206 does not limit the Services’ authorities under the ESA or preclude the Services from designating Tribal lands or waters as critical habitat, nor does it suggest that Tribal lands or waters cannot meet the Act’s definition of “critical habitat.” We are directed by the Act to identify areas that meet the definition of “critical habitat” (*i.e.*, occupied lands that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species) without regard to landownership. While S.O. 3206 provides important guidance, it does not relieve or supersede the Secretaries’ statutory obligation to identify as critical habitat those specific areas meeting the definition of “critical habitat” and to designate such areas unless otherwise exempted by statute or excluded following the discretionary 4(b)(2) exclusion analysis.

Further, following the language and intent of S.O. 3206, when we undertake a discretionary 4(b)(2) exclusion analysis we will always consider exclusions of Tribal lands prior to finalizing a designation of critical habitat, and will give great weight to the collaborative conservation partnerships the Services have with the Tribes, as well as Tribal conservation programs

and plans that address listed species and their habitats. The effects of critical habitat designation on Tribal sovereignty and the Services’ working relationship with Tribes are relevant impacts that the Services will generally consider in the context of any exclusion analysis under Section 4(b)(2). *See, e.g., Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1105 (D. Ariz. 2003).

#### *State Comments*

*Comment (21):* One commenter asked the Services to use the same standards for evaluating State conservation plans as those used for evaluating federally permitted plans for possible exclusions. The commenter noted that in the draft policy the Services have outlined different conditions for exclusion for HCPs, SHAs, and CCAAs versus all other conservation plans (including State plans). The former must only meet three conditions, while the latter are evaluated based on eight factors. Justification is not provided for why two different sets of criteria are being used. For example, HCP/SHA/CCAA plans need only be “properly implemented” while other conservation plans must show not only implementation but also “success of the chosen mechanism.” No explanation for this difference is provided. Furthermore, the commenter noted that all plans should be held to the same threshold for exclusion consideration. States spend enormous amounts of time to craft species-conservation plans. Finally, the commenter stated that plans are developed and implemented based on extensive scientific expertise housed in State wildlife agencies and they are crafted to meet State and Federal laws, rules, and regulations applicable to the protection of wildlife.

*Our Response:* The Services recognize that considerable time and expertise go into creating State management plans. Any requests for exclusions by States will be considered, whether based on a State management plan or for a State wildlife area. The Services need to evaluate any exclusion request on a case-by-case, fact-specific basis. The Services recognize that not all State plans are the same, and not all plans are designed to meet applicable Federal laws, rules, and regulations. The eight factors presented in this final policy regarding non-permitted plans are factors the Services will consider when conducting a discretionary 4(b)(2) exclusion analysis evaluating a State conservation plan or wildlife management area for exclusion. We will not hold State or other non-Federal conservation plans to higher standards

than permitted plans; the list of eight factors simply indicates the types of factors we will evaluate in any conservation plan. It should be noted that HCPs and SHAs have already been subjected to rigorous analyses of numerous criteria through the permitting process that are not expressly listed in the policy.

*Comment (22):* A commenter suggested that the Services add the following language to the policy regarding State lands:

We recognize Congress placed high value in working with State partners in the conservation of threatened and endangered species and we will give great weight to the recommendations from our State partners when evaluating critical habitat on State lands. Many States have land holdings that cross a broad spectrum of uses that can range from lands primarily managed for conservation purposes while other lands are owned to provide maximum economic return as in the case of some State school lands. The Service, in weighing the benefits of inclusion versus exclusion of State lands, will conduct a discretionary analysis if the State indicates a wish to be excluded from a critical habitat designation and provides a detailed assessment on the merits of their requested exclusion. The Service is not under obligation to exclude those State lands but will use the State’s assessment as we weigh the expected gain in conservation value for inclusion of a tract of State land in a final critical habitat designation.

*Our Response:* As stated above, the Services decline to add a specific policy element suggesting that we would give great weight to recommendations of our State partners when evaluating critical habitat on State lands. The Services agree with the commenter’s premise that conservation of endangered and threatened species cannot be done without cooperation of State partners. We also agree that we generally will consider exclusions of State lands if requested by States; however, we are under no obligation to exclude such lands, even where requested.

#### *Comments Regarding Federal Lands*

*Comment (23):* One commenter stated that the Services should not “focus” designation of critical habitat on Federal lands, nor assume that the benefits of critical habitat designations on Federal lands “are typically greater” than the benefits of excluding these areas.

*Our Response:* When designating critical habitat, the Services follow the Act and implementing regulations to develop a designation based solely on the best scientific data available, and that identifies physical or biological features essential to the conservation of a species or areas that are essential for the conservation of a species. This initial identification of eligible areas

that meet the definition of “critical habitat” is conducted without regard to landownership or the identity of land managers. Before finalizing a designation of critical habitat, the Services must consider economic impacts, the impact on national security, and any other relevant impact of designating critical habitat. It is following this consideration of potential impacts that the Secretary may then exclude particular areas from critical habitat, but only if the exclusion will not result in the extinction of the species.

The Services look to the Congressional intent of the Act—in particular, section 2(c) states that all Federal agencies shall seek to conserve listed species and their habitats. Additionally, section 7(a)(2) of the Act requires Federal agencies that fund, authorize, or carry out projects to ensure their actions are not likely to destroy or adversely modify critical habitat. The commenter does not explain why the Services should not focus, to the extent practicable and allowed by the Act, on designation of critical habitat on Federal lands. Also, the commenter does not provide an explanation to support its view that the benefits of including Federal lands in a designation of critical habitat are not typically greater than including other areas. In fact, because Federal agencies are required to ensure that their actions are not likely to destroy or adversely modify critical habitat, the benefits of including Federal lands are typically greater than the benefits of including other areas.

*Comment (24):* Another commenter asked the Services to consider excluding Federal lands that are subject to special management by land-management agencies. Congress has mandated that Federal lands, such as lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service, be available for multiple uses. The commenter stated the Services’ designation of critical habitat primarily on Federal lands upsets the balance struck in land-management decisions made by the agencies charged with administering Federal lands and, moreover, interferes with the directives established by Congress.

*Our Response:* Complying with the Act does not interfere with other Federal agency mandates. The Act is one of many Federal mandates with which all Federal agencies must comply, and Federal agencies must use available discretion to take into account the needs of listed species when implementing their other duties. The Services are also required to comply with the Act as they manage their lands,

monuments, trust resources, and sanctuaries for multiple purposes. It has been the experience of the Services that listing or designating critical habitat for species does not drastically alter existing management schemes of other Federal agencies. In those instances where conflicts arise, the Services have successfully worked with the affected Federal agency to reduce conflicts with its mission. The Services are committed to continuing the collaborative relationships with other Federal agencies to further conservation of species and their habitats.

*Comment (25):* One commenter stated that a reasonable exclusion policy should allow the Services to recognize and consider exclusions for all types of conservation projects, whether they occur on Federal or non-Federal lands. The commenter understands the Services’ intent to reduce regulatory burdens on private lands. However, the commenter opposes a policy that would disqualify exclusions on Federal lands, while prioritizing them for recovery. The commenter strongly stated that exclusions should be based on the criteria outlined in section 4(b)(2) of the Act, whether the land is Federal or non-Federal. Section 4(b)(2) of the Act provides the Secretary the discretion to “exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat,” but does not delineate whether landownership should play a factor in the decision to exclude lands from designation.

*Our Response:* To the extent that the commenter is suggesting that discretionary 4(b)(2) exclusion analyses are done on a case-by-case basis and are highly fact-specific, we agree. This policy does not preclude exclusions of Federal lands; in fact, the Services have excluded particular Federal lands in the recent past. However, the Services maintain their policy position that Federal lands will typically have greater benefits of inclusion compared to the benefits of exclusion. This position is consistent with the purposes of the Act as outlined in section 2. Section 2(c)(1) states:

It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and

threatened species. Because the section 7 consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, designation of critical habitat on Federal lands is more likely to benefit species than designation of critical habitat on private lands without a Federal nexus.

*Comment (26):* A commenter suggested that the Services should create an incentive for Federal land managers. The Services could consider a similar approach to Federal land exclusions that are provided for Department of Defense installations. Applying this same standard to all Federal lands, the commenter stated, would create a stronger incentive for more agencies to live up to the requirements of section 7(a)(1) of the Act.

*Our Response:* Congress intended for Federal agencies to participate in the conservation of endangered and threatened species. As discussed above, section 2(c)(1) of the Act clearly states this responsibility. Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and threatened species. Section 7(a)(2) of the Act requires Federal agencies to consult with the Services to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.”

Exemption of Department of Defense lands from critical habitat is mandated under section 4(a)(3)(B)(i) of the Act, and is thus entirely different from discretionary exclusions of particular lands from a designation of critical habitat under section 4(b)(2). Exemption of an area covered under an INRMP under the Sikes Act is based on the statutory condition that the Secretary has determined the plan provides a benefit to a species, whereas an exclusion of a particular area is based on the discretionary 4(b)(2) weighing of the benefits of inclusion and exclusion.

#### *Comments on Economics*

*Comment (27):* A commenter asked the Services to provide details of how costs and benefits are evaluated. The draft policy does not clearly define how benefits and costs will be determined, giving the Services a great deal of discretion. The commenter noted that the draft policy does not adequately explain how the consideration of

economic impacts will be applied during the exclusion process. The phrase “nature of those impacts” in the draft policy fails to provide a description that will give adequate notice of what will actually be considered.

*Our Response:* The policy is not intended to present a detailed treatment of economic impact analysis methodology. The Summary of Comments and Recommendations section of the Service’s final rule regarding revisions to the regulations for impact analyses of critical habitat, which was published on August 28, 2013 (78 FR 53058), contains a discussion of cost and benefit analysis of critical habitat designations.

To aid in the consideration of probable incremental economic impacts under section 4(b)(2) of the Act, the Services conduct an economic analysis of the designation of critical habitat, which satisfies the mandatory consideration of economic impacts. Should the Secretaries consider excluding a particular area from critical habitat, the economic analysis is one tool the Secretaries may use to inform their decision whether to exclude the particular area.

The commenter points out that the phrase “nature of those impacts” is not defined. The Services intentionally did not define this phrase, because it has been the experience of the Services that economic impacts of critical habitat designations vary widely, making it infeasible to quantify the level of impacts that would trigger further consideration in all cases.

*Comment (28):* Because the Services use an incremental approach to estimating economic impacts, one commenter suggested that the economic impacts of critical habitat are vastly underestimated. The commenter suggested the Services should conduct an economic analysis that evaluates the cumulative and co-extensive costs of critical habitat. Focusing on incremental economic impacts does not provide an accurate picture, as it discounts the full financial implications of a listing for landowners, businesses, and communities. The commenter expressed the opinion that the incremental approach effectively shifts the economic costs of critical habitat designations to the listing process under the Act where the Service is prohibited from considering costs. Ultimately, because this approach will result in fewer costs being attributed to critical habitat designation, it will greatly reduce the usefulness of the 4(b)(2) process.

*Our Response:* We disagree. Our final rule amending 50 CFR 424.19,

published August 28, 2013 (78 FR 53058), codified the use of the incremental method for conducting impact analyses, including economic analyses, for critical habitat designations. That final rule contains responses to public comments that clearly lay out the Services’ rationale for using the incremental method. Please refer to that rule for more information. Evaluating incremental impacts that result from a regulation being promulgated, rather than considering coextensive impacts that may be ascribed to various previous regulations, is further supported by Executive Order 12866, as applied by OMB Circular A-4.

*Comment (29):* Congress expressly required the Secretaries to consider economic impacts when they designate critical habitat (16 U.S.C. 1533(b)(2)). A commenter stated the Services have interpreted this requirement to limit their use of the economic analysis to the exclusion process. The commenter further noted that the draft policy restricts discussions of the economic impacts from critical habitat designation to determinations of whether an area will be excluded from a critical habitat designation. Economic concerns are arguably the most important consideration for those being regulated. The commenter expressed the opinion that the designation of critical habitat has economic impacts on States, counties, local governments, and landowners. These impacts include increased regulatory burdens that delay projects. The commenter stated it is important that the Services recognize the economic impacts of critical habitat designation and consider those impacts throughout the designation process, as required by Congress under the Endangered Species Act. The commenter asked that the draft policy be amended to emphasize use of economic impacts analyses in each stage of the designation process, not just exclusion of an area from a critical habitat designation.

*Our Response:* We agree that the mandatory consideration of economics is an important step in the designation of critical habitat. However, we disagree that economic impact analyses should be used at each step of the designation process. The process of developing a designation is based on the best available scientific information, and consists of a determination of what is needed for species conservation. Congress expressly prohibited the Secretaries from using anything other than the best available scientific information in identifying areas that meet the definition of “critical habitat.”

However, Congress expressly required the Secretaries to consider economic impacts, national-security impacts, and other relevant impacts before finalizing the critical habitat designation.

The Services prepare an economic analysis of each proposed designation of critical habitat and may use that information in discretionary 4(b)(2) exclusion analyses. Our final rule that amended our implementing regulations at 50 CFR 424.19, which was published on August 28, 2013 (78 FR 53058), contains more information regarding impact analyses, including economics. This final policy is focused on the discretionary process of excluding areas under section 4(b)(2).

*Comment (30):* A commenter stated that the economic impact of critical habitat designations on the exercise of rights to Federal lands is significant and should not be discounted. In the preamble to the draft policy, the Services state that they “generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a ‘benefit’ of excluding a particular area from a critical habitat designation in any discretionary exclusion analysis.” The commenter suggested this statement ignores that administrative and transactional costs of critical habitat designations can be significant, particularly when critical habitat will cover a large area. The commenter stated that Federal agencies are not the only entities that must absorb the costs of section 7 consultation.

Administrative and transactional costs are also borne by non-Federal parties, such as applicants for permits or licenses. The commenter further noted that, if the exclusion analysis is limited to non-Federal lands, where section 7 consultation is often not triggered, the economic benefits of exclusion will rarely be considered. For proponents of large projects on Federal lands, these economic benefits of exclusion can be significant.

*Our Response:* We agree with the commenter that the Services should consider the indirect effects resulting from a designation of critical habitat. In fact, the Services are required to evaluate the direct and indirect costs of the designation of critical habitat under the provisions of Executive Order 12866, and we do so through the economic analyses of the designation of critical habitat. However, as noted previously, we do not consider avoidance of transactional costs associated with section 7 consultation to be a benefit of exclusion. Rather, those costs represent the inherent consequence of Congress’ decision to

require Federal agencies to avoid destruction or adverse modification. Please refer to the Summary of Comments and Recommendations section of the final rule amending 50 CFR 424.19 (78 FR 53058, August 28, 2013), particularly our response to Comment 44, for more information regarding direct and indirect costs.

*Comment (31):* One commenter suggested that the Services should also consider potential economic benefits of inclusion. Economic benefits of designating critical habitat include a potentially faster rate of recovery for the species, which could result in less long-term costs for the agency and partners.

*Our Response:* The Act requires a mandatory consideration of the economic impact of designating a specific area as critical habitat. The Services interpret this statement to be inclusive of benefits and costs that result from the designation of critical habitat. This interpretation is further supported by Executive Order 12866 as clarified in OMB Circular A-4. The Services do consider non-consumptive use benefits, such as hiking, increased tourism, or appreciation of protected open or green areas, in a qualitative manner where credible data are available. Further, in rare circumstances, when independent and credible research can be conducted on the benefits for a particular species, that information is used. However, for most species, credible studies and data related to potential economic benefits of designating their habitat as critical habitat are not available or quantifiable.

*Comment (32):* One commenter expressed the opinion that listing decisions under the Act have real economic impacts for State and local governments, through restriction on rangeland grazing, hunting, tourism, and development of resources on public and private lands. It may well be that, in some circumstances, the economic benefits of exclusion outweigh the conservation benefits of inclusion. The commenter suggested that such situations should be recognized by the Services and granted exclusion in order to provide maximum flexibility for a balanced mix of conservation and economic activities.

*Our Response:* The Services recognize that the listing of species may result in an economic impact; however, the Act does not allow the consideration of potential economic impacts when listing a species. The Act expressly limits the basis of our determination of the status of a species to the best scientific and commercial information available. The Services also cannot consider the potential economic impact

of listing a species in an exclusion analysis under section 4(b)(2) of the Act. This consideration of economics in the discretionary 4(b)(2) exclusion analysis is to be based on the incremental impacts that result solely from the designation of critical habitat, and not those impacts that may result from the listing of the species. 50 CFR 424.19.

We assume the commenter is referring to considerations of economics prior to finalizing a designation of critical habitat. The Services always consider potential economic impacts that may result from the designation of critical habitat. The purpose of the second sentence of section 4(b)(2) is to authorize the Secretaries to exclude particular areas from a designation if the benefits of exclusion outweigh the benefits of inclusion. The Services recognize that there may be circumstances when the economic benefits of exclusion (together with any other benefits of exclusion) do in fact outweigh the conservation benefits of inclusion (together with any other benefits of inclusion). In that case, the Services may decide to exclude the particular area at issue (unless exclusion will result in extinction of the species). The Services will evaluate the best available scientific information when undertaking a discretionary 4(b)(2) exclusion analysis.

*Comment (33):* A commenter noted that the Services should consider financial commitments made in HCPs, SHAs, and CCAAs. Proponents could commit serious finances only to have the area later designated as critical habitat.

*Our Response:* The Services do not consider the financial commitments made in HCPs, SHAs, or CCAAs, as a standalone factor when evaluating areas for exclusion. The Services, however, do consider the conservation benefits associated with financial commitments of a plan to reduce the benefits of including a particular area in critical habitat. The fostering and maintenance of conservation partnerships can be a benefit of exclusion, and can serve as an incentive to future financial commitments to further conservation. The Services greatly value the on-the-ground conservation delivered by these partnerships and their associated permitted plans.

#### *Comments on National Security*

*Comment (34):* A commenter asked the Services to clarify how national-security concerns will be considered. The commenter stated that the Services say they will give “great weight” to these concerns, but this phrase is a subjective term and could use

additional clarity. The use of the phrase implies national-security concerns will always outweigh the benefits of inclusion. The commenter recommends expanding or altering this phrase to better clarify how national-security concerns will be considered.

*Our Response:* The Services do not consider the phrase “great weight” to imply a predetermined exclusion based on national-security concerns, as the commenter is suggesting. The Services always consider for exclusion from the designation areas for which DoD, DHS, or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. The agency requesting such exclusion must provide a reasonably specific rationale for such exclusion. The Service will weigh heavily those concerns regarding the probable incremental impact to national security as a result of designating critical habitat. This does not mean the Services will then in turn give little weight to any benefits of inclusion. It is not the Services’ intent to predetermine the outcome of a discretionary 4(b)(2) exclusion analysis.

#### *General Comments*

*Comment (35):* One commenter asked for an explanation of how the two proposed critical habitat rules and draft policy will work together, discussing the challenges and benefits they provide together. E.O. 13563 states that regulations “must promote predictability and reduce uncertainty.”

*Our Response:* The regulations and policy are intended to provide clarity, transparency, and certainty regarding the development and implementation of critical habitat, and provide for a more predictable and transparent process for designating critical habitat. All three initiatives work together to provide greater clarity to the public as to how the Services develop and implement critical habitat designations. The rule amending 50 CFR part 424 provides new definitions and clarifications that will inform the process of designating critical habitat. The rule revising the definition of “destruction or adverse modification” (at 50 CFR 402.02) redefines that term and clarifies its role in section 7 consultations. This policy focuses on how the Services implement section 4(b)(2) of the Act, with regard to excluding areas from critical habitat designations.

*Comment (36):* The draft policy states that it will be prospective only and will not apply to any “previously completed” critical habitat designations. One commenter stated the policy should more clearly state that the revised

language will not be used in reassessing or reassigning critical habitat; only future designations of critical habitat will fall under the new policy.

*Our Response:* The commenter is correct that this final policy does not apply to designations of critical habitat finalized prior to the effective date of this policy (see **DATES**, above). This policy applies to future designations of critical habitat that are completed after the effective date of this policy. If the Services choose to revise previous designations, the Services will use the operative regulations and policies in place at the time of such revision. Of course, as we have indicated elsewhere, this policy does not establish binding standards that mandate particular outcomes.

*Comment (37):* We received many comments that the policy proposed changes that were arbitrary and without merit, because they will deprive private property owners and States of incentives and tools to conserve species and their habitat.

*Our Response:* The Services have developed, and continue to develop, considerable tools to assist landowners in the conservation of species and their habitats. Nothing in this policy takes away from those tools and reliance on, and recognition of, collaborative conservation partnerships. Rather, the Services believe the elements of this policy provide greater clarity and certainty on how those conservation tools are regarded and evaluated when considering designations of critical habitat. Additionally, the Services' goal is to remove any real or perceived disincentive for voluntary conservation plans and collaborative partnerships, whether permitted under section 10 of the Act or developed outside of those provisions.

*Comment (38):* A commenter stated that monitoring and adaptive management of conservation plans should not be used as standards for determining exclusions. The commenter noted that critical habitat designations do not have this standard, which elevates the exclusionary determination above that which the Services use in their critical habitat designations.

*Our Response:* In order to exclude an area from critical habitat, the benefits of exclusion must outweigh those of inclusion, and the exclusion must not result in the extinction of the species. As the commenter correctly notes, adaptive management and monitoring are not a prescribed part of critical habitat designations and implementation. However, monitoring the implementation of conservation actions is essential to determine

effectiveness of such actions, and using adaptive management is critical to the long-term success of conservation plans. Therefore, these factors are important considerations in evaluating the degree to which the existence of the conservation plan reduces the benefits of inclusion of an area in critical habitat.

*Comment (39):* A commenter stated that in the list of eight factors the Services say they will consider when evaluating lands for exclusion based on non-permitted conservation plans, the Services should clarify what they mean by, "The degree to which there has been agency review and required determinations." The commenter asked which agencies would review the conservation plan, agreement, or partnership—the Services, other Federal agencies, or State or local agencies? What determinations are "required determinations?"

*Our Response:* Should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis, we would evaluate any information supplied by the requester for exclusion, including whether the plan has complied with applicable local, State, and Federal requirements, and any determinations required therein. For example, a county-level ordinance requiring habitat set-asides for development may require State environmental review and public scoping. This type of required review or determination would be taken into consideration when evaluating particular areas for exclusion. The Services are not prescribing any suite of required determinations. The burden is on the requester to provide relevant information pertaining to review of the plan by any agency. This is important information that will be used in our evaluation of the effectiveness of a conservation plan in the discretionary 4(b)(2) exclusion analysis.

*Comment (40):* One commenter disagreed with the Services' proposal to consider whether a permittee "is expected to continue to [properly implement the conservation agreement] for the term of the agreement." The commenter stated the Services should rely on their authority to revoke permits and revise critical habitat rather than speculating about future implementation of conservation agreements. Accordingly, the commenter requests that the Services remove the phrase "and is expected to continue to do so for the term of the agreement" from the first condition related to the exclusion of conservation plans related to section 10 permits.

*Our Response:* The Services need to evaluate whether there is reasonable certainty of implementation and

completion of conservation plans. Permittees are expected to fulfill the provisions of their permits for the agreed-upon time period. However, given the voluntary nature of agreements, it is possible, even in permitted plans, that permittees may not implement the plan as conditioned or may cancel an agreement at any time. Therefore, certainty of the continuance of any conservation plan is an important consideration.

*Comment (41):* One commenter stated that the Services should emphasize the benefits of critical habitat and expressed disappointment that the Services' draft policy attempts to minimize the actual benefits that derive from critical habitat with an extremely cursory description of critical habitat's benefits at the beginning of the preamble to the draft policy.

*Our Response:* The Services in no way intend to understate the important functions of critical habitat. We recognize that the primary threat faced by most endangered and threatened species has been, and continues to be, loss and fragmentation of suitable habitat. Critical habitat designation is one conservation tool in the Act that attempts to address this situation, by identifying habitat features and areas essential to the conservation of the species. It provides educational benefits by bringing these important areas to the public's and landowners' attention, and requires consultation with the Services for proposed activities by Federal agencies, on Federal lands, or involving a Federal nexus, to ensure that such activities are not likely to cause the destruction or adverse modification of the critical habitat. These benefits are considered by the Services on a case-by-case basis in the context of the discretionary consideration of exclusions under Section 4(b)(2).

*Comment (42):* A commenter stated that the Services should clarify that this policy provides broad program guidance, not specific prescriptions of exclusion analysis and designation. It does not concern a specific action concerning a specific property. Also, the commenter stated the Services should point out that the 4(b)(2) policy could be used to avoid a Fifth Amendment taking if extensive property restrictions would occur due to critical habitat designation.

*Our Response:* We agree that the purpose of this policy is to provide guidance and clarity as to how the Services consider exclusions under section 4(b)(2) of the Act, rather than formulaic prescriptions as to how exclusion analyses are performed. As noted above, each area considered for exclusion from a particular critical

habitat designation is unique, and the factors considered in such evaluation are fact-specific. Thus, there is no simple, one-size-fits-all approach; rather, the Services take a case-by-case approach in considering the factors in a weighing and balancing analysis, and the relative importance (or weight) of each of those factors.

The Services do not consider the designation of critical habitat to impose property restrictions such that a Fifth Amendment taking issue would arise.

*Comment (43):* One commenter noted that the Services should clarify that exclusion of private lands from critical habitat designation is not a “reward.” The commenter stated the draft policy may be perceived as contradictory to key messaging being promoted through outreach efforts to landowners and that the Services’ outreach messaging has been that critical habitat designation does not affect private landowners, unless their activity is authorized, funded, or carried out by a Federal agency. The commenter’s opinion is that the draft policy, however, appears to “reward” landowners by excluding their land from critical habitat if their land is covered by a conservation plan.

*Our Response:* We agree in part with the commenter. It is true that critical habitat does not create a regulatory impact on private lands where there is no Federal nexus, and that even when there is a Federal nexus, the potential impact of a designation of critical habitat sometimes is minimal. Nevertheless, the Services are keenly aware of the significant concerns that some landowners have about critical habitat. We also recognize that landowners invest time and money for proactive conservation plans on their lands. The Services do not exclude particular areas from a designation of critical habitat as a reward to landowners for conservation actions they undertake. Rather, the existence of a conservation plan; effective, implemented conservation actions; and a demonstrated partnership are relevant factors that should be considered in any discretionary 4(b)(2) analysis. If the Services find the benefits of exclusion outweigh inclusion based on the specific facts, the particular area covered by the conservation plan may be excluded, provided the exclusion will not result in the extinction of the species.

*Comment (44):* A commenter asked the Services to define “partnerships” and how they will be evaluated.

*Our Response:* Partnerships come in many forms. Some partnerships have a long-standing track record of the partners working together for the

conservation of species and their habitat, some partnerships are newly formed, and others are generally anticipated to occur in the future. We greatly appreciate and value these conservation partnerships, and will consider the specifics of what each partnership contributes to the conservation of the species when conducting discretionary 4(b)(2) exclusion analyses. We will also consider the general benefits that excluding areas will have on encouraging future partnerships. Because the specifics and context of partnerships vary so much, we conclude that it would not be useful to attempt to expressly define “partnerships,” or to set out uniform guidance as to how they will be evaluated.

*Comment (45):* One commenter stated that the length of a conservation plan and the certainty it will continue to be implemented should be added to the criteria used to evaluate HCPs, SHAs, and CCAAs. None of the conditions account for the temporary nature of these agreements, nor is this aspect discussed elsewhere in the draft policy or preamble. A commenter recommended adding a fourth condition to address the expected longevity of the CCAA/SHA/HCP.

*Our Response:* We have already captured this in the first condition we evaluate, which states: “The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.” We have determined not to be more prescriptive than this, because we need to retain flexibility in our evaluations. We may use the track record of partnership in our discretionary 4(b)(2) exclusion analysis, which may include the length of the permitted plan. For example, some plans have long-term implementation schedules in which additional conservation measures are developed or phased in over time, so it would not be appropriate to expect all measures will be put into place immediately. The Services expect that plans will be fully implemented regardless of their term of agreement or operation. When issuing permits, the Services consider whether the term of any such plan is sufficient to produce meaningful conservation benefits to the species. Therefore, it is not necessary in all cases to evaluate the term of a permit as a condition for exclusion from critical habitat. However, the Services have

retained their flexibility to evaluate plans on a case-by-case basis, and may consider the term of the plan if appropriate.

#### *Comments Regarding Transportation Infrastructure*

*Comment (46):* A commenter requested that the Services exclude transportation infrastructure from critical habitat designations. The commenter suggested that a new paragraph or policy element be added. The paragraph would state the Services will always consider in their discretionary exclusion analysis that dedicated transportation infrastructure and rights-of-way (ROWs) be excluded from critical habitat, given that transportation lands are managed primarily for the use and safety of the travelling public and usually have very little conservation value for listed species.

*Our Response:* The Services recognize the importance of maintaining transportation infrastructure and ROWs for the safe conveyance of people and goods. However, the Services do not agree that creating a dedicated policy element giving great weight and consideration to exclusion of transportation infrastructure and ROWs is necessary. Some areas seemingly included within the overall boundaries of critical habitat designations consist of manmade structures and impervious surfaces that do not contain the features essential to the conservation of a species. This occurs because of the scale and resolution of the maps used to depict critical habitat. To remedy this, all regulations designating critical habitat contain language stating that manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Portions of ROWs may not contain manmade structures, and may be included in areas that otherwise meet the definition of “critical habitat.” In some cases, the footprint of ROWs themselves may not have the features essential to the conservation of the species at issue. In this case, should the Services engage in a discretionary 4(b)(2) exclusion analysis, the Services may determine that there is little or no benefit of inclusion, and that the

benefits of exclusion outweigh the benefits of inclusion, and, therefore, decide to exclude the ROWs from the designation.

*Comment (47):* The designation of critical habitat on an airport may serve to attract wildlife to the airport environment. The Federal Aviation Administration (FAA) requests that an element be added to the policy that would convey great weight and consideration to excluding aircraft-movement areas, runway and taxi areas, object-free areas, and runway-protection zones from designations of critical habitat. Designation of critical habitat could also impair the airport owner's ability to expand facilities, and thus have economic costs. FAA requests that safety be a specific consideration in any exclusion analysis.

*Our Response:* The Services disagree that a dedicated policy element is needed in this particular instance. When identifying areas that meet the definition of "critical habitat," the Act does not authorize the Services to consider landownership. It is a process that relies on the best scientific data available to determine the specific occupied areas containing features essential to the conservation of a species that may require special management considerations or protection and unoccupied areas that may be essential for the conservation of the species. Active airport areas that do not meet the definition of "critical habitat" (*i.e.*, occupied areas that do not contain the features essential to the conservation of a particular species that may require special management considerations or protection or unoccupied areas that are not essential for the conservation of the species) will not be designated critical habitat. As mentioned above, manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are generally not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to destroy or adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

In some particular instances, the Services may identify areas within airport boundaries that meet the definition of "critical habitat" as applied to a particular species. In these instances, the Services generally would consider any request for exclusion from the designation received from airport managers or FAA under the general authority of section 4(b)(2) or applicable

elements of this policy, *e.g.*, the non-permitted plans and partnerships provision of this policy. In addition, the Services encourage airport managers to consider developing HCPs that would address incidental take of listed species and conservation of their habitat.

#### *Comments on NEPA Requirements*

*Comment (48):* The Services have determined that a categorical exclusion (CE) from the NEPA requirements applies to the draft policy. CEs address categories of actions that do not individually or cumulatively have a significant effect on the human environment. The commenter stated that a CE is not appropriate for NEPA compliance on issuance of this draft policy, given the potential expansion in future critical habitat designations and the significant effect on environmental and economic resources in areas to be designated as a result of these initiatives.

The commenter asserted that the Services' proposed actions constitute a "major federal action significantly affecting the quality of the human environment" (42 U.S.C. part 4321, *et seq.*). Furthermore, the commenter noted, the Services are required to prepare a full Environmental Impact Statement (EIS), in draft and final, as part of this process and prior to any final Federal decisionmaking on the proposed rules and guidance. An EIS is justified by the sweeping geographic scope of the proposals and their potentially significant effects on environmental resources, land-use patterns, growth and development, and regulated communities.

*Our Response:* Following our review of the statutory language of section 4(b)(2) and our requirements for compliance under the National Environmental Policy Act of 1969 (NEPA), we find that the categorical exclusion found at 43 CFR 46.210(i) and NOAA Administrative Order 216-6 applies to this policy. As reflected in the DOI regulatory provision, the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and is, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature . . ." NOAA Administrative Order 216-6 contains a substantively identical exclusion for "policy directives, regulations and guidelines of

an administrative, financial, legal, technical or procedural nature." Section 6.03c.3(i). The NOAA provision also excludes "preparation of regulations, Orders, manuals or other guidance that implement, but do not substantially change these documents, or other guidance." *Id.*

At the time the DOI categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble to a language correction to the categorical exclusion provisions gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government.

This final policy is an action that is fundamentally administrative or procedural in nature. Although the policy addresses more than the timing of procedural requirements, it is nevertheless administrative and procedural in nature, because it goes no further than to clarify, in expressly non-binding terms, the existing 4(b)(2) exclusion process by describing how the Services undertake discretionary exclusion analyses as a result of statutory language, legislative history, case law, or other authority. This final policy is meant to complement the revisions to 50 CFR 424.19 regarding impact analyses of critical habitat designations and provide for a more predictable and transparent critical-habitat-exclusion process. This final policy is nonbinding and does not limit Secretarial discretion because it does not mandate particular outcomes in future decisions regarding exclusions from critical habitat. As elaborated elsewhere in this final policy, the exclusion of a particular area from a particular critical habitat designation is, and remains, discretionary.

Specifically, this final policy explains how the Services consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The policy does not constrain the Services' discretion in making decisions with respect to exclusions from critical habitat. The considerations in this policy are consistent with the Act, its legislative history, and relevant circuit court opinions. Therefore, the policy statements are of an administrative (*e.g.*, describing the current practices of the Service that have come about as a result of legislative history, case law, or other

authority), technical (e.g., edits for plain language), and/or procedural (e.g., clarifying an existing process for a Service or NMFS activity) nature.

FWS reviewed the regulations at 43 CFR 46.215: Categorical Exclusions: Extraordinary Circumstances, and we have determined that none of the circumstances apply to this situation. Although the final policy will provide for a credible, predictable, and transparent critical-habitat-exclusion process, the effects of these changes would not “have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,” as nothing in the policy is intended to determine or change the outcome of any critical habitat determination. Moreover, the policy would not require that any previous critical habitat designations be reevaluated on this basis. Furthermore, the 4(b)(2) policy does not “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects” (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the policy on implementing section 4(b)(2) of the Act.

NMFS also reviewed its exceptions and has found that this policy does not trigger any of the exceptions that would preclude reliance on the categorical exclusion provisions. It does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. NOAA Administrative Order 216–6, § 5.05c.

*Comment (49):* A commenter stated that NEPA review should not be a standard when evaluating conservation plans and that the Services should not evaluate whether a conservation plan, agreement, or partnership was subject to NEPA review when determining whether to exclude areas from critical habitat designations. See 79 FR 27057 (May 12, 2014) (section 2.d. of the draft policy). Consideration of this factor discounts the many worthwhile conservation plans developed by private entities and State and local governments. The commenter stated

that because NEPA only requires analysis of Federal actions (see 42 U.S.C. 4332(2)(C)), conservation plans that are not approved by a Federal agency—such as those developed by citizens and State and local governments—would not undergo NEPA review. States, which are principal managers of wildlife within their borders, frequently develop conservation plans to benefit listed and non-listed species. Also, landowners can establish conservation banks or conservation easements without NEPA review or public input. Thus, the commenter stated that the application of this factor to plans and agreements for which they are often inapplicable would seem to automatically weigh against exclusion in most instances. Instead, the commenter suggests that the Services should focus on the effectiveness of the plan and its conservation value, regardless of the procedural processes used to establish the plan.

*Our Response:* The list of factors the Services will consider in connection with exclusion analysis of non-permitted plans seems to have been misunderstood as absolute requirements for excluding areas covered by such plans. For some plans that the Services may evaluate (those that are Federal and may have a significant impact on the environment), it would be appropriate to consider whether NEPA reviews have been completed; for other plans, it may not be. The Services are not suggesting that every plan needs to have undergone NEPA review. Not all of the items listed under paragraph 2 (described above under the heading, *Private or Other Non-Federal Conservation Plans and Partnerships, in General*) are needed to ensure the Services consider a plan. To this end, the Services have modified the language preceding the list of factors for evaluating non-permitted conservation plans, to clarify that some of the factors may not be relevant to all plans.

#### *Specific Language Suggested by Commenters*

*Comment (50):* Several commenters suggested specific line edits or word usage.

*Our Response:* We have addressed these comments as appropriate in this document.

*Comment (51):* A commenter suggested changing the phrase “and meets the conservation needs of the species” to “and maintains the physical or biological features essential for the conservation of the species” in draft policy element 3(c), which relates to permitted plans under section 10 of the Act. This change is suggested to maintain consistency in the use of terms

related to critical habitat designations and exclusions.

*Our Response:* The Services have elected not to make the suggested change. The language in question refers to permitted HCPs, SHAs, and CCAAs, and more specifically their underlying conservation plans. Plans developed to support these conservation vehicles are not necessarily designed using the terminology applicable to critical habitat designation. Therefore, we conclude that it is more appropriate to retain the more general language used in our proposal.

*Comment (52):* One commenter stated it will be very difficult for the Services to determine if excluding one piece of habitat “will result in the extinction of a species,” as stated in the draft policy element 8. Therefore, the commenter recommends the language be changed to express a likelihood the action will result in the extinction of the species and stated this determination should be made according to the best available science. The commenter suggests the following as replacement language: “We must not exclude an area if the best available science indicates that failure to designate it will likely result in the extinction of the species.”

*Our Response:* Part 8 of the policy is a restatement of the statutory provision of the Act that states the Secretary shall not exclude an area if the exclusion will result in the extinction of the species concerned. To the extent that the statutory language is ambiguous, we decline to interpret it at this time.

*Comment (53):* One commenter remarked there remains a fair amount of vague language in the factors that are considered during a discretionary 4(b)(2) exclusion analysis. Specifically, the commenter stated it is unclear if factors that begin with “Whether” will rank higher if the answer is affirmative. Also, factors that begin with “The degree to which,” “The extent or,” and “The demonstrated implementation” must be clarified and quantified before they can be appropriately and fairly assigned weight in a designation of critical habitat.

*Our Response:* The examples of language noted above from the draft policy were carefully chosen. As this is a policy and not a regulation, the Services chose language such as “the degree to which” to accommodate the gradations and variations in certain fact patterns relating to conservation partnerships and plans. Not all plans and partnerships are developed in the same manner, and no one set of evaluation criteria would apply. Rather, the Services’ intent in drafting the language was to provide latitude in

evaluating different types of plans and partnerships. Further, the commenter does not provide any examples of how to quantify measures, nor does the commenter provide alternate language or suggested revisions to this section of the policy.

*Comment (54):* One commenter suggested adding an additional factor under non-permitted plans and partnerships, "Plans must be reasonably expected to achieve verifiable, beneficial results to qualify for exclusion from critical habitat designation."

*Our Response:* We appreciate the suggestions, but we believe these factors are already captured in the factors in the policy under paragraphs 2.f. ("The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.") and 2.h. ("Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.") The existence of a monitoring program and adaptive management (paragraph 2.h.) speaks to verifiable results, and the statements regarding providing for the conservation of the essential features and effective conservation measures (paragraph 2.f.) relate to beneficial results. Therefore, we did not adopt the suggested additions.

*Comment (55):* One commenter suggested adding a fourth condition under the permitted plans section of the policy: "If plans cannot be implemented or do not achieve the intended results, a re-evaluation of critical habitat designation may be required."

*Our Response:* As discussed in this final policy in the framework section, we base the exclusion not only on the plan, but on the conservation partnership. Therefore, our first step would be to work with that partner to implement the plan, bring the plan into compliance, or adjust the conservation management or objectives of the plan to be effective for the conservation of the covered species. We of course retain the authority under the Act to revise the designation, if necessary, through the rulemaking process to include these areas in critical habitat, if appropriate. For the above reasons, while we considered the suggestion to add a policy element, we have determined that it is not necessary.

*Comment (56):* One commenter suggested adding the following language to the draft policy element paragraph 5: "If the agency requesting the exclusion does not provide us with a specific justification, we will contact the agency

to require that it provide a specific justification. When the agency provides a specific justification, we will defer to the expert judgment of the DoD, DHS, or another Federal agency."

*Our Response:* The suggested text is paraphrased from the policy preamble. Therefore, the Services do not agree that this language adds substantively to the clarity of the policy, and we did not adopt this suggestion.

*Comment (57):* A commenter suggested we add the following language to the policy regarding private lands: "The Service recognizes that many listed species are found primarily or partially on private lands. For some endemic species, their entire range may be wholly on private lands, making partnerships with those landowners far more valuable than any expected gain that might be achieved through the incremental gains expected through a critical habitat designation and subsequent section 7 consultations. We acknowledge the potential incremental gain in conservation value from designating critical habitat on private land can be undermined if the landowner is not a partner in that designation or is opposed to that designation. Private land tracts that are proposed as critical habitat are likely to maximize their recovery value for listed species if the landowner is amenable to conservation and recovery activities on their lands. Therefore, landowners whose property has been proposed as critical habitat and wish to be excluded from that designation will be given serious consideration for exclusion if they provide information concerning how the lands will be managed for the conservation of the species."

*Our Response:* The Services generally will consider exclusion of private lands from a designation of critical habitat if specifically requested. Private lands are needed for the conservation of endangered and threatened species. If a private landowner requests exclusion, and provides a reasoned rationale for such exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced), the Services would consider exclusion of those lands. However, the Services decline to include a policy element in this policy covering this particular suggestion.

*Comment (58):* A commenter suggested that we give great weight and consideration to exclusion of lands whose landowners allow access to their lands for purposes of surveys, monitoring, and other conservation and research activities.

*Our Response:* The Services would consider and give appropriate weight, on a case-by-case basis, to the benefits of the information gathered, should the Secretaries choose to enter into the discretionary 4(b)(2) exclusion analysis. If not yet established, we hope that arrangements of this sort with landowners could lead to conservation partnerships in the future. Development of those partnerships could result in furthering the conservation of the species.

*Comment (59):* A commenter suggested that the Services should include specific text in the policy regarding the importance of private landowner partnership and cooperation in species recovery efforts. Furthermore, the commenter suggests the Services give great weight to excluding private lands whose owners have expressed interest in participation in voluntary recovery efforts.

*Our Response:* The Services agree that recovery of listed species relies on the cooperation of private landowners and managers. The commenter brings to light an inherent tension with listing and recovery under the Act. One might think that the process of listing, designating critical habitat, developing a recovery plan, carrying out recovery plan objectives, and ultimately delisting a species should be a linear process. It is not. Adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants and identifying areas that meet the definition of "critical habitat" are science-based processes. Areas meeting the definition of "critical habitat" for a given species must be identified as eligible for designation as critical habitat, regardless of landownership or potential future conflict with recovery opportunities, such as mentioned by the commenter. The Secretary may, however, exclude areas based on non-biological factors. The subject of this policy is to make transparent how the Services plan to address certain fact patterns under which the Secretaries will consider excluding particular areas from a designation. The presumption of cooperation for purposes of recovery of a species is not a particular fact pattern the Services have chosen to include, but is inherently captured under the partnership element of this policy. As stated in the permitted plans section of this policy, the Services would not weigh heavily a prospective partnership in which a landowner merely may choose to cooperate with the Services. If habitat-based threats are the main driver for a species' listing, the designation of critical habitat could be an important tool for species conservation.

*Comment (60):* We received numerous specific comments in several categories that were not directly relevant to this final policy on exclusions from critical habitat, and, therefore, they are not addressed in this section. While not directly relevant to this policy, we may address some of these issues in future rulemaking or policy development by the Services. These include:

- Issues regarding earlier coordination with States in the designation of critical habitat;
- Development and designation processes for critical habitat;
- Development of conservation plans;
- Relocation of existing critical habitat designations from airport lands; and
- Nonessential experimental populations.

#### **Required Determinations**

We intend to look to this policy as general non-binding guidance when we consider exclusions from critical habitat designations. The policy does not limit the Secretaries' discretion in particular designations. In each designation, we are required to comply with various Executive Orders and statutes for those individual rulemakings. Below we discuss compliance with several Executive Orders and statutes as they pertain to this final policy.

#### **Regulatory Planning and Review (Executive Orders 12866 and 13563)**

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this final policy is a significant action because it may create a serious inconsistency with other agency actions.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that our regulatory system must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this policy in a manner consistent with these requirements.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) We find this final policy will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this policy will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. Small governments will not be affected because the final policy will not place additional requirements on any city, county, or other local municipalities.

(b) This final policy will not produce a Federal mandate on State, local, or Tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This policy will impose no obligations on State, local, or Tribal governments because this final policy is meant to complement the amendments to 50 CFR 424.19, and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process. The only entities directly affected by this final policy are the FWS and NMFS. Therefore, a Small Government Agency Plan is not required.

#### **Takings—Executive Order 12630**

In accordance with Executive Order 12630, this final policy will not have significant takings implications. This final policy will not pertain to "taking" of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final policy (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final policy will substantially advance a legitimate government interest (clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### **Federalism—Executive Order 13132**

In accordance with Executive Order 13132 (Federalism), this final policy does not have Federalism implications and a Federalism summary impact statement is not required. This final

policy pertains only to exclusions from designations of critical habitat under section 4 of the Act, and 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.

#### **Civil Justice Reform—Executive Order 12988**

In accordance with Executive Order 12988 (Civil Justice Reform), this final policy will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The clarification of expectations regarding critical habitat and providing a more predictable and transparent critical-habitat-exclusion process will make it easier for the public to understand our critical-habitat-designation process, and thus should not significantly affect or burden the judicial system.

#### **Paperwork Reduction Act of 1995**

This final policy does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This final policy will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### **National Environmental Policy Act (NEPA)**

We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46), and NOAA's Administrative Order regarding NEPA compliance (NAO 216–6 (May 20, 1999)).

We have determined that this policy is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are "of an administrative, financial, legal, technical, or procedural nature." This action does not trigger an extraordinary circumstance, as outlined in 43 CFR

46.215, applicable to the categorical exclusion. Therefore, this policy does not constitute a major Federal action significantly affecting the quality of the human environment.

We have also determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216-6. Specifically, the policy fits within two categorical exclusion provisions in § 6.03c.3(i)—for “preparation of regulations, Orders, manuals, or other guidance that implement, but do not substantially change these documents, or other guidance” and for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” NAO 216-6, § 6.03c.3(i). The policy would not trigger an exception precluding reliance on the categorical exclusions because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. *Id.* § 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. Issuance of this rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects.

#### **Government-to-Government Relationship With Tribes**

In accordance with Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”, November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final policy on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this policy, which is general in nature, does not have tribal implications as defined in Executive Order 13175. Our intent with this policy is to provide non-binding guidance on our approach to considering exclusion of areas from critical habitat, including tribal lands. This policy does not establish a new direction. We will

continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats and work with them as we promulgate individual critical habitat designations, including consideration of potential exclusions on the basis of tribal interests. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

#### **Energy Supply, Distribution, or Use**

Executive Order 13211 “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final policy is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### **Policy on Implementation of Section 4(b)(2) of the Act**

1. The decision to exclude any particular area from a designation of critical habitat is always discretionary, as the Act states that the Secretaries “may” exclude any area. In no circumstances is an exclusion of any particular area required by the Act.

2. When we undertake a discretionary 4(b)(2) exclusion analysis, we will evaluate the effect of non-permitted conservation plans or agreements and their attendant partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors. The list of factors that we will consider for non-permitted conservation plans or agreements is shown below. This list is not exclusive; all items may not apply to every non-permitted conservation plan or agreement and are not requirements of plans or agreements.

a. The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

b. The extent of public participation in the development of the conservation plan.

c. The degree to which there has been agency review and required determinations (*e.g.*, State regulatory requirements), as necessary and appropriate.

d. Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance was required.

e. The demonstrated implementation and success of the chosen mechanism.

f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.

g. Whether there is a reasonable expectation that the conservation management strategies and actions contained in the conservation plan or agreement will be implemented.

h. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

3. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted candidate conservation agreement with assurances (CCAA), safe harbor agreement (SHA), or habitat conservation plan (HCP), and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

a. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.

b. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

c. The CCAA/SHA/HCP specifically addresses that species’ habitat and meets the conservation needs of the species in the planning area.

We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion of a particular area from a designation of critical habitat.

4. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first instance, meet the definition of “critical habitat.”

5. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of areas for which a Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, and will give great weight to national-security or homeland-security concerns in analyzing the benefits of exclusion. National-security and/or homeland-security concerns are not a factor, however, in the process of determining what areas, in the first instance, meet the definition of “critical habitat.”

6. Except in the circumstances described in 5 above, we will focus our exclusions on non-Federal lands. Because the section 7(a)(2) consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands or of designating non-Federal lands.

7. When the Services are determining whether to undertake a discretionary 4(b)(2) exclusion analysis as a result of the probable incremental economic impacts of designating a particular area, it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services’ determination.

8. For any area to be excluded, we must find that the benefits of excluding that area outweigh the benefits of including that area in the designation. Although we retain discretion because we cannot anticipate all fact patterns that may occur, it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. We must not exclude an area if the failure to designate it will result in the extinction of the species.

#### Authors

The primary authors of this policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife

Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, and the National Marine Fisheries Service’s Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

#### Authority

The authority for this action is section 4(h) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 29, 2016.

**Michael J. Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

Dated: January 29, 2016.

**Samuel D. Rauch, III,**

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

[FR Doc. 2016–02677 Filed 2–10–16; 8:45 am]

**BILLING CODE 4333–15–P; 3510–22–P**

# Proposed Rules

Federal Register

Vol. 81, No. 28

Thursday, February 11, 2016

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

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 25

[Docket No. FAA-2015-5758; Notice No. 25-16-02-SC]

#### Special Conditions: The Boeing Company, Boeing Model 737-8 Airplane; Non-Rechargeable Lithium Battery Installations

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for the Boeing Model 737-8 airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is non-rechargeable lithium battery systems. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** Send your comments on or before March 28, 2016.

**ADDRESSES:** Send comments identified by docket number FAA-2015-5758 using any of the following methods:

- *Federal eRegulations 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:* The FAA will post all comments it receives, without change, to <http://www.regulations.gov/>, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477-19478), as well as at <http://DocketsInfo.dot.gov/>.

*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 Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Nazih Khaouly, Airplane and Flight Crew Interface Branch, ANM-111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington, 98057-3356; telephone 425-227-2432; facsimile 425-227-1149.

#### SUPPLEMENTARY INFORMATION:

#### Future Requests for Installation of Non-Rechargeable Lithium Batteries

The FAA anticipates that non-rechargeable lithium batteries will be installed in other makes and models of airplanes. We have made the determination to require special conditions for all applications requesting the installation of non-rechargeable lithium batteries until the airworthiness requirements can be revised to address this issue. Having the same standards across the range of all transport-airplane makes and models will ensure regulatory consistency for the aviation industry.

#### Comments Invited

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

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

#### Background

On January 27, 2012, The Boeing Company applied for an amendment to Type Certificate No. A16WE to include a new Model 737-8 airplane. The Model 737-8 airplane is a narrow-body, transport-category airplane that is a derivative of the Model 737-800 airplane with two CFM LEAP-1B wing-mounted engines.

The Model 737-8 airplane will include non-rechargeable lithium batteries. The current battery requirements in Title 14, Code of Federal Regulations (14 CFR) part 25 are inadequate for addressing an airplane with lithium batteries.

#### Type Certification Basis

Under the provisions of 14 CFR 21.101, The Boeing Company must show that the Model 737-8 airplane meets the applicable provisions of the regulations listed in Type Certificate A16WE or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA. The regulations listed in the type certificate are commonly referred to as the "original type certification basis." The regulations listed in Type Certificate No. A16WE are 14 CFR part 25 effective February 1, 1965 including Amendments 25-1 through 25-77 with exceptions listed in the type certificate. In addition, the certification basis includes other regulations, special conditions, and exemptions that are not relevant to these proposed special conditions. Type Certificate No. A16WE will be updated to include a complete description of the certification basis for this airplane model.

In addition to the applicable airworthiness regulations and special conditions, the Model 737-8 airplane

must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model 737-8 airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

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

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

#### Novel or Unusual Design Features

A battery system consists of the battery and any protective, monitoring and alerting circuitry or hardware inside or outside of the battery and venting capability where necessary. For the purpose of these special conditions, we refer to a battery and battery system as a battery. The Model 737-8 airplane will incorporate non-rechargeable lithium batteries, which are novel or unusual design features.

#### Discussion

We derived the current regulations governing installation of batteries in transport-category airplanes from Civil Air Regulations (CAR) 4b.625(d) as part of the re-codification of CAR 4b that established 14 CFR part 25 in February 1965. We basically reworded the battery requirements, which are currently in § 25.1353(b)(1) through (b)(4), from the CAR requirements. Non-rechargeable lithium batteries are novel and unusual with respect to the state of technology considered when these requirements were codified. These batteries introduce higher energy levels into airplane systems through new chemical compositions in various battery-cell sizes and construction. Interconnection of these cells in battery packs introduces failure modes that require unique design considerations, such as provisions for thermal management.

Recent events involving rechargeable and non-rechargeable lithium batteries

prompted the FAA to initiate a broad evaluation of these energy-storage technologies. In January 2013, two independent events involving rechargeable lithium-ion batteries demonstrated unanticipated failure modes. A National Transportation Safety Board (NTSB) letter to the FAA, dated May 22, 2014, which is available at <http://www.ntsb.gov>, filename A-14-032-036.pdf, describes these events.

On July 12, 2013, an event involving a non-rechargeable lithium battery, in an emergency locator transmitter installation, demonstrated unanticipated failure modes. Air Accident Investigations Branch Bulletin S5/2013 describes this event.

Some other known uses of rechargeable and non-rechargeable lithium batteries on airplanes include:

- Flight deck and avionics systems such as displays, global positioning systems, cockpit voice recorders, flight data recorders, underwater locator beacons, navigation computers, integrated avionics computers, satellite network and communication systems, communication-management units, and remote-monitor electronic line-replaceable units (LRU);

- Cabin safety, entertainment, and communications equipment, including life rafts, escape slides, seatbelt air bags, cabin management systems, Ethernet switches, routers and media servers, wireless systems, internet and in-flight entertainment systems, satellite televisions, remotes, and handsets;

- Systems in cargo areas including door controls, sensors, video surveillance equipment, and security systems.

Some known potential hazards and failure modes associated with non-rechargeable lithium batteries are:

- Internal failures

In general, these batteries are significantly more susceptible to internal failures that can result in self-sustaining increases in temperature and pressure (*i.e.*, thermal runaway) than their nickel-cadmium or lead-acid counterparts. The metallic lithium can ignite, resulting in a self-sustaining fire or explosion.

- Fast or imbalanced discharging

Fast discharging or an imbalanced discharge of one cell of a multi-cell battery may create an overheating condition that results in an uncontrollable venting condition, which in turn leads to a thermal event or an explosion.

- Flammability

Unlike nickel-cadmium and lead-acid batteries, these batteries use higher

energy and current in an electrochemical system that can be configured to maximize energy storage of lithium. They also use liquid electrolytes that can be extremely flammable. The electrolyte, as well as the electrodes, can serve as a source of fuel for an external fire if the battery casing is breached.

Proposed Special Condition 1 requires that each individual cell within a battery be designed to maintain safe temperatures and pressures. Proposed Special Condition 2 addresses these same issues but for the entire battery. Proposed Special Condition 2 requires the battery be designed to prevent propagation of a thermal event, such as self-sustained, uncontrolled increases in temperature or pressure from one cell to adjacent cells.

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

Proposed Special Conditions 3, 9 and 10 are self-explanatory, and the FAA does not provide further explanation for them at this time.

The FAA proposes Special Condition 4 to make it clear that the flammable-fluid fire-protection requirements of § 25.863 apply to non-rechargeable lithium battery installations. Section 25.863 is applicable to areas of the airplane that could be exposed to flammable fluid leakage from airplane systems. Non-rechargeable lithium batteries contain electrolyte that is a flammable fluid.

Proposed Special Condition 5 requires each non-rechargeable lithium battery installation to not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape. Proposed Special Condition 6 requires each non-rechargeable lithium battery installation to have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells. The means of meeting these proposed special conditions may be the same, but they are independent requirements addressing different hazards. Proposed Special Condition 5 addresses corrosive fluids and gases, whereas Proposed Special Condition 6 addresses heat.

Proposed Special Conditions 7 and 8 require non-rechargeable lithium

batteries to have automatic means for battery disconnection and control of battery discharge rate due to the fast-acting nature of lithium-battery chemical reactions. Manual intervention would not be timely or effective in mitigating the hazards associated with these batteries.

These special conditions will apply to all non-rechargeable lithium battery installations in lieu of § 25.1353(b)(1) through (b)(4) at Amendment 25–123. Sections 25.1353(b)(1) through (b)(4) at Amendment 25–123 will remain in effect for other battery installations.

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

### Applicability

As discussed above, these special conditions are applicable to the Boeing Model 737–8 airplane. Should the applicant apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

### Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability.

### List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and record keeping requirements.

■ The authority citation for these special conditions continues to read as follows:

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

### The Proposed Special Conditions

■ Accordingly, the FAA proposes the following special conditions as part of the type certification basis for Boeing Model 737–8 airplane.

### Non-Rechargeable Lithium Battery Installations

In lieu of § 25.1353(b)(1) through (b)(4) at Amendment 25–123, each non-rechargeable lithium battery installation must:

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

2. Prevent the occurrence of self-sustaining, uncontrolled increases in temperature or pressure.

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

4. Meet the requirements of § 25.863.

5. Not damage surrounding structure or adjacent systems, equipment, or electrical wiring from corrosive fluids or gases that may escape.

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

7. Be capable of automatically controlling the discharge rate of each cell to prevent cell imbalance, back-charging, overheating, and uncontrollable temperature and pressure.

8. Have a means to automatically disconnect from its discharging circuit in the event of an over-temperature condition, cell failure or battery failure.

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

10. Have a means for the flightcrew or maintenance personnel to determine the battery charge state if the battery's function is required for safe operation of the airplane.

**Note 1:** A battery system consists of the battery and any protective, monitoring and alerting circuitry or hardware inside or outside of the battery. It also includes vents (where necessary) and packaging. For the purpose of these special conditions, a battery and battery system are referred to as a battery.

Issued in Renton, Washington, on February 4, 2016.

**Michael Kaszycki,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2016–02761 Filed 2–10–16; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2015–5194; Airspace Docket No. 15–ACE–6]

### Proposed Establishment of Class E Airspace; Coldwater, KS

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at Coldwater, KS. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures developed at Commanche County Airport, for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** Comments must be received on or before March 28, 2016.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, telephone (202) 366–9826. You must identify the docket number FAA–2015–5194; Airspace Docket No. 15–ACE–6, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at [http://www.faa.gov/air\\_traffic/publications/](http://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC, 20591; telephone: 202–267–8783. The order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202–741–6030, or go to [http://www.archives.gov/federal\\_register/code\\_offederal-regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_offederal-regulations/ibr_locations.html).

FAA order 7400.9, Airspace Designations and Reporting Points is published yearly and effective on September 15.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Shelby, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone: 817–222–5857.

### SUPPLEMENTARY INFORMATION:

#### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the

authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace at Commanche County Airport, Coldwater, KS.

#### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2015-5194/Airspace Docket No. 15-ACE-6." The postcard will be date/time stamped and returned to the commenter.

#### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at <http://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267-9677, to request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

#### Availability and Summary of Documents Proposed for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

#### The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Commanche County Airport, Coldwater, KS, to accommodate new standard instrument approach procedures. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

#### Regulatory Notices and Analyses

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

#### Environmental Review

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

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### The Proposed Amendment

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

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

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

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

#### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

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

\* \* \* \* \*

#### ACE KS E5 Coldwater, KS [New]

Commanche County Airport, KS  
(Lat. 37°13'22" N., long. 099°19'55" W.)

That airspace extending upward From 700 feet above the surface within a 7.5-mile radius of Commanche County Airport.

Issued in Fort Worth, TX, on February 3, 2016.

**Vonnie Royal,**

*Acting Manager, Operations Support Group,  
ATO Central Service Center.*

[FR Doc. 2016-02674 Filed 2-10-16; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[REG-101701-16]

RIN 1545-BN24

**Additional Limitation on Suspension of Benefits Applicable to Certain Pension Plans Under the Multiemployer Pension Reform Act of 2014****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** The Multiemployer Pension Reform Act of 2014 (“MPRA”), which was enacted by Congress as part of the Consolidated and Further Continuing Appropriations Act of 2015, relates to multiemployer defined benefit pension plans that are projected to have insufficient funds, within a specified timeframe, to pay the full plan benefits to which individuals will be entitled (referred to as plans in “critical and declining status”). Under MPRA, the sponsor of such a plan is permitted to reduce the pension benefits payable to plan participants and beneficiaries if certain conditions and limitations are satisfied (referred to in MPRA as a “suspension of benefits”). One specific limitation governs the application of a suspension of benefits under any plan that includes benefits directly attributable to a participant’s service with any employer that has withdrawn from the plan in a complete withdrawal, paid its full withdrawal liability, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries equal to any benefits for such participants and beneficiaries reduced as a result of the financial status of the plan. This document contains proposed regulations that would provide guidance relating to this specific limitation. These regulations affect active, retired, and deferred vested participants and beneficiaries under any such multiemployer plan in critical and declining status as well as employers contributing to, and sponsors and administrators of, those plans.

**DATES:** Comments must be received by March 15, 2016. Outlines of topics to be discussed at the public hearing scheduled for March 22, 2016 must be received by March 15, 2016.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-101701-16), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station,

Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-101701-16), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-101701-16). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, the Department of the Treasury MPRA guidance information line at (202) 622-1559; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Background**

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 432(e)(9) of the Internal Revenue Code (Code), as amended by section 201 of the Multiemployer Pension Reform Act of 2014, Division O of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113-235 (128 Stat. 2130 (2014)) (MPRA).<sup>1</sup> As amended, section 432(e)(9) permits plan sponsors of certain multiemployer plans to reduce the plan benefits payable to participants and beneficiaries by plan amendment (referred to in the statute as a “suspension of benefits”) if specified conditions are satisfied. A plan sponsor that seeks to implement a suspension of benefits must submit an application that the Secretary of the Treasury, in consultation with the Pension Benefit Guaranty Corporation and the Secretary of Labor (generally referred to in this preamble as the Treasury Department, PBGC, and Labor Department, respectively), is required by the statute to approve upon finding that certain specified conditions are satisfied. One condition is that the plan is in critical and declining status, meaning that the plan is projected to have insufficient funds, within a specified timeframe, to

<sup>1</sup> Section 201 of MPRA makes parallel amendments to section 305 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA). The Treasury Department has interpretive jurisdiction over the subject matter of these provisions under ERISA as well as the Code. See also section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713). Thus, these proposed Treasury regulations issued under section 432 of the Code apply as well for purposes of section 305 of ERISA.

pay the full benefits to which individuals will be entitled under the plan.

Another condition, set forth in section 432(e)(9)(D)(vii), is a specific limitation on how a suspension of benefits must be applied under a plan that, as described in section 432(e)(9)(D)(vii)(III), includes benefits that are directly attributable to a participant’s service with any employer that has, prior to the date MPRA was enacted, withdrawn from the plan in a complete withdrawal under section 4203 of ERISA, paid the full amount of the employer’s withdrawal liability under section 4201(b)(1) of ERISA or an agreement with the plan, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries of the plan under a separate, single-employer plan sponsored by the employer, in an amount equal to any amount of benefits for these participants and beneficiaries reduced as a result of the financial status of the plan. Such an employer is referred to in this preamble as a “subclause III employer,” and the agreement to assume liability for those benefits is referred to as a “make-whole agreement.”

If the specific limitation of section 432(e)(9)(D)(vii) applies to a plan, then section 432(e)(9)(D)(vii)(I) requires that the suspension of benefits first be applied to the maximum extent permissible to benefits attributable to a participant’s service with an employer that withdrew from the plan and failed to pay (or is delinquent with respect to paying) the full amount of its withdrawal liability under section 4201(b)(1) of ERISA or an agreement with the plan. Such an employer is referred to in this preamble as a “subclause I employer.” Second, under section 432(e)(9)(D)(vii)(II), except as provided in section 432(e)(9)(D)(vii)(III), a suspension of benefits must be applied to all other benefits. Third, under section 432(e)(9)(D)(vii)(III), a suspension must be applied to benefits under a plan that are directly attributable to a participant’s service with a subclause III employer.

On June 19, 2015, the Treasury Department and the IRS published temporary regulations (TD 9723) under section 432(e)(9) in the **Federal Register** (80 FR 35207) providing general guidance regarding section 432(e)(9) as well as outlining the requirements for a plan sponsor of a plan that is in critical and declining status to apply for approval of a suspension of benefits and for the Treasury Department to begin processing such an application. A notice of proposed rulemaking cross-

referencing the temporary regulations (REG-102648-15) and providing additional guidance was published in the same issue of the **Federal Register** (80 FR 35262). Neither the temporary nor the proposed regulations include guidance regarding the limitation under section 432(e)(9)(D)(vii).

On October 23, 2015, the Treasury Department published a notice in the **Federal Register** (80 FR 64508) regarding an application for a proposed suspension of benefits, which represented that the plan is of the type to which section 432(e)(9)(D)(vii) applies. The notice requested public comments on all aspects of the application, including with respect to the interpretation of section 432(e)(9)(D)(vii) that is reflected in the application. The Treasury Department and the IRS have considered the comments received in response to that notice in developing these proposed regulations.

#### Explanation of Provisions

These proposed regulations would amend the Income Tax Regulations (26 CFR part 1) to provide guidance regarding section 432(e)(9)(D)(vii). The Treasury Department consulted with PBGC and the Labor Department in developing these proposed regulations. These proposed regulations would add a new paragraph (d)(8) to proposed § 1.432(e)(9)-1 and do not otherwise affect the provisions of the proposed regulations published in the **Federal Register** (80 FR 35262) on June 19, 2015.

Section 432(e)(9)(D)(vii) sets forth a rule that limits how a suspension may be applied under a plan that includes benefits that are directly attributable to a participant's service with any employer that, as defined in section 432(e)(9)(D)(vii)(III), has withdrawn, paid the full amount of its withdrawal liability, and, pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries of the plan under a separate, single-employer plan sponsored by the employer, in an amount equal to any amount of benefits for such participants and beneficiaries reduced as a result of the financial status of the multiemployer plan. In determining how a suspension should be allocated consistent with the statutory framework, the Treasury Department and the IRS analyzed the statute and applied principles of statutory construction.

Subclause (I) of section 432(e)(9)(D)(vii) provides that the suspension of benefits should first be applied "to the maximum extent permissible." Accordingly, the Treasury

Department and the IRS conclude that reductions with respect to benefits attributable to service with a subclause I employer must be applied first to the maximum extent permissible before reductions are permitted to be applied to any other benefits. Consequently, these proposed regulations require that a suspension of benefits under a plan that is subject to section 432(e)(9)(D)(vii) be applied to the maximum extent permissible to benefits attributable to service with a subclause I employer. Only if such a suspension is not reasonably estimated to achieve the level that is necessary to enable the plan to avoid insolvency may a suspension then be applied to other benefits that are permitted to be suspended and that are attributable to a participant's service with other employers.

In contrast, subclause (II) does not include the phrase "to the maximum extent permissible," and therefore the Treasury Department and the IRS have concluded that the best interpretation of section 432(e)(9)(D)(vii) is that a suspension need not be applied to the maximum extent permissible to benefits described in subclause (II) before any suspension is applied to benefits described in subclause (III).<sup>2</sup> This interpretation is also consistent with the language in subclause (II) providing for application of a suspension "except as provided in subclause (III)," contemplating a coordinated application of those subclauses, which are to be applied "second" and "third," respectively.<sup>3</sup> Because of the order of application of subclauses (II) and (III) and the coordinated application described in the preceding sentence, the Treasury Department and the IRS conclude that the best interpretation of section 432(e)(9)(D)(vii) is that the application of a suspension to benefits

described in subclause (II) must be greater than or equal to the application of the suspension to benefits described in subclause (III).

Under these proposed regulations, a suspension would not be permitted to reduce benefits directly attributable to service with a subclause III employer, unless other benefits are first reduced and are reduced to at least the same extent (thus protecting a subclause III employer from the possibility that the suspension would be expressly designed to take advantage of the employer's agreement to make participants and beneficiaries whole for the reductions). Under these proposed regulations, a suspension would not violate this restriction if no participant's benefits that are directly attributable to service with a subclause III employer are reduced more than that individual's benefits would have been reduced if, holding constant the benefit formula, work history, and all other relevant factors used to determine the individual's benefits, those benefits were attributable to that participant's service with any other employer.

These proposed regulations would also provide that the benefits described in section 432(e)(9)(D)(vii)(III) are any benefits for a participant under a plan that are directly attributable to service with a subclause III employer, without regard to whether the employer has assumed liability for providing benefits to the participant that were reduced as a result of the financial status of the plan. For example, if a participant commenced receiving retirement benefits under a plan, which are directly attributable to service with such an employer, before the date the employer entered into a make-whole agreement, then the participant's benefits would be described in section 432(e)(9)(D)(vii)(III) even if those benefits were not covered by the make-whole agreement. This interpretation is based on the statutory language in section 432(e)(9)(D)(vii)(III), which defines the benefits to which that subclause applies as those benefits that are directly attributable to service with an employer that has met the conditions set forth in section 432(e)(9)(D)(vii)(III)(aa) and (bb). In other words, the statutory provision refers to benefits directly attributable to service with an employer described in subclause III, and not only to benefits covered by the make-whole agreement.

The Treasury Department and the IRS are also considering an alternative to the ordering rule set forth in these proposed regulations. Under the alternative, as under the proposed regulations, the rule would require that a suspension of benefits under a plan that is subject to

<sup>2</sup> See *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). To read subclause (II) to require that benefits be suspended "to the maximum extent permissible" without that language would either render that language superfluous in subclause (I), see *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."), or effectively rewrite subclause (II) to include that requirement, see *Hall v. United States*, 132 S. Ct. 1882, 1893 (2012) ("[I]t is not for us to rewrite the statute.").

<sup>3</sup> See *Corley v. United States*, 556 U.S. 303, 314 (2009) (rejecting constructions "at odds with the basic interpretive canon that '[a] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

section 432(e)(9)(D)(vii) be applied to the maximum extent permissible to benefits attributable to service with a subclause I employer before any suspension is applied to benefits attributable to service with other employers. However, in contrast to the approach described in these proposed regulations, the alternative would require that any such suspension of benefits be applied to provide for a *lesser* reduction in benefits that are directly attributable to service with a subclause III employer than to benefits that are attributable to any other service. The alternative approach could be satisfied if, for example, benefits that are directly attributable to service with a subclause III employer are reduced less, on a percentage basis, than benefits would have been reduced if, holding constant the benefit formula, work history, and all other relevant factors used to determine benefits, those benefits were attributable to service with any other employer.

The Treasury Department and the IRS recognize that the language of section 432(e)(9)(D)(vii) has similarities to other statutory provisions that establish priority categories requiring claims to be fully satisfied under each earlier category before any claims are permitted to be satisfied under any subsequent category. For example, section 4044 of ERISA provides for the allocation of pension plan assets in the event of a distress termination and for categories of payments to be made “in the following order:” “First,” “Second,” “Third,” “Fourth,” “Fifth” and “Sixth.”<sup>4</sup>

If such an approach were applied under section 432(e)(9)(D)(vii), then the maximum permitted suspension would be required to be imposed with respect to benefits described in each subclause before any suspension could apply to benefits described in a successive subclause. Under that approach, any suspension of benefits would first have to be applied to the maximum extent permissible to benefits attributable to a participant’s service with a subclause I employer. Only if such a suspension were not reasonably estimated to achieve the level that is necessary to enable the plan to avoid insolvency would the suspension then be applied to other benefits that are permitted to be suspended and that are attributable to a

participant’s service with any other employers (except for benefits that are directly attributable to service with a subclause III employer). Under this approach, only if the additional suspension were not reasonably estimated to achieve the level that is necessary to enable the plan to avoid insolvency would the suspension then be applied also to benefits directly attributable to a participant’s service with a subclause III employer.

Based on the language of the statute as well as principles of statutory construction described in this preamble, the proposed regulations and alternative rule do not reflect the approach described in the preceding paragraph.<sup>5</sup> In addition, in contrast to section 4044 of ERISA, which includes the language “in the following order,” there is no similar generally applicable ordering language in section 432(e)(9)(D)(vii) and section 305(e)(9)(D)(vii) of ERISA. As under section 4044 of ERISA, in enacting section 432(e)(9)(D)(vii) and its counterpart under ERISA, Congress could readily have used consistent language in describing the scope of permissible benefit suspensions with respect to the benefits described in each of the three statutory subclauses. Instead of doing so, Congress created a distinction in describing the treatment of benefits described in the three subclauses in section 432(e)(9)(D)(vii).<sup>6</sup> For these reasons, the Treasury Department and the IRS have concluded that the best reading of Congressional intent is that a suspension of benefits described in section 432(e)(9)(D)(vii)(II) does not need to be applied “to the maximum extent permissible” before any suspension is permitted to be applied to benefits described in section 432(e)(9)(D)(vii)(III). However, the Treasury Department and the IRS request comments on whether “to the maximum extent permissible” should be applied to benefits described in subclause II in the final regulations.

#### Effective/Applicability Dates

These regulations are proposed to be effective on and apply with respect to suspensions for which the approval or denial is issued on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

#### Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements

of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

The Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. In this case, the IRS and the Treasury Department believe that the regulations likely would not have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. 605. This certification is based on the fact that the number of small entities affected by this rule is unlikely to be substantial because it is unlikely that a substantial number of small multiemployer plans in critical and declining status are subject to the limitation contained in section 432(e)(9)(D)(vii). Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

#### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the Treasury Department and the IRS as prescribed in this preamble in the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of these proposed regulations, including the interaction of the provisions of the proposed regulation with the limitation described in section 432(e)(9)(D)(vi) relating to the requirement that a suspension of benefits be equitably distributed.

In addition to the comment request included in this preamble under the “Explanation of Provisions” heading, the Treasury Department and the IRS request comments regarding the alternative rule also described under the “Explanation of Provisions” heading or any other alternative. With respect to the alternative rule described in this preamble, comments are specifically requested regarding whether satisfaction of the alternative rule described in this preamble should be required on an individual-by-individual basis or on an aggregate basis (comparing the aggregate suspension of benefits that are directly attributable to service with a subclause III employer to what the aggregate

<sup>4</sup> The regulations interpreting this provision provide: “If the plan has sufficient assets to pay for all benefits in a priority category, the remaining assets shall then be allocated to the next lower priority category. This process shall be repeated until all benefits in priority categories 1 through 6 have been provided or until all available plan assets have been allocated.” See 29 CFR 4044.10(d).

<sup>5</sup> See footnotes 2 and 3 and accompanying text.

<sup>6</sup> That is, the phrase “to the maximum extent permissible” appears in subclause (I) but not in subclause (II).

would have been if, holding constant the benefit formula, work history, and all other relevant factors used to determine benefits, those benefits were attributable to service with any other employer).

All comments will be available for public inspection and copying at [www.regulations.gov](http://www.regulations.gov) or upon request. **Please Note:** All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

A public hearing on these proposed regulations has been scheduled for March 22, 2016 beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by March 15, 2016, and an outline of topics to be discussed and the amount of time to be devoted to each topic by March 15, 2016. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

#### Contact Information

For general questions regarding these regulations, please contact the Department of the Treasury MPRA guidance information line at (202) 622-1559 (not a toll-free number). For information regarding a specific application for a suspension of benefits, please contact the Treasury Department at (202) 622-1534 (not a toll-free number).

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 1.432(e)(9)–1 is added to read as follows:

**§ 1.432(e)(9)–1 Benefit suspensions for multiemployer plans in critical and declining status.**

(a) through (c) [Reserved]

(d) *Limitations on suspension.* (1) through (7) [Reserved]

(8) *Additional rules for plans*

*described in section 432(e)(9)(D)(vii)—*  
(i) *In general.* In the case of a plan that includes the benefits described in paragraph (d)(8)(i)(C) of this section, any suspension of benefits under this section shall—

(A) First, be applied to the maximum extent permissible to benefits attributable to a participant's service for an employer that withdrew from the plan and failed to pay (or is delinquent with respect to paying) the full amount of its withdrawal liability under section 4201(b)(1) of ERISA or an agreement with the plan;

(B) Second, except as provided by paragraph (d)(8)(i)(C) of this section, be applied to all other benefits that may be suspended under this section; and

(C) Third, be applied to benefits under a plan that are directly attributable to a participant's service with any employer that has, prior to December 16, 2014—

(1) Withdrawn from the plan in a complete withdrawal under section 4203 of ERISA and paid the full amount of the employer's withdrawal liability under section 4201(b)(1) of ERISA or an agreement with the plan, and

(2) Pursuant to a collective bargaining agreement, assumed liability for providing benefits to participants and beneficiaries of the plan under a separate, single-employer plan sponsored by the employer, in an amount equal to any amount of benefits for such participants and beneficiaries reduced as a result of the financial status of the plan.

(ii) *Application of suspensions to benefits that are directly attributable to a participant's service with certain employers—*(A) *Greater reduction in certain benefits not permitted.* A suspension of benefits under this section must not be applied to provide for a greater reduction in benefits

described in paragraph (d)(8)(i)(C) of this section than the reduction that is applied to benefits described in paragraph (d)(8)(i)(B) of this section. This requirement is satisfied if no participant's benefits that are directly attributable to service with an employer described in paragraph (d)(8)(i)(C) of this section are reduced more than that participant's benefits would have been reduced if, holding the benefit formula, work history, and all relevant factors used to compute benefits constant, those benefits were attributable to service with an employer that is not described in paragraph (d)(8)(i)(C) of this section.

(B) *Application of limitation to benefits of participants with respect to which the employer has not assumed liability.* Benefits under a plan that are directly attributable to a participant's service with an employer described in paragraph (d)(8)(i)(C) of this section include all such benefits without regard to whether the employer has assumed liability for providing benefits to the participant that were reduced as a result of the financial status of the plan as described in paragraph (d)(8)(i)(C)(2) of this section. Thus, all benefits under a plan that are directly attributable to a participant's service with an employer described in paragraph (d)(8)(i)(C) of this section are subject to the limitation in paragraph (d)(8)(ii)(A) of this section, even if the employer has not, pursuant to a collective bargaining agreement that satisfies the requirements of paragraph (d)(8)(i)(C)(2) of this section, assumed liability for providing those benefits to participants and beneficiaries of the plan.

**John Dalrymple,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2016-02772 Filed 2-9-16; 4:15 pm]

**BILLING CODE 4830-01-P**

#### DEPARTMENT OF HOMELAND SECURITY

#### Coast Guard

#### 33 CFR Part 100

[Docket Number USCG-2016-0022]

RIN 1625-AA08

#### Safety Zone; Cooper River Bridge Run, Cooper River, and Town Creek Reaches, Charleston, SC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish a safety zone on the waters of

Cooper River and Town Creek Reaches in Charleston, South Carolina during the Cooper River Bridge Run on April 2, 2016 from 7:30 a.m. to 10:30 a.m. The Cooper River Bridge Run is a 10-K run across the Arthur Ravenel Bridge. The safety zone is necessary for the safety of the runners and the general public during this event. This proposed rulemaking would prohibit persons and vessels from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port Charleston or a designated representative.

**DATES:** Comments and related material must be received by the Coast Guard on or before February 26, 2016.

**ADDRESSES:** You may submit comments identified by docket number USCG–2016–0022 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the

**SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email Lieutenant John Downing, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843) 740–3184, email [John.Z.Downing@uscg.mil](mailto:John.Z.Downing@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR Code of Federal Regulations  
 DHS Department of Homeland Security  
 E.O. Executive order  
 FR Federal Register  
 NPRM Notice of proposed rulemaking  
 Pub. L. Public Law  
 § Section  
 U.S.C. United States Code  
 COTP Captain of the Port

**II. Background, Purpose, and Legal Basis**

The legal basis for this proposed rule is the Coast Guard’s authority to establish regulated safety zones and other limited access areas: 33 U.S.C. 1231; 50 U.S.C. 191, 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; and Department of Homeland Security Delegation No. 0170.

The purpose of the rule is to ensure the safety of the runners, and the general public during the scheduled event.

**III. Discussion of Proposed Rule**

The Coast Guard proposes to establish a safety zone on the waters of the Cooper River and Town Creek Reaches in Charleston, South Carolina during the Cooper River Bridge Run. The race is

scheduled to take place from 7:30 a.m. to 10:30 a.m. April 2, 2016. Approximately 40,000 runners are anticipated to participate in the race. Persons and vessels desiring to enter, transit through, anchor in, or remain within the proposed safety zone may contact the Captain of the Port Charleston by telephone at (843) 740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the proposed safety zone is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Charleston or a designated representative. The Coast Guard will provide notice of the safety zone by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

**IV. Regulatory Analyses**

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

*A. Regulatory Planning and Review*

E.O.s 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This NPRM has not been designated a “significant regulatory action,” under E.O. 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget. This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The economic impact of this rule is not significant for the following reasons: (1) The safety zone will only be enforced for a total of three hours; (2) although persons and vessels may not enter, transit through, anchor in, or remain within the safety zone without

authorization from the Captain of the Port Charleston or a designated representative, they may operate in the surrounding area during the enforcement period; and (3) the Coast Guard will provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

*B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980, (5 U.S.C. 601–612), as amended requires Federal agencies to consider the potential impact of regulations on “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We have considered the impact of this proposed rule on small entities. This rule may affect the following entities, some of which may be small entities: the owner or operators of vessels intending to enter, transit through, anchor in, or remain within the regulated area during the enforcement period. For the reasons discussed in Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities.

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

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

*C. Collection of Information*

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

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under E.O. 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this proposed rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

#### E. Unfunded Mandates Reform Act

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

#### F. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves safety zone prohibiting vessel traffic from a limited area surrounding the Cooper River Bridge on the waters of the Cooper River and Town Creek Reaches for a 3 hour period. This rule is categorically excluded from further

review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

#### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

#### V. Public Participation and Request for Comments

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

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

#### List of Subjects in 33 CFR Part 165

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

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

#### PART 165—SAFETY OF LIFE ON NAVIGABLE WATERS

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

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191, 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; and Department of Homeland Security Delegation No. 0170.

■ 2. Add a temporary § 165.35T07–0022 to read as follows:

#### § 165.35T07–0022 Safety Zone; Cooper River Bridge Run, Charleston SC.

(a) *Location.* All waters of the Cooper River, and Town Creek Reaches encompassed within the following points:

- (1) 32°48'32" N./079°56'08" W.,
- (2) 32°48'20" N./079°54'20" W.,
- (3) 32°47'20" N./079°54'29" W.,
- (4) 32°47'20" N./079°55'28" W.

(b) *Definition.* The term “designated representative” means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Charleston in the enforcement of the regulated areas.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Charleston or a designated representative.

(2) Persons and vessels desiring to enter, transit through, or remain within the regulated area may contact the Captain of the Port Charleston by telephone at 843–740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, or remain within the regulated area is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Charleston or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Period.* This proposed rule will be enforced from 7:30 a.m. until 10:30 a.m. on April 2, 2016.

Dated: January 29, 2016.

**G.L. Tomasulo,**

*Captain, U.S. Coast Guard, Captain of the Port Charleston.*

[FR Doc. 2016-02621 Filed 2-10-16; 8:45 am]

**BILLING CODE 9110-04-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2016-0028; FRL-9942-02-Region 9]

#### Approval of Air Plan Revisions; Arizona; Rescissions and Corrections

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the Arizona State Implementation Plan (SIP) under the Clean Air Act. These revisions include rescissions of certain statutory provisions, administrative and prohibitory rules, and test methods. The EPA is also proposing to correct certain errors in previous actions on prior revisions to the Arizona SIP and to make certain other corrections. The intended effect is to rescind unnecessary provisions from the applicable SIP and to correct certain errors in previous SIP actions.

**DATES:** Comments must be received by March 14, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2016-0028 at <http://www.regulations.gov>, or via email to Andrew Steckel, Rules Office Chief, at [Steckel.Andrew@epa.gov](mailto:Steckel.Andrew@epa.gov). For comments submitted at [Regulations.gov](http://Regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](http://Regulations.gov). For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For

additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:**

Andrew Steckel, EPA Region IX, (415) 947-4115, email: [steckel.andrew@epa.gov](mailto:steckel.andrew@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the “Rules and Regulations” section of this **Federal Register**, the EPA is approving the rescissions from the Arizona SIP, and correcting the errors from previous Arizona SIP rulemakings, in a direct final action without prior proposal because we believe the SIP revision and error corrections are not controversial. The rescissions involve statutory and regulatory provisions related to declarations of policy and legal authority, jurisdiction over Indian lands, prohibitory rules, and test methods and performance test specifications. The error corrections relate to an inadvertent listing of a rule on which the EPA did not take action in the Arizona SIP, a typographical error, and erroneous approvals of non-SIP submittals as part of the SIP.

A detailed rationale for the approval of the rescissions and the correction of the errors is set forth in the direct final rule. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in a subsequent final rule based on this proposed rule. Please note that if the EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, the EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, see please see the direct final action.

Dated: January 25, 2016.

**Jared Blumenfeld,**

*Regional Administrator, Region IX.*

[FR Doc. 2016-02724 Filed 2-10-16; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2015-0155; FRL-9942-19-Region 4]

#### Approval and Promulgation of Implementation Plans; Mississippi; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve, in part, and disapprove in part, portions of the State Implementation Plan (SIP) submission, submitted by the State of Mississippi, through the Mississippi Department of Environmental Quality (MDEQ), on June 20, 2013, to demonstrate that the State meets the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour sulfur dioxide (SO<sub>2</sub>) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. MDEQ certified that the Mississippi SIP contains provisions that ensure the 2010 1-hour SO<sub>2</sub> NAAQS is implemented, enforced, and maintained in Mississippi. With the exception of the state board majority requirements respecting significant portion of income, for which EPA is proposing to disapprove, EPA is proposing to determine that portions of Mississippi’s infrastructure submission, submitted to EPA on June 20, 2013, satisfy certain required infrastructure elements for the 2010 1-hour SO<sub>2</sub> NAAQS.

**DATES:** Written comments must be received on or before March 14, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2015-0155, by one of the following methods:

1. [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
2. *Email:* [R4-ARMS@epa.gov](mailto:R4-ARMS@epa.gov).
3. *Fax:* (404) 562-9019.
4. *Mail:* “EPA-R04-OAR-2015-0155,” Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency,

Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No. EPA–R04–OAR–2015–0155. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through

[www.regulations.gov](http://www.regulations.gov) or email, information that you consider to be CBI or otherwise protected. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means 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 EPA without going through [www.regulations.gov](http://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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. 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 either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person 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 Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached via telephone at (404) 562–9031 or via electronic mail at [notarianni.michele@epa.gov](mailto:notarianni.michele@epa.gov).

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### I. Background and Overview

On June 22, 2010 (75 FR 35520), EPA promulgated a revised primary SO<sub>2</sub> NAAQS to an hourly standard of 75 parts per billion (ppb) based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour SO<sub>2</sub> NAAQS to EPA no later than June 22, 2013.<sup>1</sup>

<sup>1</sup> In these infrastructure SIP submissions states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a

Today's action is proposing to approve Mississippi's infrastructure SIP submission for the applicable requirements of the 2010 1-hour SO<sub>2</sub> NAAQS, with the exception of the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4) and the state board majority requirements respecting significant portion of income of section 110(a)(2)(E)(ii). With respect to the interstate transport requirements of section 110(a)(2)(D)(i)(I) and (II), EPA is not proposing any action today regarding these requirements. With respect to Mississippi's infrastructure SIP submission related to the majority requirements respecting significant portion of income of 110(a)(2)(E)(ii), EPA is proposing to disapprove this portion of Mississippi's infrastructure SIP submission because Mississippi does not preclude at least a majority of the members of its boards from receiving a significant portion of their income from persons subject to permits or enforcement orders issued by such boards. For the aspects of Mississippi's submittal proposed for approval today, EPA notes that the Agency is not approving any specific rule, but rather proposing that Mississippi's already approved SIP meets certain CAA requirements.

### II. What elements are required under sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending

combination of state regulations and statutes, some of which have been incorporated into the federally-approved SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2). Throughout this rulemaking, unless otherwise indicated, the term "Air Pollution Control (APC)" or "Section APC–S–X" indicates that the cited regulation has been approved into Mississippi's federally-approved SIP. The term "Mississippi Code" indicates cited Mississippi State statutes, which are not a part of the SIP unless otherwise indicated.

upon what provisions the state's existing SIP already contains.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for the "infrastructure" SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are summarized below and in EPA's September 13, 2013, memorandum entitled "Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2)."<sup>2</sup>

- 110(a)(2)(A): Emission Limits and Other Control Measures
- 110(a)(2)(B): Ambient Air Quality Monitoring/Data System
- 110(a)(2)(C): Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources<sup>3</sup>
- 110(a)(2)(D)(i)(I) and (II): Interstate Pollution Transport
- 110(a)(2)(D)(ii): Interstate Pollution Abatement and International Air Pollution
- 110(a)(2)(E): Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies
- 110(a)(2)(F): Stationary Source Monitoring and Reporting
- 110(a)(2)(G): Emergency Powers
- 110(a)(2)(H): SIP Revisions
- 110(a)(2)(I): Plan Revisions for Nonattainment Areas<sup>4</sup>
- 110(a)(2)(J): Consultation with Government Officials, Public Notification, and Prevention of

<sup>2</sup> Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

<sup>3</sup> This rulemaking only addresses requirements for this element as they relate to attainment areas.

<sup>4</sup> As mentioned above, this element is not relevant to today's proposed rulemaking.

Significant Deterioration (PSD) and Visibility Protection

- 110(a)(2)(K): Air Quality Modeling and Submission of Modeling Data
- 110(a)(2)(L): Permitting fees
- 110(a)(2)(M): Consultation and Participation by Affected Local Entities

### III. What is EPA's approach to the review of infrastructure SIP submissions?

EPA is acting upon the SIP submission from Mississippi that addresses the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 1-hour SO<sub>2</sub> NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)," and these SIP submissions are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA's taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as "infrastructure SIP" submissions. Although the term "infrastructure SIP" does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as "nonattainment SIP" or "attainment plan SIP" submissions to address the nonattainment planning requirements of part D of title I of the CAA, "regional haze SIP" submissions required by EPA rule to address the visibility protection requirements of CAA section 169A, and nonattainment new source review (NNSR) permit program submissions to address the permit requirements of CAA, title I, part D.

Section 110(a)(1) addresses the timing and general requirements for infrastructure SIP submissions, and section 110(a)(2) provides more details concerning the required contents of these submissions. The list of required elements provided in section 110(a)(2)

contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive program provisions, and some of which pertain to requirements for both authority and substantive program provisions.<sup>5</sup> EPA therefore believes that while the timing requirement in section 110(a)(1) is unambiguous, some of the other statutory provisions are ambiguous. In particular, EPA believes that the list of required elements for infrastructure SIP submissions provided in section 110(a)(2) contains ambiguities concerning what is required for inclusion in an infrastructure SIP submission.

The following examples of ambiguities illustrate the need for EPA to interpret some section 110(a)(1) and section 110(a)(2) requirements with respect to infrastructure SIP submissions for a given new or revised NAAQS. One example of ambiguity is that section 110(a)(2) requires that "each" SIP submission must meet the list of requirements therein, while EPA has long noted that this literal reading of the statute is internally inconsistent and would create a conflict with the nonattainment provisions in part D of title I of the Act, which specifically address nonattainment SIP requirements.<sup>6</sup> Section 110(a)(2)(I) pertains to nonattainment SIP requirements and part D addresses when attainment plan SIP submissions to address nonattainment area requirements are due. For example, section 172(b) requires EPA to establish a schedule for submission of such plans for certain pollutants when the Administrator promulgates the designation of an area as nonattainment, and section 107(d)(1)(B) allows up to two years, or in some cases three years, for such designations to be promulgated.<sup>7</sup> This ambiguity illustrates

<sup>5</sup> For example: Section 110(a)(2)(E)(i) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a SIP-approved program to address certain sources as required by part C of title I of the CAA; and section 110(a)(2)(G) provides that states must have legal authority to address emergencies as well as contingency plans that are triggered in the event of such emergencies.

<sup>6</sup> See, e.g., "Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call; Final Rule," 70 FR 25162, at 25163-65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

<sup>7</sup> EPA notes that this ambiguity within section 110(a)(2) is heightened by the fact that various subparts of part D set specific dates for submission of certain types of SIP submissions in designated nonattainment areas for various pollutants. Note,

that rather than apply all the stated requirements of section 110(a)(2) in a strict literal sense, EPA must determine which provisions of section 110(a)(2) are applicable for a particular infrastructure SIP submission.

Another example of ambiguity within sections 110(a)(1) and 110(a)(2) with respect to infrastructure SIPs pertains to whether states must meet all of the infrastructure SIP requirements in a single SIP submission, and whether EPA must act upon such SIP submission in a single action. Although section 110(a)(1) directs states to submit “a plan” to meet these requirements, EPA interprets the CAA to allow states to make multiple SIP submissions separately addressing infrastructure SIP elements for the same NAAQS. If states elect to make such multiple SIP submissions to meet the infrastructure SIP requirements, EPA can elect to act on such submissions either individually or in a larger combined action.<sup>8</sup> Similarly, EPA interprets the CAA to allow it to take action on the individual parts of one larger, comprehensive infrastructure SIP submission for a given NAAQS without concurrent action on the entire submission. For example, EPA has sometimes elected to act at different times on various elements and sub-elements of the same infrastructure SIP submission.<sup>9</sup>

Ambiguities within sections 110(a)(1) and 110(a)(2) may also arise with respect to infrastructure SIP submission requirements for different NAAQS. Thus, EPA notes that not every element

*e.g.*, that section 182(a)(1) provides specific dates for submission of emissions inventories for the ozone NAAQS. Some of these specific dates are necessarily later than three years after promulgation of the new or revised NAAQS.

<sup>8</sup> See, *e.g.*, “Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting,” 78 FR 4339 (January 22, 2013) (EPA’s final action approving the structural PSD elements of the New Mexico SIP submitted by the State separately to meet the requirements of EPA’s 2008 PM<sub>2.5</sub> NSR rule), and “Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 PM<sub>2.5</sub> NAAQS,” (78 FR 4337) (January 22, 2013) (EPA’s final action on the infrastructure SIP for the 2006 PM<sub>2.5</sub> NAAQS).

<sup>9</sup> On December 14, 2007, the State of Tennessee, through the Tennessee Department of Environment and Conservation, made a SIP revision to EPA demonstrating that the State meets the requirements of sections 110(a)(1) and (2). EPA proposed action for infrastructure SIP elements (C) and (J) on January 23, 2012 (77 FR 3213) and took final action on March 14, 2012 (77 FR 14976). On April 16, 2012 (77 FR 22533) and July 23, 2012 (77 FR 42997), EPA took separate proposed and final actions on all other section 110(a)(2) infrastructure SIP elements of Tennessee’s December 14, 2007 submittal.

of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS. The states’ attendant infrastructure SIP submissions for each NAAQS therefore could be different. For example, the monitoring requirements that a state might need to meet in its infrastructure SIP submission for purposes of section 110(a)(2)(B) could be very different for different pollutants because the content and scope of a state’s infrastructure SIP submission to meet this element might be very different for an entirely new NAAQS than for a minor revision to an existing NAAQS.<sup>10</sup>

EPA notes that interpretation of section 110(a)(2) is also necessary when EPA reviews other types of SIP submissions required under the CAA. Therefore, as with infrastructure SIP submissions, EPA also has to identify and interpret the relevant elements of section 110(a)(2) that logically apply to these other types of SIP submissions. For example, section 172(c)(7) requires that attainment plan SIP submissions required by part D have to meet the “applicable requirements” of section 110(a)(2). Thus, for example, attainment plan SIP submissions must meet the requirements of section 110(a)(2)(A) regarding enforceable emission limits and control measures and section 110(a)(2)(E)(i) regarding air agency resources and authority. By contrast, it is clear that attainment plan SIP submissions required by part D would not need to meet the portion of section 110(a)(2)(C) that pertains to the PSD program required in part C of title I of the CAA, because PSD does not apply to a pollutant for which an area is designated nonattainment and thus subject to part D planning requirements. As this example illustrates, each type of SIP submission may implicate some elements of section 110(a)(2) but not others.

Given the potential for ambiguity in some of the statutory language of section 110(a)(1) and section 110(a)(2), EPA believes that it is appropriate to interpret the ambiguous portions of section 110(a)(1) and section 110(a)(2) in the context of acting on a particular SIP submission. In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the NAAQS in question or the history of SIP development for the relevant pollutant, would meet each of the requirements, or meet each of them in the same way.

<sup>10</sup> For example, implementation of the 1997 PM<sub>2.5</sub> NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Therefore, EPA has adopted an approach under which it reviews infrastructure SIP submissions against the list of elements in section 110(a)(2), but only to the extent each element applies for that particular NAAQS.

Historically, EPA has elected to use guidance documents to make recommendations to states for infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements.<sup>11</sup> EPA most recently issued guidance for infrastructure SIPs on September 13, 2013 (2013 Guidance).<sup>12</sup> EPA developed this document to provide states with up-to-date guidance for infrastructure SIPs for any new or revised NAAQS. Within this guidance, EPA describes the duty of states to make infrastructure SIP submissions to meet basic structural SIP requirements within three years of promulgation of a new or revised NAAQS. EPA also made recommendations about many specific subsections of section 110(a)(2) that are relevant in the context of infrastructure SIP submissions.<sup>13</sup> The guidance also discusses the substantively important issues that are germane to certain subsections of section 110(a)(2). Significantly, EPA interprets sections 110(a)(1) and 110(a)(2) such that infrastructure SIP submissions need to address certain issues and need not address others. Accordingly, EPA reviews each infrastructure SIP submission for compliance with the

<sup>11</sup> EPA notes, however, that nothing in the CAA requires EPA to provide guidance or to promulgate regulations for infrastructure SIP submissions. The CAA directly applies to states and requires the submission of infrastructure SIP submissions, regardless of whether or not EPA provides guidance or regulations pertaining to such submissions. EPA elects to issue such guidance in order to assist states, as appropriate.

<sup>12</sup> “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

<sup>13</sup> EPA’s September 13, 2013, guidance did not make recommendations with respect to infrastructure SIP submissions to address section 110(a)(2)(D)(i)(I). EPA issued the guidance shortly after the U.S. Supreme Court agreed to review the D.C. Circuit decision in *EME Homer City*, 696 F.3d7 (D.C. Cir. 2012) which had interpreted the requirements of section 110(a)(2)(D)(i)(I). In light of the uncertainty created by ongoing litigation, EPA elected not to provide additional guidance on the requirements of section 110(a)(2)(D)(i)(I) at that time. As the guidance is neither binding nor required by statute, whether EPA elects to provide guidance on a particular section has no impact on a state’s CAA obligations.

applicable statutory provisions of section 110(a)(2), as appropriate.

As an example, section 110(a)(2)(E)(ii) is a required element of section 110(a)(2) for infrastructure SIP submissions. Under this element, a state must meet the substantive requirements of section 128, which pertain to state boards that approve permits or enforcement orders and heads of executive agencies with similar powers. Thus, EPA reviews infrastructure SIP submissions to ensure that the state's implementation plan appropriately addresses the requirements of section 110(a)(2)(E)(ii) and section 128. The 2013 Guidance explains EPA's interpretation that there may be a variety of ways by which states can appropriately address these substantive statutory requirements, depending on the structure of an individual state's permitting or enforcement program (e.g., whether permits and enforcement orders are approved by a multi-member board or by a head of an executive agency). However they are addressed by the state, the substantive requirements of section 128 are necessarily included in EPA's evaluation of infrastructure SIP submissions because section 110(a)(2)(E)(ii) explicitly requires that the state satisfy the provisions of section 128.

As another example, EPA's review of infrastructure SIP submissions with respect to the PSD program requirements in sections 110(a)(2)(C), (D)(i)(II), and (F) focuses upon the structural PSD program requirements contained in part C and EPA's PSD regulations. Structural PSD program requirements include provisions necessary for the PSD program to address all regulated sources and new source review (NSR) pollutants, including greenhouse gases (GHGs). By contrast, structural PSD program requirements do not include provisions that are not required under EPA's regulations at 40 CFR 51.166 but are merely available as an option for the state, such as the option to provide grandfathering of complete permit applications with respect to the 2012 fine particulate matter (PM<sub>2.5</sub>) NAAQS. Accordingly, the latter optional provisions are types of provisions EPA considers irrelevant in the context of an infrastructure SIP action.

For other section 110(a)(2) elements, however, EPA's review of a state's infrastructure SIP submission focuses on assuring that the state's implementation plan meets basic structural requirements. For example, section 110(a)(2)(C) includes, among other things, the requirement that states have a program to regulate minor new

sources. Thus, EPA evaluates whether the state has an EPA-approved minor NSR program and whether the program addresses the pollutants relevant to that NAAQS. In the context of acting on an infrastructure SIP submission, however, EPA does not think it is necessary to conduct a review of each and every provision of a state's existing minor source program (i.e., already in the existing SIP) for compliance with the requirements of the CAA and EPA's regulations that pertain to such programs.

With respect to certain other issues, EPA does not believe that an action on a state's infrastructure SIP submission is necessarily the appropriate type of action in which to address possible deficiencies in a state's existing SIP. These issues include: (i) Existing provisions related to excess emissions from sources during periods of startup, shutdown, or malfunction that may be contrary to the CAA and EPA's policies addressing such excess emissions ("SSM"); (ii) existing provisions related to "director's variance" or "director's discretion" that may be contrary to the CAA because they purport to allow revisions to SIP-approved emissions limits while limiting public process or not requiring further approval by EPA; and (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) ("NSR Reform"). Thus, EPA believes it may approve an infrastructure SIP submission without scrutinizing the totality of the existing SIP for such potentially deficient provisions and may approve the submission even if it is aware of such existing provisions.<sup>14</sup> It is important to note that EPA's approval of a state's infrastructure SIP submission should not be construed as explicit or implicit re-approval of any existing potentially deficient provisions that relate to the three specific issues just described.

EPA's approach to review of infrastructure SIP submissions is to identify the CAA requirements that are logically applicable to that submission. EPA believes that this approach to the review of a particular infrastructure SIP submission is appropriate, because it would not be reasonable to read the

<sup>14</sup> By contrast, EPA notes that if a state were to include a new provision in an infrastructure SIP submission that contained a legal deficiency, such as a new exemption for excess emissions during SSM events, then EPA would need to evaluate that provision for compliance against the rubric of applicable CAA requirements in the context of the action on the infrastructure SIP.

general requirements of section 110(a)(1) and the list of elements in 110(a)(2) as requiring review of each and every provision of a state's existing SIP against all requirements in the CAA and EPA regulations merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts. These provisions, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA evaluates adequacy of the infrastructure SIP submission. EPA believes that a better approach is for states and EPA to focus attention on those elements of section 110(a)(2) of the CAA most likely to warrant a specific SIP revision due to the promulgation of a new or revised NAAQS or other factors.

For example, EPA's 2013 Guidance gives simpler recommendations with respect to carbon monoxide than other NAAQS pollutants to meet the visibility requirements of section 110(a)(2)(D)(i)(II), because carbon monoxide does not affect visibility. As a result, an infrastructure SIP submission for any future new or revised NAAQS for carbon monoxide need only state this fact in order to address the visibility prong of section 110(a)(2)(D)(i)(II). Finally, EPA believes that its approach with respect to infrastructure SIP requirements is based on a reasonable reading of sections 110(a)(1) and 110(a)(2) because the CAA provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow EPA to take appropriately tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a "SIP call" whenever the Agency determines that a state's implementation plan is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or to otherwise comply with the CAA.<sup>15</sup> Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past

<sup>15</sup> For example, EPA issued a SIP call to Utah to address specific existing SIP deficiencies related to the treatment of excess emissions during SSM events. See "Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revisions," 74 FR 21639 (April 18, 2011).

approvals of SIP submissions.<sup>16</sup> Significantly, EPA's determination that an action on a state's infrastructure SIP submission is not the appropriate time and place to address all potential existing SIP deficiencies does not preclude EPA's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action to correct those deficiencies at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on an infrastructure SIP submission, EPA believes that section 110(a)(2)(A) may be among the statutory bases that EPA relies upon in the course of addressing such deficiency in a subsequent action.<sup>17</sup>

#### IV. What is EPA's analysis of how Mississippi addressed the elements of the sections 110(a)(1) and (2) "Infrastructure" provisions?

Mississippi's June 20, 2013, infrastructure submission addresses the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): *Emission Limits and Other Control Measures*: Section 110(a)(2)(A) requires that each implementation plan include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements. Mississippi's infrastructure SIP submission provides an overview of the provisions of the Mississippi Air Pollution Control (APC) regulations relevant to air quality control. *Mississippi Code Title 49*,

Section 49-17-17(h) (Appendix A-9),<sup>18</sup> authorizes MDEQ to adopt, modify, or repeal ambient air quality standards and emissions standards for the control of air pollution, including those necessary to obtain EPA approval under section 110 of the CAA. Sections APC-S-1, *Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants*, and APC-S-3, *Regulations for the Prevention of Air Pollution Emergency Episodes*, establish enforceable emissions limitations and other control measures, means or techniques, for activities that contribute to SO<sub>2</sub> concentrations in the ambient air and provide authority for MDEQ to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA. EPA has made the preliminary determination that the provisions contained in these regulations, and Mississippi's statute are adequate for enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance for the 2010 1-hour SO<sub>2</sub> NAAQS in the State.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 20, 1999), and the Agency is addressing such state regulations in a separate action.<sup>19</sup>

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which

is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) *Ambient Air Quality Monitoring/Data System*: Section 110(a)(2)(B) requires SIPs to provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator. Section APC-S-1, *Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants*, and *Mississippi Code Title 49*, Section 49-17-17(g), provides MDEQ with the authority to collect and disseminate information relating to air quality and pollution and the prevention, control, supervision, and abatement thereof. Annually, States develop and submit to EPA for approval statewide ambient monitoring network plans consistent with the requirements of 40 CFR parts 50, 53, and 58. The annual network plan involves an evaluation of any proposed changes to the monitoring network, includes the annual ambient monitoring network design plan and a certified evaluation of the agency's ambient monitors and auxiliary support equipment.<sup>20</sup> On June 9, 2015, Mississippi submitted its monitoring network plan to EPA, which was approved by EPA on October 6, 2015. Mississippi's approved monitoring network plan can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2015-0155. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the ambient air quality monitoring and data system requirements related to the 2010 1-hour SO<sub>2</sub> NAAQS.

3. 110(a)(2)(C) *Programs for Enforcement of Control Measures and for Construction or Modification of Stationary Sources*: This element consists of three sub-elements: Enforcement, state-wide regulation of new and modified minor sources and minor modifications of major sources, and preconstruction permitting of major sources and major modifications in areas designated attainment or unclassifiable for the subject NAAQS as required by CAA title I part C (*i.e.*, the major source PSD program). To meet the requirements for this element, Mississippi cited APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*

<sup>16</sup> EPA has used this authority to correct errors in past actions on SIP submissions related to PSD programs. See "Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule," 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA section 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, *e.g.*, 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

<sup>17</sup> See, *e.g.*, EPA's disapproval of a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, *e.g.*, 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

<sup>18</sup> *Mississippi Code Title 49* is referenced in the State's infrastructure SIP submissions as "Appendix A-9." As discussed above, unless otherwise indicated herein, portions of the Mississippi Code referenced in this proposal are not incorporated into the SIP.

<sup>19</sup> On June 12, 2015, EPA published a final action entitled, "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction." See 80 FR 33840.

<sup>20</sup> On occasion, proposed changes to the monitoring network are evaluated outside of the network plan approval process in accordance with 40 CFR part 58.

and APC-S-2, *Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*, Section V. These regulations enable MDEQ to regulate sources contributing to the 2010 1-hour SO<sub>2</sub> NAAQS through enforceable permits.

**Enforcement:** MDEQ's APC-S-2, *Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*, Section VI provides for the enforcement of SO<sub>2</sub> emission limits and control measures through construction permitting for new or modified stationary sources. Also note that under *Mississippi Code Title 49, Chapter 17*, MDEQ has enforcement authority to seek penalties and injunctive relief for violations of emission limits and other control measures and violations of permits.

**PSD Permitting for Major Sources:** EPA interprets the PSD sub-element to require that a state's infrastructure SIP submission for a particular NAAQS demonstrate that the state has a complete PSD permitting program in place covering the structural PSD requirements for all regulated NSR pollutants. A state's PSD permitting program is complete for this sub-element (and prong 3 of D(i) and J related to PSD) if EPA has already approved or is simultaneously approving the state's SIP with respect to all structural PSD requirements that are due under the EPA regulations or the CAA on or before the date of the EPA's proposed action on the infrastructure SIP submission.

For the 2010 1-hour SO<sub>2</sub> NAAQS, Mississippi's authority to regulate new and modified sources to assist in the protection of air quality in nonattainment, attainment or unclassifiable areas in Mississippi is established in Regulations APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, and APC-S-2, *Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*. These SIP-approved regulations pertain to the construction of any new major stationary source or any project at an existing major stationary source in an area designated as nonattainment, attainment or unclassifiable. Mississippi's infrastructure SIP submission demonstrates that new major sources and major modifications in areas of the State designated attainment or unclassifiable for the specified NAAQS are subject to a federally-approved PSD permitting program meeting all the current structural requirements of part C of title I of the CAA to satisfy the infrastructure

SIP PSD elements.<sup>21</sup> As such, EPA has made the preliminary determination that Mississippi's SIP and practices are adequate and comply with the PSD elements of the 2010 1-hour SO<sub>2</sub> NAAQS.

**Regulation of minor sources and modifications:** Section 110(a)(2)(C) also requires the SIP to include provisions that govern the minor source preconstruction program that regulates emissions of the 2010 1-hour SO<sub>2</sub> NAAQS. Mississippi has a SIP-approved minor NSR permitting program at APC-S-2, Section I. D—*Permitting Requirements*, that regulates the preconstruction permitting of modifications and construction of minor stationary sources.

EPA has made the preliminary determination that Mississippi's SIP is adequate for enforcement of control measures, PSD permitting for major sources and regulation of minor sources and modifications related to the 2010 1-hour SO<sub>2</sub> NAAQS.

4. 110(a)(2)(D)(i)(I) and (II): *Interstate Pollution Transport:* Section 110(a)(2)(D)(i) has two components: 110(a)(2)(D)(i)(I) and 110(a)(2)(D)(i)(II). Each of these components has two subparts resulting in four distinct components, commonly referred to as "prongs," that must be addressed in infrastructure SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state ("prong 1"), and interfering with maintenance of the NAAQS in another state ("prong 2"). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state from interfering with measures required to prevent significant deterioration of air quality in another state ("prong 3"), or to protect visibility in another state ("prong 4").

110(a)(2)(D)(i)(I)—prongs 1 and 2: EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states of section 110(a)(2)(D)(i)(I) (prongs 1 and 2) because Mississippi's 2010 1-hour SO<sub>2</sub> NAAQS infrastructure submission did not address prongs 1 and 2.

<sup>21</sup> For more information on the structural PSD program requirements that are relevant to EPA's review infrastructure SIP in connection with the current PSD-related infrastructure requirements, see the Technical Support Document in the docket for today's rulemaking.

110(a)(2)(D)(i)(II)—prong 3: With regard to section 110(a)(2)(D)(i)(II), the PSD element, referred to as prong 3, this requirement may be met by a state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to: A PSD program meeting all the current structural requirements of part C of title I of the CAA, or (if the state contains a nonattainment area for the relevant pollutant) a NNSR program that implements the NAAQS for a relevant pollutant. As discussed in more detail above under section 110(a)(2)(C), Mississippi's SIP contains provisions for the State's PSD program that reflects the required structural PSD requirements to satisfy the requirement of prong 3. EPA has made the preliminary determination that Mississippi's SIP is adequate for interstate transport for PSD permitting of major sources and major modifications related to the 2010 1-hour SO<sub>2</sub> NAAQS for section 110(a)(2)(D)(i)(II) (prong 3).

110(a)(2)(D)(i)(II)—prong 4: EPA is not proposing any action in this rulemaking related to the interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states of section 110(a)(2)(D)(i)(II) (prong 4) and will consider these requirements in relation to Mississippi's 2010 1-hour SO<sub>2</sub> NAAQS infrastructure submission in a separate rulemaking.

5. 110(a)(2)(D)(ii): *Interstate Pollution Abatement and International Air Pollution:* Section 110(a)(2)(D)(ii) requires SIPs to include provisions ensuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. Section APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, provides how MDEQ will notify neighboring state and local agencies of potential impacts from new or modified sources consistent with the requirements of 40 CFR 51.166, which is adopted by reference into the Mississippi SIP. Additionally, Mississippi does not have any pending obligation under section 115 and 126 of the CAA. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for ensuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 2010 1-hour SO<sub>2</sub> NAAQS.

6. 110(a)(2)(E) *Adequate Resources and Authority, Conflict of Interest, and Oversight of Local Governments and Regional Agencies:* Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the

state will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the state comply with the requirements respecting state boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Mississippi's SIP as meeting the requirements of sections 110(a)(2)(E)(i) and (iii). EPA is proposing to approve, in part, and disapprove, in part, Mississippi's SIP respecting section 110(a)(2)(E)(ii). EPA's rationale for today's proposals respecting each section of 110(a)(2)(E) is described in turn below.

To satisfy the requirements of sections 110(a)(2)(E)(i) and (iii), Mississippi provides that MDEQ is responsible for promulgating rules and regulations for the NAAQS, emissions standards, general policies, a system of permits, fee schedules for the review of plans, and other planning needs as found in *Mississippi Code Title 49, Section 49-17-17(d)* and *Section 49-17-17(h)* (Appendix A-9). As evidence of the adequacy of MDEQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Mississippi on March 12, 2015, outlining 105 grant commitments and the current status of these commitments for fiscal year 2014. The letter EPA submitted to Mississippi can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2015-0155. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. There were no outstanding issues in relation to the SIP for fiscal year 2014, therefore, MDEQ's grants were finalized and closed out. In addition, the requirements of 110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under State law has been used to carry out the State's implementation plan and related issues. Mississippi's authority to implement provisions of the State's SIP is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Mississippi has adequate resources for implementation of the 2010 1-hour SO<sub>2</sub> NAAQS.

To meet the requirements of section 110(a)(2)(E)(ii), states must comply with the requirements respecting state boards pursuant to section 128 of the Act. Section 128 of the CAA requires that states include provisions in their SIP to address conflicts of interest for state boards or bodies that oversee CAA permits and enforcement orders and disclosure of conflict of interest requirements. Specifically, CAA section 128(a)(1) necessitates that each SIP shall require that at least a majority of any board or body which approves permits or enforcement orders shall be subject to the described public interest service and income restrictions therein. Subsection 128(a)(2) requires that the members of any board or body, or the head of an executive agency with similar power to approve permits or enforcement orders under the CAA, shall also be subject to conflict of interest disclosure requirements.

To meet its section 110(a)(2)(E)(ii) obligations for the 2010 1-hour SO<sub>2</sub> NAAQS, Mississippi's infrastructure SIP submission cites Article 4, Section 109 of the Mississippi Constitution and portions of Mississippi Code sections 25-4-25, -27, -29, -103, -105, and -109. These provisions were incorporated into the Mississippi SIP to meet CAA section 128 requirements in EPA's final action for the 1997 and 2006 PM<sub>2.5</sub> NAAQS infrastructure SIP. *See* 78 FR 20793.<sup>22</sup> In this same final action for the 1997 and 2006 PM<sub>2.5</sub> NAAQS infrastructure SIP (78 FR 20793), EPA disapproved Mississippi's October 11, 2012, submission as not satisfying the significant portion of income requirement of section 128(a)(1).

Based upon the review of the above cited laws and provisions, EPA is proposing to approve the section 110(a)(2)(E)(ii) portions of the infrastructure SIP submission as it relates to the public interest requirements of section 128(a)(1) and the conflict of interest disclosure provisions of section 128(a)(2) for the 2010 1-hour SO<sub>2</sub> NAAQS. EPA is proposing to disapprove the section 110(a)(2)(E)(ii) portion of the infrastructure SIP submission as it pertains to compliance with the significant portion of income requirement of section 128(a)(1) for the 2010 1-hour SO<sub>2</sub> NAAQS.<sup>23</sup>

<sup>22</sup> This final action pertained to Mississippi's October 11, 2012, infrastructure SIP submission and only addressed compliance with 110(a)(2)(E)(ii) respecting CAA section 128 requirements.

<sup>23</sup> EPA took similar action with respect to Mississippi's section 110(a)(2)(E)(ii) submission for the 1997 and 2006 PM<sub>2.5</sub>, 2008 Lead, and 2008 8-hour Ozone NAAQS.

With respect to the significant portion of income requirement of section 128(a)(1), the provisions included in the infrastructure SIP submission do not preclude at least a majority of the members of the Mississippi Boards<sup>24</sup> from receiving a significant portion of their income from persons subject to permits or enforcement orders issued by such Boards. While the submitted laws and provisions preclude members of the Mississippi Boards from certain types of income (e.g., contracts with State or political subdivisions thereof, or income obtained through the use of his or her public office or obtained to influence a decision of the Mississippi Boards), they do not preclude a majority of members of the Mississippi Boards from deriving any significant portion of their income from persons subject to permits or enforcement orders so long as that income is not derived from one of the proscribed methods described in the laws and provisions submitted by the State. To date, because a majority of board members may still derive a significant portion of income from persons subject to permits or enforcement orders issued by the Mississippi Boards, the Mississippi SIP does not meet the section 128(a)(1) majority requirements respecting significant portion of income, and as such, EPA is today proposing to disapprove the State's 110(a)(2)(E)(ii) submission as it relates only to this portion of section 128(a)(1).

Accordingly, EPA is proposing to approve the section 110(a)(2)(E)(ii) submission as it relates to the public interest requirements of section 128(a)(1) and the conflict of interest disclosure provisions of section 128(a)(2) and proposing to disapprove Mississippi's section 110(a)(2)(E)(ii) submission as it pertains to compliance with the significant portion of income requirement of section 128(a)(1) for the 2010 1-hour SO<sub>2</sub> NAAQS.

7. 110(a)(2)(F) *Stationary Source Monitoring and Reporting*: Section 110(a)(2)(F) requires SIPs to meet applicable requirements addressing: (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions related data from such sources, and (iii) correlation of such reports by the state agency with any

<sup>24</sup> The Mississippi Commission on Environmental Quality issues and supervises enforcement orders, and the Mississippi Department of Environmental Quality Permit Board has the authority to issue, modify, revoke or deny permits.

emission limitations or standards established pursuant to this section, which reports shall be available at reasonable times for public inspection. Section APC-S-2, *Permit Regulations for the Construction and/or Operation of Air Emissions Equipment*, establishes requirements for emissions compliance testing utilizing emissions sampling and analysis. It further describes how the State ensures the quality of its data through observing emissions and monitoring operations. MDEQ uses these data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with emission regulations and additional EPA requirements. *Mississippi Code 49*, Section 49-17-21 (Appendix A-9) provides MDEQ with the authority to require the maintenance of records related to the operation of air contaminant sources and any authorized representative of the Commission may examine and copy any such records or memoranda pertaining to the operation of such contaminant source. Section APC-S-2 lists requirements for compliance testing and reporting that is required to be included in any MDEQ air pollution permit and requires that copies of records relating to the operation of air contamination sources be submitted to the Permit Board as required by the permit or upon request. Section APC-S-1, *Air Emission Regulations For The Prevention, Abatement, and Control of Air Contaminants*, authorizes source owners or operators to use any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, for the purpose of submitting compliance certifications. EPA is unaware of any provision preventing the use of credible evidence in the Mississippi SIP.

Additionally, Mississippi is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years

and report emissions for certain larger sources annually through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them—NO<sub>x</sub>, SO<sub>2</sub>, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Mississippi made its latest update to the 2012 NEI on January 9, 2014. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the Web site <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the stationary source monitoring systems related to the 2010 1-hour SO<sub>2</sub> NAAQS.

8. 110(a)(2)(G) *Emergency powers*: This section of the CAA requires that states demonstrate authority comparable with section 303 of the CAA and adequate contingency plans to implement such authority. *Mississippi Code Title 49* (Appendix A-9) and Section APC-S-3, *Mississippi Regulations for the Prevention of Air Pollution Emergency Episodes*, identify air pollution emergency episodes and preplanned abatement strategies. Specifically, Section APC-S-3 authorizes the MDEQ Director, once it has been determined that an Air Pollution Emergency Episode condition exists at one or more monitoring sites solely because of emissions from a limited number of sources, to order source(s) to put into effect the emission control programs which are applicable for each episode stage. Section APC-S-3 also lists regulations to prevent the excessive buildup of air pollutants during air pollution episodes. Also, *Mississippi Code Title 49*, Section 49-17-27 (Appendix A-9), states that in the event an emergency is found to exist by the Mississippi Commission on Environmental Quality, it may issue an emergency order as circumstances may require. Emergency situations include those which create an imminent and substantial endangerment threatening the public health and safety or the lives and property of the people in Mississippi. EPA has made the preliminary determination that Mississippi's SIP is adequate for emergency powers related to the 2010 1-hour SO<sub>2</sub> NAAQS. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submission with respect to section 110(a)(2)(G).

9. 110(a)(2)(H) *SIP Revisions*: Section 110(a)(2)(H), in summary, requires each SIP to provide for revisions of such plan

(i) as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) whenever the Administrator finds that the plan is substantially inadequate to attain the NAAQS or to otherwise comply with any additional applicable requirements. MDEQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS in Mississippi. The State has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the NAAQS. *Mississippi Code Title 49*, Section 49-17-17(h) (Appendix A-9), provides MDEQ with the statutory authority to adopt, modify or repeal and promulgate ambient air and water quality standards and emissions standards for the State. As such, the State has the authority to revise the SIP to accommodate changes to NAAQS and revise the SIP if the EPA Administrator finds the plan to be substantially inadequate to attain the NAAQS. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 2010 1-hour SO<sub>2</sub> NAAQS when necessary.

10. 110(a)(2)(J) *Consultation with Government Officials, Public Notification, and PSD and Visibility Protection*: EPA is proposing to approve Mississippi's infrastructure SIP submission for the 2010 1-hour SO<sub>2</sub> NAAQS with respect to the general requirement in section 110(a)(2)(J) to include a program in the SIP that provides for meeting the applicable consultation requirements of section 121, the public notification requirements of section 127, PSD, and visibility protection. EPA's rationale for each sub-element is described below.

*Consultation with government officials (121 consultation)*: Section 110(a)(2)(J) of the CAA requires states to provide a process for consultation with local governments, designated organizations and Federal Land Managers carrying out NAAQS implementation requirements pursuant to section 121 relative to consultation. Section APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, and *Mississippi Code Title 49*, Section 49-17-17(c) (Appendix A-9), along with the State's various implementations plans, such as the State's Regional Haze Implementation Plan, provide for consultation between appropriate state, local, and tribal air

pollution control agencies as well as the corresponding Federal Land Managers whose jurisdictions might be affected by SIP development activities. Mississippi adopted state-wide consultation procedures for the implementation of transportation conformity. These consultation procedures were developed in coordination with the transportation partners in the State and are consistent with the approaches used for development of mobile inventories for SIPs. Implementation of transportation conformity as outlined in the consultation procedures requires MDEQ to consult with Federal, state and local transportation and air quality agency officials on the development of motor vehicle emissions budgets. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate that the State meets applicable requirements related to consultation with government officials for the 2010 1-hour SO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submission with respect to section 110(a)(2)(j) consultation with government officials.

*Public notification (127 public notification):* These requirements are met through regulation APC-S-3, *Mississippi Regulations for the Prevention of Air Pollution Emergency Episodes*, which requires that MDEQ notify the public of any air pollution alert, warning, or emergency. The MDEQ Web site also provides air quality summary data, air quality index reports and links to more information regarding public awareness of measures that can prevent such exceedances and of ways in which the public can participate in regulatory and other efforts to improve air quality. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide public notification related to the 2010 1-hour SO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submission with respect to section 110(a)(2)(j) public notification.

*PSD:* With regard to the PSD element of section 110(a)(2)(j), this requirement may be met by a state's confirmation in an infrastructure SIP submission that new major sources and major modifications in the state are subject to a PSD program meeting all the current structural requirements of part C of title I of the CAA. As discussed in more detail above under the section discussing 110(a)(2)(C), Mississippi's SIP contains provisions for the State's PSD program that reflect the relevant

SIP revisions pertaining to the required structural PSD requirements to satisfy the requirement of the PSD element of section 110(a)(2)(j). EPA has made the preliminary determination that Mississippi's SIP and practices are adequate for the PSD element of section 110(a)(2)(j).

*Visibility protection:* EPA's 2013 Guidance notes that it does not treat the visibility protection aspects of section 110(a)(2)(j) as applicable for purposes of the infrastructure SIP approval process. MDEQ referenced its regional haze program as germane to the visibility component of section 110(a)(2)(j). EPA recognizes that states are subject to visibility protection and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). However, there are no newly applicable visibility protection obligations after the promulgation of a new or revised NAAQS. Thus, EPA has determined that states do not need to address the visibility component of 110(a)(2)(j) in infrastructure SIP submittals so MDEQ does not need to rely on its regional haze program to fulfill its obligations under section 110(a)(2)(j). As such, EPA has made the preliminary determination that Mississippi's infrastructure SIP submission related to the 2010 1-hour SO<sub>2</sub> NAAQS is approvable for the visibility protection element of section 110(a)(2)(j) and that Mississippi does not need to rely on its regional haze program to address this element.

11. 110(a)(2)(K) *Air Quality Modeling and Submission of Modeling Data:* Section 110(a)(2)(K) of the CAA requires that SIPs provide for performing air quality modeling so that effects on air quality of emissions from NAAQS pollutants can be predicted and submission of such data to the EPA can be made. Sections APC-S-2, V. B.—*Permit Regulation for the Construction and/or Operation of Air Emissions Equipment*, and APC-S-5, *Mississippi Regulations for the Prevention of Significant Deterioration of Air Quality*, specify that required air modeling be conducted in accordance with 40 CFR part 51, Appendix W, *Guideline on Air Quality Models*, as incorporated into the Mississippi SIP. These standards demonstrate that Mississippi has the authority to perform air quality monitoring and provide relevant data for the purpose of predicting the effect on ambient air quality of the 2010 1-hour SO<sub>2</sub> NAAQS. Additionally, Mississippi supports a regional effort to coordinate the development of emissions inventories and conduct regional modeling for several NAAQS, including the 2010 1-hour SO<sub>2</sub> NAAQS,

for the southeastern states. Taken as a whole, Mississippi's air quality regulations and practices demonstrate that MDEQ has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 2010 1-hour SO<sub>2</sub> NAAQS. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate the State's ability to provide for air quality and modeling, along with analysis of the associated data, related to the 2010 1-hour SO<sub>2</sub> NAAQS when necessary. Accordingly, EPA is proposing to approve Mississippi's infrastructure SIP submission with respect to section 110(a)(2)(K).

12. 110(a)(2)(L) *Permitting fees:* Section 110(a)(2)(L) requires the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under the CAA, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V.

Mississippi's *Mississippi Code Title 49*, Section 49-2-9(c) (Appendix A-9), authorizes MDEQ to apply for, receive, and expend Federal or State funds in order to operate its air programs. Mississippi SIP *Mississippi Code Title 49*, Section 49-17-30 (Appendix A-9), provides for the assessment of title V permit fees to cover the reasonable cost of reviewing and acting upon air permitting activities in the State including title V, PSD and NNSR permits. *Mississippi Code Title 49*, Section 49-17-14 (Appendix A-9), allows MDEQ to expend or utilize monies in the Mississippi Air Operating Permit Program Fee Trust Fund to pay all reasonable direct and indirect costs associated with the development and administration of the title V program and the PSD and NNSR permitting programs. The Mississippi Air Operating Permit Program Fee Trust Fund consists of State legislative appropriations, Federal grant funds and title V fees. Additionally, Mississippi has a federally-approved title V operating permit program at Section

APC-S-6<sup>25</sup> that covers the implementation and enforcement of PSD and NNSR permits after they have been issued. EPA has made the preliminary determination that Mississippi adequately provide for permitting fees related to the 2010 1-hour SO<sub>2</sub> NAAQS when necessary.

13. 110(a)(2)(M) *Consultation and Participation by Affected Local Entities*: Section 110(a)(2)(M) of the Act requires states to provide for consultation and participation in SIP development by local political subdivisions affected by the SIP. *Mississippi Code Title 49, Sections 49-17-17(c) 49-17-19(b)* (Appendix A-9) requires that MDEQ notify the public (including local political subdivisions) of an application, preliminary determination, the activity or activities involved in the permit action, any emissions change associated with any permit modification, and the opportunity for comment prior to making a final permitting decision. Additionally, MDEQ works closely with local political subdivisions during the development of its transportation conformity SIP and regional haze SIP. EPA has made the preliminary determination that Mississippi's SIP and practices adequately demonstrate consultation with affected local entities related to the 2010 1-hour SO<sub>2</sub> NAAQS.

## V. Proposed Action

With the exception of interstate transport provisions pertaining to the contribution to nonattainment or interference with maintenance in other states and visibility protection requirements of section 110(a)(2)(D)(i)(I) and (II) (prongs 1, 2, and 4), and the state board majority requirements respecting the significant portion of income of section 110(a)(2)(E)(ii), EPA is proposing to approve Mississippi's June 20, 2013, SIP submission for the 2010 1-hour SO<sub>2</sub> NAAQS for the above described infrastructure SIP requirements. EPA is proposing to approve these portions of Mississippi's infrastructure SIP submission for the 2010 1-hour SO<sub>2</sub> NAAQS because these aspects of the submission are consistent with section 110 of the CAA. With regard to the state board majority requirements respecting significant portion of income, EPA is proposing to disapprove Mississippi's June 20, 2013, infrastructure submission.

Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of a CAA Part D Plan or is required in response to a

finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP call) starts a sanctions clock. The portion of section 110(a)(2)(E)(ii) provisions (the provisions being proposed for disapproval in today's notice) were not submitted to meet requirements for Part D or a SIP call, and therefore, if EPA takes final action to disapprove this submittal, no sanctions will be triggered. However, if this disapproval action is finalized, that final action will trigger the requirement under section 110(c) that EPA promulgate a Federal Implementation Plan (FIP) no later than two years from the date of the disapproval unless the State corrects the deficiency, and EPA approves the plan or plan revision before EPA promulgates such FIP.

## VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 (Pub. L. 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

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

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule 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 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: January 28, 2016.

**Heather McTeer Toney,**

*Regional Administrator, Region 4.*

[FR Doc. 2016-02608 Filed 2-10-16; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 52 and 81

[EPA-R04-OAR-2015-0743; FRL-9942-01-Region 4]

### Air Plan Approval and Designation of Areas; MS; Redesignation of the DeSoto County, 2008 8-Hour Ozone Nonattainment Area to Attainment

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** On December 11, 2015, the State of Mississippi, through the Mississippi Department of Environment Quality (MDEQ), submitted a request for the Environmental Protection Agency (EPA) to redesignate the portion of Mississippi that is within the Memphis, Tennessee-Mississippi-Arkansas (Memphis, TN-MS-AR) 2008 8-hour ozone nonattainment area (hereafter referred to as the "Memphis, TN-MS-AR Area" or "Area") and to approve a State

<sup>25</sup> Title V program regulations are federally-approved but not incorporated into the federally-approved SIP.

Implementation Plan (SIP) revision containing a maintenance plan for the Area. EPA is proposing to determine that the Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone national ambient air quality standards (NAAQS); to approve the State's plan for maintaining attainment of the 2008 8-hour ozone NAAQS in the Area, including the motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC) for the year 2027 for the Mississippi portion of the Area, into the SIP; and to redesignate the Mississippi portion of the Area to attainment for the 2008 8-hour ozone NAAQS. EPA is also notifying the public of the status of EPA's adequacy determination for the MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area.

**DATES:** Comments must be received on or before March 14, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2015-0743 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. 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 <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman of the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Mr. Lakeman may be reached by phone at (404) 562-9043 or via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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### I. What are the actions EPA is proposing to take?

EPA is proposing to take the following three separate but related actions, one of which involves multiple elements: (1) To determine that the Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS;<sup>1</sup> (2) to approve Mississippi's plan for maintaining the 2008 8-hour ozone NAAQS (maintenance plan), including the associated MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area, into the SIP; and (3) to redesignate the Mississippi portion of the Memphis, TN-MS-AR Area to attainment for the 2008 8-hour ozone NAAQS. EPA is also notifying the public of the status of EPA's adequacy determination for the MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area. The Memphis, TN-MS-AR Area consists of a portion of DeSoto County in Mississippi, all of Shelby County in Tennessee, and all of Crittenden County in Arkansas. This proposed actions are summarized below and described in greater detail throughout this notice of proposed rulemaking.

EPA is making the preliminary determination that the Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS based on recent air quality data and proposing to approve Mississippi's maintenance plan for its portion of the Memphis, TN-MS-AR Area as meeting the requirements of section 175A (such approval being one

<sup>1</sup> On August 27, 2015, EPA published a notice of proposed rulemaking entitled "Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Several Areas Classified as Marginal for the 2008 Ozone National Ambient Air Quality Standards" proposing to determine that the Memphis, TN-MS-AR Area attained the 2008 8-hour ozone NAAQS by the applicable attainment date of July 20, 2015, based on 2012-2014 monitoring data. See 80 FR 51992. Any final action on the August 27, 2015 proposed rule will occur in a separate rulemaking from this proposed action.

of the Clean Air Act (CAA or Act) criteria for redesignation to attainment status). The maintenance plan is designed to keep the Memphis, TN-MS-AR Area in attainment of the 2008 8-hour ozone NAAQS through 2027. The maintenance plan includes 2027 MVEBs for NO<sub>x</sub> and VOC for the Mississippi portion of the Memphis, TN-MS-AR Area for transportation conformity purposes. EPA is proposing to approve these MVEBs and incorporate them into the Mississippi SIP.

EPA also proposes to determine that the Mississippi portion of the Memphis, TN-MS-AR Area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. Accordingly, in this action, EPA is proposing to approve a request to change the legal designation of DeSoto County within the Mississippi portion of the Memphis, TN-MS-AR Area, as found at 40 CFR part 81, from nonattainment to attainment for the 2008 8-hour ozone NAAQS.

EPA is also notifying the public of the status of EPA's adequacy process for the 2027 NO<sub>x</sub> and VOC MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area. The Adequacy comment period began on November 2, 2015, with EPA's posting of the availability of Mississippi's submissions on EPA's Adequacy Web site (<http://www3.epa.gov/otaq/stateresources/transconf/cursips.htm#desoto-ms>).

The Adequacy comment period for these MVEBs closed on December 2, 2015. No comments, adverse or otherwise, were received during the Adequacy comment period. Please see section VII of this proposed rulemaking for further explanation of this process and for more details on the MVEBs.

In summary, this notice of proposed rulemaking is in response to Mississippi's December 11, 2015, redesignation request and associated SIP submission that address the specific issues summarized previously and the necessary elements described in section 107(d)(3)(E) of the CAA for redesignation of the Mississippi portion of the Memphis, TN-MS-AR Area to attainment for the 2008 8-hour ozone NAAQS.

### II. What is the background for EPA's proposed actions?

On March 12, 2008, EPA promulgated a revised 8-hour ozone NAAQS of 0.075 parts per million (ppm). See 73 FR 16436 (March 27, 2008). Under EPA's regulations at 40 CFR part 50, the 2008 8-hour ozone NAAQS is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ambient air quality ozone

concentrations is less than or equal to 0.075 ppm. See 40 CFR 50.15. Ambient air quality monitoring data for the 3-year period must meet a data completeness requirement. The ambient air quality monitoring data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness as determined in Appendix I of part 50.

Upon promulgation of a new or revised NAAQS, the CAA requires EPA to designate as nonattainment any area that is violating the NAAQS, based on the three most recent years of complete, quality assured, and certified ambient air quality data at the conclusion of the designation process. The Memphis, TN-MS-AR Area was designated nonattainment for the 2008 8-hour ozone NAAQS on May 21, 2012 (effective July 20, 2012) using 2008–2010 ambient air quality data. See 77 FR 30088 (May 21, 2012). At the time of designation, the Memphis, TN-MS-AR Area was classified as a marginal nonattainment area for the 2008 8-hour ozone NAAQS. In the final implementation rule for the 2008 8-hour ozone NAAQS (SIP Implementation Rule),<sup>2</sup> EPA established ozone nonattainment area attainment dates based on Table 1 of section 181(a) of the CAA. This established an attainment date three years after the July 20, 2012, effective date for areas classified as marginal areas for the 2008 8-hour ozone nonattainment designations. Therefore, the Memphis, TN-MS-AR Area's attainment date is July 20, 2015.

### III. What are the criteria for redesignation?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation providing that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for

<sup>2</sup> This rule, entitled Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements and published at 80 FR 12264 (March 6, 2015), addresses a range of nonattainment area SIP requirements for the 2008 ozone NAAQS, including requirements pertaining to attainment demonstrations, reasonable further progress (RFP), reasonably available control technology (RACT), reasonably available control measures (RACM), major new source review (NSR), emission inventories, and the timing of SIP submissions and of compliance with emission control measures in the SIP. This rule also addresses the revocation of the 1997 ozone NAAQS and the anti-backsliding requirements that apply when the 1997 ozone NAAQS are revoked.

the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the state containing such area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

On April 16, 1992, EPA provided guidance on redesignation in the General Preamble for the Implementation of title I of the CAA Amendments of 1990 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. "Ozone and Carbon Monoxide Design Value Calculations," Memorandum from Bill Laxton, Director, Technical Support Division, June 18, 1990;
2. "Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;
3. "Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;
4. "Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereafter referred to as the "Calcagni Memorandum");
5. "State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines," Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;
6. "Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas," Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;
7. "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992," Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;
8. "Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas," Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993;

9. "Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment," Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

10. "Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard," Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

### IV. Why is EPA proposing these actions?

On December 11, 2015, the State of Mississippi, through MDEQ, requested that EPA redesignate the Mississippi portion of the Memphis, TN-MS-AR Area to attainment for the 2008 8-hour ozone NAAQS. EPA's evaluation indicates that the entire Memphis, TN-MS-AR Area has attained the 2008 8-hour ozone NAAQS, and that the Mississippi portion of the Memphis, TN-MS-AR Area meets the requirements for redesignation as set forth in section 107(d)(3)(E), including the maintenance plan requirements under section 175A of the CAA. As a result, EPA is proposing to take the three related actions summarized in section I of this notice.

### V. What is EPA's analysis of the request?

As stated previously, in accordance with the CAA, EPA proposes in this action to: (1) Determine that the Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS; (2) approve the Mississippi portion of the Memphis, TN-MS-AR Area's 2008 8-hour ozone NAAQS maintenance plan, including the associated MVEBs, into the Mississippi SIP; and (3) redesignate the Mississippi portion of the Memphis, TN-MS-AR Area to attainment for the 2008 8-hour ozone NAAQS. The five redesignation criteria provided under CAA section 107(d)(3)(E) are discussed in greater detail for the Area in the following paragraphs of this section.

#### *Criteria (1)—The Memphis, TN-MS-AR Area has Attained the 2008 8-Hour Ozone NAAQS*

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the area has attained the applicable NAAQS (CAA section 107(d)(3)(E)(i)). For ozone, an area may be considered to be attaining the 2008 8-hour ozone NAAQS if it meets the 2008 8-hour ozone NAAQS, as determined in accordance with 40 CFR 50.15 and Appendix I of part 50, based on three complete, consecutive calendar years of quality-assured air

quality monitoring data. To attain the NAAQS, the 3-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year must not exceed 0.075 ppm. Based on the data handling and reporting convention described in 40 CFR part 50, Appendix I, the NAAQS are attained if the design value is 0.075 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58 and

recorded in the EPA Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

In this action, EPA is proposing to determine that the Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS. EPA reviewed ozone monitoring data from monitoring stations in the Memphis, TN-MS-AR Area for the 2008 8-hour ozone NAAQS for 2012–2014, and the design values for

each monitor in the Area are less than 0.075 ppm. These data have been quality-assured, are recorded in Aerometric Information Retrieval System (AIRS–AQS), and indicate that the Area is attaining the 2008 8-hour ozone NAAQS. The fourth-highest 8-hour ozone values at each monitor for 2012, 2013, 2014, and the 3-year averages of these values (*i.e.*, design values), are summarized in Table 1, below.

TABLE 1—2012–2014 DESIGN VALUE CONCENTRATIONS FOR THE MEMPHIS, TN-MS-AR AREA [ppm]

Location	Site	4th Highest 8-hour ozone value (ppm)			3-Year design values (ppm)
		2012	2013	2014	2012–2014
DeSoto, MS .....	Hernando .....	0.075	0.065	0.067	0.069
Shelby, TN .....	Frayser .....	0.083	0.069	0.067	0.073
Shelby, TN .....	Orgill Park .....	0.084	0.063	0.065	0.070
Shelby, TN .....	Shelby Farms .....	0.086	0.069	0.066	0.073
Crittenden, AR .....	Marion .....	0.079	0.067	0.067	0.071

The 3-year design value for 2012–2014 for the Memphis, TN-MS-AR Area is 0.073 ppm,<sup>3</sup> which meets the NAAQS. EPA has reviewed 2015 preliminary monitoring data for the Area, and that data indicates that the Area continues to attain.<sup>4</sup> In this action, EPA is proposing to determine that Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS. EPA will not take final action to approve the redesignation if the 3-year design value exceeds the NAAQS prior to EPA finalizing the redesignation. As discussed in more detail below, the State of Mississippi has committed to continue monitoring in this Area in accordance with 40 CFR part 58.

*Criteria (2)—Mississippi Has a Fully Approved SIP Under Section 110(k) for the Mississippi Portion of the Memphis, TN-MS-AR Area; and Criteria (5)—Mississippi Has Met All Applicable Requirements Under Section 110 and Part D of Title I of the CAA*

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the state has met all applicable requirements under section 110 and part D of title I of the CAA (CAA section 107(d)(3)(E)(v)) and that the state has a fully approved SIP under section 110(k) for the area (CAA section 107(d)(3)(E)(ii)). EPA proposes

to find that Mississippi has met all applicable SIP requirements for the Mississippi portion of the Area under section 110 of the CAA (general SIP requirements) for purposes of redesignation. Additionally, EPA proposes to find that the Mississippi SIP satisfies the criterion that it meets applicable SIP requirements for purposes of redesignation under part D of title I of the CAA in accordance with section 107(d)(3)(E)(v). Further, EPA proposes to determine that the SIP is fully approved with respect to all requirements applicable for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). In making these determinations, EPA ascertained which requirements are applicable to the Area and, if applicable, that they are fully approved under section 110(k). SIPs must be fully approved only with respect to requirements that were applicable prior to submittal of the complete redesignation request.

a. The Mississippi Portion of the Memphis, TN-MS-AR Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

*General SIP requirements.* General SIP elements and requirements are delineated in section 110(a)(2) of title I, part A of the CAA. These requirements include, but are not limited to, the following: Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing; provisions for establishment and operation of appropriate procedures

needed to monitor ambient air quality; implementation of a source permit program; provisions for the implementation of part C requirements (Prevention of Significant Deterioration (PSD)) and provisions for the implementation of part D requirements (NSR permit programs); provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address the interstate transport of air pollutants. The section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that the CAA's interstate transport requirements should be construed to be applicable requirements for purposes of redesignation.

In addition, EPA believes that other section 110(a)(2) elements that are

<sup>3</sup> The highest 3-year design value at a monitoring station is considered the design value for the Area.

<sup>4</sup> This preliminary data is available at EPA's air data Web site: [http://aqsdri1.epa.gov/aqsweb/aqstmp/airdata/download\\_files.html#Daily](http://aqsdri1.epa.gov/aqsweb/aqstmp/airdata/download_files.html#Daily).

neither connected with nonattainment plan submissions nor linked with an area's attainment status are not applicable requirements for purposes of redesignation. The area will still be subject to these requirements after the area is redesignated. The section 110(a)(2) and part D requirements which are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This approach is consistent with EPA's existing policy on applicability (*i.e.*, for redesignations) of conformity and oxygenated fuels requirements, as well as with section 184 ozone transport requirements. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 2008); Cleveland-Akron-Loraine, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking at (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio, redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania, redesignation (66 FR 50399, October 19, 2001).

EPA has reviewed Mississippi's SIP and has concluded that it meets the general SIP requirements under section 110(a)(2) of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Mississippi's SIP addressing CAA section 110(a)(2) requirements including provisions addressing the 2008 ozone NAAQS. *See* 80 FR 11131 (March 2, 2015); 80 FR 14019 (March 18, 2015). These requirements are, however, statewide requirements that are not linked to the ozone nonattainment status of the Area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of Mississippi's ozone redesignation request.

*Title I, Part D, applicable SIP requirements.* Section 172(c) of the CAA sets forth the basic requirements of attainment plans for nonattainment areas that are required to submit them pursuant to section 172(b). Subpart 2 of part D, which includes section 182 of the CAA, establishes specific requirements for ozone nonattainment areas depending on the area's nonattainment classification. As provided in Subpart 2, a marginal ozone nonattainment area, such as the Memphis, TN-MS-AR Area, must submit an emissions inventory that complies with section 172(c)(3), but the specific requirements of section 182(a) apply in lieu of the demonstration of

attainment (and contingency measures) required by section 172(c). 42 U.S.C. 7511a(a). A thorough discussion of the requirements contained in sections 172(c) and 182 can be found in the General Preamble for Implementation of Title I (57 FR 13498).

*Section 182(a) Requirements.* Section 182(a)(1) requires states to submit a comprehensive, accurate, and current inventory of actual emissions from sources of VOC and NO<sub>x</sub> emitted within the boundaries of the ozone nonattainment area. Mississippi provided an emissions inventory for the Memphis, TN-MS-AR Area to EPA in a January 14, 2015, SIP submission. On July 2, 2015, EPA published a direct final rule approving this emissions inventory into the SIP. *See* 80 FR 37985.

Under section 182(a)(2)(A), states with ozone nonattainment areas that were designated prior to the enactment of the 1990 CAA amendments were required to submit, within six months of classification, all rules and corrections to existing VOC RACT rules that were required under section 172(b)(3) of the CAA (and related guidance) prior to the 1990 CAA amendments. The Mississippi portion of the Memphis, TN-MS-AR Area is not subject to the section 182(a)(2) RACT "fix up" because the Area was designated as nonattainment after the enactment of the 1990 CAA amendments.

Section 182(a)(2)(B) requires each state with a marginal ozone nonattainment area that implemented, or was required to implement, an inspection and maintenance (I/M) program prior to the 1990 CAA amendments to submit a SIP revision providing for an I/M program no less stringent than that required prior to the 1990 amendments or already in the SIP at the time of the amendments, whichever is more stringent. The Mississippi portion of the Memphis, TN-MS-AR Area is not subject to the section 182(a)(2)(B) requirement because it was designated as nonattainment after the enactment of the 1990 CAA amendments and did not have an I/M program in place prior to those amendments.

Regarding the permitting and offset requirements of section 182(a)(2)(C) and section 182(a)(4), Mississippi does not have an approved part D NSR program in place. However, EPA has determined that areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR, because PSD requirements will apply after redesignation. A more detailed rationale

for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." Mississippi's PSD program will become applicable in the Memphis, TN-MS-AR Area upon redesignation to attainment.

Section 182(a)(3) requires states to submit periodic inventories and emissions statements. Section 182(a)(3)(A) requires states to submit a periodic inventory every three years. As discussed later on in the section of this notice titled Criteria (4)(e), *Verification of Continued Attainment*, the State will continue to update its emissions inventory at least once every three years. Under section 182(a)(3)(B), each state with an ozone nonattainment area must submit a SIP revision requiring emissions statements to be submitted to the state by sources within that nonattainment area. Mississippi provided a SIP revision to EPA on August 28, 2015, addressing the section 182(a)(3)(B) emissions statements requirement, and on January 12, 2016, EPA published a final rule approving this SIP revision. *See* 81 FR 1320.

*Section 176 Conformity Requirements.* Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability that EPA promulgated pursuant to its authority under the CAA.

EPA interprets the conformity SIP requirements<sup>5</sup> as not applying for purposes of evaluating a redesignation request under section 107(d) because state conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. *See Wall v.*

<sup>5</sup> CAA section 176(c)(4)(E) requires states to submit revisions to their SIPs to reflect certain Federal criteria and procedures for determining transportation conformity. Transportation conformity SIPs are different from the MVEBs that are established in control strategy SIPs and maintenance plans.

EPA, 265 F.3d 426 (6th Cir. 2001) (upholding this interpretation); *see also* 60 FR 62748 (December 7, 1995) (redesignation of Tampa, Florida). Nonetheless, Mississippi has an approved conformity SIP for the Mississippi portion of the Memphis, TN-MS-AR Area. *See* 78 FR 67952 (November 13, 2013). Thus, EPA proposes that the Mississippi portion of the Memphis, TN-MS-AR Area has satisfied all applicable requirements for purposes of redesignation under section 110 and part D of title I of the CAA.

b. The Mississippi Portion of the Memphis, TN-MS-AR Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

As discussed previously, EPA has fully approved the State's SIP for the Mississippi portion of the Memphis, TN-MS-AR Area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. *See, e.g.*, 80 FR 11131 (March 2, 2015); 80 FR 14019 (March 18, 2015). EPA may rely on prior SIP approvals in approving a redesignation request (*see* Calcagni Memorandum at p. 3; *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984, 989–90 (6th Cir. 1998); *Wall*, 265 F.3d 426) plus any additional measures it may approve in conjunction with a redesignation action (*see* 68 FR 25426 (May 12, 2003) and citations therein). EPA believes that the section 110 elements that are neither connected with nonattainment plan submissions nor linked to an area's nonattainment status are not applicable requirements for purposes of redesignation, and EPA has approved all part D requirements applicable for purposes of this redesignation. *See* 80 FR 37985 (July 2, 2015) and 80 FR 1320 (January 12, 2016).

*Criteria (3)—The Air Quality Improvement in the Memphis, TN-MS-AR Area Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions*

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, applicable Federal air pollution control regulations, and other permanent and enforceable reductions (CAA section 107(d)(3)(E)(iii)). EPA has preliminarily determined that Mississippi has demonstrated that the observed air

quality improvement in the Memphis, TN-MS-AR Area is due to permanent and enforceable reductions in emissions resulting from Federal measures. EPA proposes to agree with the State's conclusion that meteorology has not had a significant role in the steady decline in ozone concentrations in the Area.<sup>6</sup>

Federal measures enacted in recent years have resulted in permanent emission reductions. The Federal measures that have been implemented include the following:

*Tier 2 vehicle and fuel standards.* Implementation began in 2004 and requires all passenger vehicles in any manufacturer's fleet to meet an average standard of 0.07 grams of NO<sub>x</sub> per mile. Additionally, in January 2006 the sulfur content of gasoline was required to be on average 30 ppm which assists in lowering the NO<sub>x</sub> emissions. Most gasoline sold in Mississippi prior to January 2006 had a sulfur content of about 300 ppm.<sup>7</sup> EPA expects that these standards will reduce NO<sub>x</sub> emissions from vehicles by approximately 74 percent by 2030, translating to nearly 3 million tons annually by 2030.<sup>8</sup>

*Large non-road diesel engines rule.* This rule was promulgated in 2004, and is being phased in between 2008 through 2014. This rule will also reduce the sulfur content in the nonroad diesel fuel. When fully implemented, this rule will reduce NO<sub>x</sub>, VOC, particulate matter, and carbon monoxide. These emission reductions are federally enforceable. EPA issued this rule in June 2004, which applies to diesel engines used in industries, such as construction, agriculture, and mining. It is estimated that compliance with this rule will cut NO<sub>x</sub> emissions from non-road diesel engines by up to 90 percent nationwide.

*Heavy-duty gasoline and diesel highway vehicle standards.* EPA issued this rule in January 2001 (66 FR 5002). This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007, which further reduced the highway diesel fuel sulfur content to 15 ppm, leading to additional

reductions in combustion NO<sub>x</sub> and VOC emissions. EPA expects that this rule will achieve a 95 percent reduction in NO<sub>x</sub> emissions from diesel trucks and buses and will reduce NO<sub>x</sub> emissions by 2.6 million tons by 2030 when the heavy-duty vehicle fleet is completely replaced with newer heavy-duty vehicles that comply with these emission standards.<sup>9</sup>

*Nonroad spark-ignition engines and recreational engines standards.* The nonroad spark-ignition and recreational engine standards, effective in July 2003, regulate NO<sub>x</sub>, hydrocarbons, and carbon monoxide from groups of previously unregulated nonroad engines. These engine standards apply to large spark-ignition engines (*e.g.*, forklifts and airport ground service equipment), recreational vehicles (*e.g.*, off-highway motorcycles and all-terrain-vehicles), and recreational marine diesel engines sold in the United States and imported after the effective date of these standards. When all of the nonroad spark-ignition and recreational engine standards are fully implemented, an overall 72 percent reduction in hydrocarbons, 80 percent reduction in NO<sub>x</sub>, and 56 percent reduction in carbon monoxide emissions are expected by 2020. These controls reduce ambient concentrations of ozone, carbon monoxide, and fine particulate matter.

*National Program for greenhouse gas (GHG) emissions and Fuel Economy Standards.* The federal GHG and fuel economy standards apply to light-duty cars and trucks in model years 2012–2016 (phase 1) and 2017–2025 (phase 2). The final standards are projected to result in an average industry fleet-wide level of 163 grams/mile of carbon dioxide which is equivalent to 54.5 miles per gallon if achieved exclusively through fuel economy improvements. The fuel economy standards result in less fuel being consumed, and therefore less NO<sub>x</sub> emissions released.

EPA proposes to find that the improvements in air quality in the Memphis, TN-MS-AR Area are due to real, permanent and enforceable reductions in NO<sub>x</sub> and VOC emissions resulting from Federal measures.

<sup>6</sup> The State compared temperature and wind data for each of the design value attainment years (2012–2014) with the 30-year averages for the Area. *See* pp.10–15 of Mississippi's December 11, 2015, submission for the State's meteorological analysis.

<sup>7</sup> Mississippi also identified Tier 3 Motor Vehicle Emissions and Fuel Standards as a federal measure. EPA issued this rule in April 28, 2014, which applies to light duty passenger cars and trucks. EPA promulgated this rule to reduce air pollution from new passenger cars and trucks beginning in 2017. Tier 3 emission standards will lower sulfur content of gasoline and lower the emissions standards.

<sup>8</sup> EPA, Regulatory Announcement, EPA420-F-99-051 (December 1999), available at: <http://www.epa.gov/tier2/documents/f99051.pdf>.

<sup>9</sup> 66 FR 5002, 5012 (January 18, 2001). Mississippi also identified Federal rules requiring manufacturers to install on-board diagnostic (OBD) systems for heavy-duty vehicles and for engines certified for use in heavy-duty vehicles. EPA promulgated these rules to help ensure that the projected benefits from the relevant federal vehicle emissions standards are realized.

*Criteria (4)—The Mississippi Portion of the Memphis, TN-MS-AR Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA*

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the area has a fully approved maintenance plan pursuant to section 175A of the CAA (CAA section 107(d)(3)(E)(iv)). In conjunction with its request to redesignate the Mississippi portion of the Memphis, TN-MS-AR Area to attainment for the 2008 8-hour ozone NAAQS, MDEQ submitted a SIP revision to provide for the maintenance of the 2008 8-hour ozone NAAQS for at least 10 years after the effective date of redesignation to attainment. EPA believes that this maintenance plan meets the requirements for approval under section 175A of the CAA.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures as EPA deems necessary to assure prompt correction of any future 2008 8-hour ozone violations. The Calcagni Memorandum provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five requirements: The attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan. As is discussed more fully below, EPA has preliminarily determined that Mississippi's maintenance plan includes all the necessary components and is thus proposing to approve it as a revision to the Mississippi SIP.

b. Attainment Emissions Inventory

EPA is proposing to determine that the Memphis, TN-MS-AR Area has attained the 2008 8-hour ozone NAAQS based on quality-assured monitoring

data for the 3-year period from 2012–2014, and is continuing to attain the standard based on preliminary 2015 data. Mississippi selected 2012 as the base year (*i.e.*, attainment emissions inventory year) for developing a comprehensive emissions inventory for NO<sub>x</sub> and VOC, for which projected emissions could be developed for 2017, 2020, and 2027. The attainment inventory identifies a level of emissions in the Area that is sufficient to attain the 2008 8-hour ozone NAAQS. Mississippi began development of the attainment inventory by first generating a baseline emissions inventory for the State's portion of the Memphis, TN-MS-AR Area. The projected summer day emission inventories have been estimated using projected rates of growth in population, traffic, economic activity, and other parameters. In addition to comparing the final year of the plan (2027) to the base year (2012), Mississippi compared interim years to the baseline to demonstrate that these years are also expected to show continued maintenance of the 2008 8-hour ozone standard.

The emissions inventory is composed of four major types of sources: Point, area, on-road mobile, and non-road mobile. Complete descriptions of how the inventories were developed are located in Appendix A through Appendix D of the December 11, 2015 submittal, which can be found in the docket for this action. Point source emissions are tabulated from data collected by direct on-site measurements of emissions or from mass balance calculations utilizing approved emission factors. For each projected year's inventory, point sources are adjusted by growth factors based on Standard Industrial Classification codes generated using growth patterns obtained from County Business Patterns. For Title V sources, the actual 2012 emissions were used. Rail yard and airport emissions reported were obtained from the EPA's 2011 National Emission Inventory.

For area sources, emissions are estimated by multiplying an emission factor by some known indicator of collective activity such as production, number of employees, or population. For each projected year's inventory, area source emissions are changed by population growth, projected production growth, or estimated employment growth.

The non-road mobile sources emissions are calculated using

NONROAD2008 within EPA's Motor Vehicle Emission Simulator (MOVES2014) model, with the exception of the railroad locomotives which were estimated by taking activity and multiplying by an emission factor. For each projected year's inventory, the emissions are estimated using EPA's MOVES2014 model with activity input such as projected landing and takeoff data for aircraft.

For on-road mobile sources, EPA's MOVES2014 mobile model is run to generate emissions. The MOVES2014 model includes the road class vehicle miles traveled (VMT) as an input file and can directly output the estimated emissions. For each projected year's inventory, the on-road mobile sources emissions are calculated by running the MOVES mobile model for the future year with the projected VMT to generate emissions that take into consideration expected Federal tailpipe standards, fleet turnover, and new fuels.

The 2012 NO<sub>x</sub> and VOC emissions for the Mississippi portion of the Memphis, TN-MS-AR Area, as well as the emissions for other years, were developed consistent with EPA guidance and are summarized in Tables 2 through 3 of the following subsection discussing the maintenance demonstration. See Appendix B through Appendix D of the December 11, 2015, submission for more detailed information on the emissions inventory.

c. Maintenance Demonstration

The maintenance plan associated with the redesignation request includes a maintenance demonstration that:

(i) Shows compliance with and maintenance of the 2008 8-hour ozone NAAQS by providing information to support the demonstration that current and future emissions of NO<sub>x</sub> and VOC remain at or below 2012 emissions levels.

(ii) Uses 2012 as the attainment year and includes future emissions inventory projections for 2017, 2020, and 2027.

(iii) Identifies an "out year" at least 10 years after the time necessary for EPA to review and approve the maintenance plan. Per 40 CFR part 93, NO<sub>x</sub> and VOC MVEBs were established for the last year (2027) of the maintenance plan (see section VII below).

(iv) Provides actual (2012) and projected emissions inventories, in tons per summer day (tpsd), for the Mississippi portion of the Memphis, TN-MS-AR Area, as shown in Tables 2 and 3, below.

TABLE 2—ACTUAL AND PROJECTED AVERAGE SUMMER DAY NO<sub>x</sub> EMISSIONS (tpsd) FOR THE MISSISSIPPI PORTION OF THE MEMPHIS, TN-MS-AR AREA

Sector	2012	2017	2020	2027
Point .....	1.78	1.81	1.83	1.89
Area .....	1.24	1.25	1.25	1.24
Non-road .....	2.89	2.29	2.06	1.78
On-road .....	8.66	5.34	3.53	2.74
Total .....	14.57	10.68	8.68	7.65

TABLE 3—ACTUAL AND PROJECTED AVERAGE SUMMER DAY VOC EMISSIONS (tpsd) FOR THE MISSISSIPPI PORTION OF THE MEMPHIS, TN-MS-AR AREA

Sector	2012	2017	2020	2027
Point .....	0.84	0.77	0.77	0.79
Area .....	6.49	6.57	6.59	6.54
Non-road .....	1.86	1.41	1.33	1.28
On-road .....	5.75	3.92	2.51	2.54
Total .....	14.94	12.67	11.19	11.15

Tables 2 and 3 summarize the 2012 and future projected emissions of NO<sub>x</sub> and VOC from the Mississippi portion of the Memphis, TN-MS-AR Area. In situations where local emissions are the primary contributor to nonattainment, such as the Memphis, TN-MS-AR Area, if the future projected emissions in the nonattainment area remain at or below the baseline emissions in the nonattainment area, then the ambient air quality standard should not be exceeded in the future. Mississippi has projected emissions as described previously and determined that emissions in the Mississippi portion of the Memphis, TN-MS-AR Area will remain below those in the attainment year inventory for the duration of the maintenance plan.

As discussed in section VI of this proposed rulemaking, a safety margin is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Mississippi selected 2012 as the attainment emissions inventory year for the Mississippi portion of the Memphis, TN-MS-AR Area. Mississippi calculated safety margins in its submittal for years 2017, 2020, and 2027. The State has allocated a portion of the 2027 safety margin to the 2027 MVEBs for the Memphis, TN-MS-AR Area.

TABLE 4—SAFETY MARGINS FOR THE MISSISSIPPI PORTION OF THE MEMPHIS, TN-MS-AR AREA

Year	VOC (tpd)	NO <sub>x</sub> (tpd)
2017 .....	2.27	3.89
2020 .....	3.75	5.90
2027 .....	3.79	6.92

The State has decided to allocate a portion of the available safety margin to the 2027 MVEBs to allow for unanticipated growth in VMT, changes and uncertainty in vehicle mix assumptions, etc., that will influence the emission estimations. MDEQ has allocated 5.26 tpd of the NO<sub>x</sub> safety margin to the 2027 NO<sub>x</sub> MVEB and 2.46 tpd of the VOC safety margin to the 2027 VOC MVEB. After allocation of the available safety margin, the remaining safety margin is 1.66 tpd for NO<sub>x</sub> and 1.33 tpd for VOC. This allocation and the resulting available safety margin for the Mississippi portion of the Memphis, TN-MS-AR Area are discussed further in section VI of this proposed rulemaking along with the MVEBs to be used for transportation conformity proposes.

d. Monitoring Network

There are five monitors measuring ozone in the Memphis, TN-MS-AR Area, of which one is located in the Mississippi portion of the Memphis, TN-MS-AR Area. In its maintenance plan, Mississippi has committed to continue operation of the monitor in the Mississippi portion of the Memphis, TN-MS-AR Area in compliance with 40 CFR part 58 and has thus addressed the requirement for monitoring. EPA

approved Mississippi's monitoring plan on November 7, 2014.

e. Verification of Continued Attainment

The State of Mississippi, through MDEQ, has the legal authority to enforce and implement the maintenance plan for the Mississippi portion of the Area. This includes the authority to adopt, implement, and enforce any subsequent emissions control contingency measures determined to be necessary to correct future ozone attainment problems. The State has committed to track the progress of the maintenance plan by updating its emissions inventory at least once every three years and reviewing the updated emissions inventories for the area using the latest emissions factors, models, and methodologies.

Additionally, under the Consolidated Emissions Reporting Rule (CERR) and Air Emissions Reporting Requirements (AERR), MDEQ is required to develop a comprehensive, annual, statewide emissions inventory every three years that is due twelve to eighteen months after the completion of the inventory year. The AERR inventory years match the base year and final year of the inventory for the maintenance plan, and are within one or two years of the interim inventory years of the maintenance plan. Therefore, MDEQ commits to compare the CERR and AERR inventories as they are developed with the maintenance plan to determine if additional steps are necessary for continued maintenance of the 2008 8-hour ozone NAAQS in this Area.

f. Contingency Measures in the Maintenance Plan

Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation, and a time limit for action by the state. A state should also identify specific indicators to be used to determine when the contingency measures need to be implemented. The maintenance plan must include a requirement that a state will implement all measures with respect to control of the pollutant that were contained in the SIP before redesignation of the area to attainment in accordance with section 175A(d).

The contingency plan included in the submittal includes a triggering mechanism to determine when contingency measures are needed and a process of developing and implementing appropriate control measures. The primary trigger is a violation of the 2008 8-hour ozone NAAQS (*i.e.*, when the three-year average of the 4th highest values is equal to or greater than 0.076 ppm at a monitor in the Area). If the quality assured/quality controlled (QA/QC) data indicates a violating design value, the trigger date will be the date of the design value violation and not the final QA/QC date. If the initial monitoring data indicates a possible violation but later QA/QC indicates that a violation did not occur, then a triggering event will not have occurred and contingency measures will not be implemented. The secondary trigger is activated when MDEQ forecasts ozone levels above the 2008 8-hour ozone NAAQS although no actual violation of the 2008 8-hour ozone NAAQS has occurred.

Once the primary or secondary trigger is activated, the MDEQ, shall commence analyses including an emissions inventory assessment to determine those emission control measures that will be required for attaining or maintaining the 2008 8-hour ozone NAAQS. At least one of the following contingency measures will be adopted and implemented within 18 to 24 months upon a primary triggering event:

- Implementation of diesel retrofit programs, including incentives for performing retrofits for fleet vehicle operations;
- Voluntary engine idling reduction programs;
- MDEQ will work with Mississippi Department of Transportation to have air quality alerts posted on the Intelligent Transportation System boards located in DeSoto County encouraging motorists to take actions to reduce emissions when forecasted ozone levels will exceed; and
- Other measures deemed appropriate at the time as a result of advances in control technologies.<sup>10</sup>

If the secondary trigger is activated, MDEQ will suspend all open burning permits within the County until the forecast shows improvement.

EPA preliminarily concludes that the maintenance plan adequately addresses the five basic components of a maintenance plan: the attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan. Therefore, EPA proposes that the maintenance plan SIP revision submitted by Mississippi for the State's portion of the Area meets the requirements of section 175A of the CAA and is approvable.

**VI. What is EPA's analysis of Mississippi's proposed NO<sub>x</sub> and VOC MVEBs for the Mississippi portion of the area?**

Under section 176(c) of the CAA, new transportation plans, programs, and projects, such as the construction of new highways, must "conform" to (*i.e.*, be consistent with) the part of the state's air quality plan that addresses pollution from cars and trucks. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or

delay timely attainment of the NAAQS or any interim milestones. If a transportation plan does not conform, most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP. The regional emissions analysis is one, but not the only, requirement for implementing transportation conformity. Transportation conformity is a requirement for nonattainment and maintenance areas. Maintenance areas are areas that were previously nonattainment for a particular NAAQS but have since been redesignated to attainment with an approved maintenance plan for that NAAQS.

Under the CAA, states are required to submit, at various times, control strategy SIPs and maintenance plans for nonattainment areas. These control strategy SIPs (including RFP and attainment demonstration requirements) and maintenance plans create MVEBs (or in this case sub-area MVEBs) for criteria pollutants and/or their precursors to address pollution from cars and trucks. Per 40 CFR part 93, a MVEB must be established for the last year of the maintenance plan. A state may adopt MVEBs for other years as well. The MVEB is the portion of the total allowable emissions in the maintenance demonstration that is allocated to highway and transit vehicle use and emissions. *See* 40 CFR 93.101. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, Transportation Conformity Rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and how to revise the MVEB.

As part of the interagency consultation process on setting MVEBs, MDEQ held discussions to determine what years to set MVEBs for the Memphis, TN-MS-AR maintenance plan. According to the transportation conformity rule, a maintenance plan must establish MVEBs for the last year of the maintenance plan (in this case, 2027). *See* 40 CFR 93.118. Table 5, below, provides the NO<sub>x</sub> and VOC MVEBs for 2027.

<sup>10</sup> If the State adopts a voluntary emission reduction measure as a contingency measure necessary to attain or maintain the NAAQS, EPA will evaluate approvability in accordance with relevant Agency guidance regarding the incorporation of voluntary measures into SIPs. *See, e.g.*, Memorandum from Richard D. Wilson, Acting Administrator for Air and Radiation, to EPA Regional Administrators re: Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs) (October 24, 1997); EPA, Office of Air and Radiation, Incorporating Emerging and Voluntary Measures in a State Implementation Plan (SIP) (September 2004).

TABLE 5—MVEBS FOR THE MISSISSIPPI PORTION OF THE MEMPHIS, TN-MS-AR AREA  
[tpd]

	2027	
	NO <sub>x</sub>	VOC
Base Year On-Road Emissions .....	2.74	2.54
Safety Margin Allocated to MVEB .....	5.26	2.46
Conformity MVEB .....	8.00	5.00

As mentioned previously, Mississippi has chosen to allocate a portion of the available safety margin to the NO<sub>x</sub> and VOC MVEBs for 2027. As discussed in section V of this proposed rulemaking notice, a safety margin is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. As discussed previously, Mississippi has selected 2012 as the base year.

Through this rulemaking, EPA is proposing to approve the MVEBs for NO<sub>x</sub> and VOC for 2027 for the Mississippi portion of the Memphis, TN-MS-AR Area because EPA believes that the Area maintains the 2008 8-hour ozone NAAQS with the emissions at the levels of the budgets. Once the MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area are approved or found adequate (whichever is completed first), they must be used for future conformity determinations. After thorough review, EPA has preliminarily determined that the budgets meet the adequacy criteria, as outlined in 40 CFR 93.118(e)(4), and is proposing to approve the budgets because they are consistent with maintenance of the 2008 8-hour ozone NAAQS through 2027.

#### VII. What is the status of EPA's adequacy determination for the proposed NO<sub>x</sub> and VOC MVEBs for the Mississippi portion of the area?

When reviewing submitted "control strategy" SIPs or maintenance plans containing MVEBs, EPA may affirmatively find the MVEB contained therein adequate for use in determining transportation conformity. Once EPA affirmatively finds the submitted MVEB is adequate for transportation conformity purposes, that MVEB must be used by state and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA.

EPA's substantive criteria for determining adequacy of a MVEB are set out in 40 CFR 93.118(e)(4). The process

for determining adequacy consists of three basic steps: public notification of a SIP submission, a public comment period, and EPA's adequacy determination. This process for determining the adequacy of submitted MVEBs for transportation conformity purposes was initially outlined in EPA's May 14, 1999, guidance, "Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision." EPA adopted regulations to codify the adequacy process in the Transportation Conformity Rule Amendments for the "New 8-Hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change," on July 1, 2004 (69 FR 40004). Additional information on the adequacy process for transportation conformity purposes is available in the proposed rule entitled, "Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes," 68 FR 38974, 38984 (June 30, 2003).

As discussed earlier, Mississippi's maintenance plan includes NO<sub>x</sub> and VOC MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area for 2027, the last year of the maintenance plan. EPA is reviewing the NO<sub>x</sub> and VOC MVEBs through the adequacy process. The NO<sub>x</sub> and VOC MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area, opened for public comment on EPA's adequacy Web site on November 2, 2015, found at: <http://www.epa.gov/otaq/stateresources/transconf/currsips.htm>. The EPA public comment period on adequacy for the 2027 MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area closed on December 2, 2015. No comments, adverse or otherwise, were received during EPA's adequacy process for the MVEBs associated with Mississippi's maintenance plan.

EPA intends to make its determination on the adequacy of the 2027 MVEBs for the Mississippi portion of the Memphis, TN-MS-AR Area for transportation conformity purposes in the near future by completing the

adequacy process that was started on November 2, 2015. After EPA finds the 2027 MVEBs adequate or approves them, the new MVEBs for NO<sub>x</sub> and VOC must be used for future transportation conformity determinations. For required regional emissions analysis years for 2027 and beyond, the applicable budgets will be the new 2027 MVEBs established in the maintenance plan, as defined in section V of this proposed rulemaking.

#### VIII. What is the effect of EPA's proposed actions?

EPA's proposed actions establish the basis upon which EPA may take final action on the issues being proposed for approval. Approval of Mississippi's redesignation request would change the legal designation of the portion of DeSoto County that is within the Memphis, TN-MS-AR Area, as found at 40 CFR part 81, from nonattainment to attainment for the 2008 8-hour ozone NAAQS. Approval of Mississippi's associated SIP revision would also incorporate a plan for maintaining the 2008 8-hour ozone NAAQS in the Memphis, TN-MS-AR Area through 2027 into the SIP. This maintenance plan includes contingency measures to remedy any future violations of the 2008 8-hour ozone NAAQS and procedures for evaluation of potential violations. The maintenance plan also establishes NO<sub>x</sub> and VOC MVEBs for 2027 for the Mississippi portion of the Memphis, TN-MS-AR Area. The MVEBs are listed in Table 5 of this document. Additionally, EPA is notifying the public of the status of EPA's adequacy determination for the newly-established NO<sub>x</sub> and VOC MVEBs for 2027 for the Mississippi portion of the Memphis, TN-MS-AR Area.

#### IX. Proposed Actions

EPA is taking three separate but related actions regarding the redesignation and maintenance of the 2008 8-hour ozone NAAQS for the Mississippi portion of the Memphis, TN-MS-AR Area. First, EPA is proposing to determine that the entire Memphis, TN-MS-AR Area is attaining the 2008 8-hour ozone NAAQS. Second,

EPA is proposing to approve the maintenance plan for the Mississippi portion of the Area, including the NO<sub>x</sub> and VOC MVEBs for 2027, into the Mississippi SIP. The maintenance plan demonstrates that the Area will continue to maintain the 2008 8-hour ozone NAAQS and that the budgets meet all of the adequacy criteria contained in 40 CFR 93.118(e)(4) and (5). Third, EPA is proposing to determine that the Mississippi portion of the Memphis, TN-MS-AR Area has met the criteria under CAA section 107(d)(3)(E) for redesignation from nonattainment to attainment for the 2008 8-hour ozone NAAQS. Further, as part of this action, EPA is describing the status of its adequacy determination for the NO<sub>x</sub> and VOC MVEBs for 2027 in accordance with 40 CFR 93.118(f)(2). Within 24 months from the effective date of EPA's adequacy determination for the MVEBs or the publication date for the final rule for this action, whichever is earlier, the transportation partners will need to demonstrate conformity to the new NO<sub>x</sub> and VOC MVEBs pursuant to 40 CFR 93.104(e).

If finalized, approval of the redesignation request would change the official designation of the portion of DeSoto County that is within the Memphis, TN-MS-AR Area, as found at 40 CFR part 81, from nonattainment to attainment for the 2008 8-hour ozone NAAQS.

#### X. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. See 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions merely propose to approve state law as meeting Federal requirements and do not impose additional requirements beyond those imposed by state law. For this reason, these proposed actions:

- Are 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);

- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- are 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.*);

- do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- are 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; and

- will not have disproportionate human health or environmental effects under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule 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

##### 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

##### 40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: January 28, 2016.

**Heather McTeer Toney,**

*Regional Administrator, Region 4.*

[FR Doc. 2016-02725 Filed 2-10-16; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 91

[Docket No. FWS-HQ-MB-2015-0161; FXMB1233090000//167//FF09M13200]

RIN 1018-BB23

#### Revision of Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Contest Regulations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the Fish and Wildlife Service (Service), propose to revise the regulations governing the annual Migratory Bird Hunting and Conservation Stamp Contest (also known as the Federal Duck Stamp Contest (contest)). Our amendments would update our contact information; update common names and spelling of species on our list of contest design subjects; correct minor grammar errors; and specify the requirement to include a second, appropriate, migratory bird species in the artwork design beginning with the 2016 contest.

**DATES:** We will accept comments that we receive on or before March 14, 2016. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on the closing date.

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

- *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-HQ-MB-2015-0161, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Comment Now!"

- *By hard copy:* Submit by U.S. mail or hand delivery to: Public Comments Processing, Attn: FWS-HQ-MB-2015-0161; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: BPHC; Falls Church, VA 22041-3803.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Comment Procedures and Public Availability of Comments under **SUPPLEMENTARY INFORMATION** for more information).

**FOR FURTHER INFORMATION CONTACT:**  
Suzanne Fellows, (703) 358-2145.  
**SUPPLEMENTARY INFORMATION:**

### Background

#### *History of the Federal Migratory Bird Hunting and Conservation Stamp (Duck Stamp) Program*

On March 16, 1934, Congress passed, and President Franklin D. Roosevelt signed, the Migratory Bird Hunting Stamp Act. Popularly known as the Duck Stamp Act, it required all waterfowl hunters 16 years or older to buy a stamp annually. The revenue generated was originally earmarked for the Department of Agriculture, but 5 years later was transferred to the Department of the Interior and the Service. We are legislatively mandated to use the revenue first to administer the Duck Stamp permit program and contest, and secondly for conservation, to buy or lease waterfowl sanctuaries.

In the years since its enactment, the Federal Duck Stamp Program has become one of the most popular and successful conservation programs ever initiated. Today, some 1.8 million stamps are sold each year, and as of 2012, Federal Duck Stamps have generated more than \$800 million for the preservation of more than 6.5 million acres of waterfowl habitat in the United States. Numerous other birds, mammals, fish, reptiles, and amphibians have similarly prospered because of habitat protection made possible by the program. An estimated one-third of the Nation's endangered and threatened species find food or shelter in refuges preserved by Duck Stamp funds. Moreover, the protected wetlands help dissipate storms, purify water supplies, store flood water, and nourish fish hatchlings important for sport and commercial fishermen.

#### *History of the Duck Stamp Contest*

The first Federal Duck Stamp was designed at President Roosevelt's request by Jay N. "Ding" Darling, a nationally known political cartoonist for the *Des Moines Register* and a noted hunter and wildlife conservationist. In subsequent years, noted wildlife artists were asked to submit designs. The first Federal Duck Stamp Contest was opened in 1949 to any U.S. artist who wished to enter, and 65 artists

submitted a total of 88 design entries. Since then, the contest has attracted large numbers of entrants, and it remains the only art competition of its kind sponsored by the U.S. Government. The Secretary of the Interior appoints a panel of noted art, waterfowl, and philatelic authorities to select each year's winning design. Winners receive no compensation for the work, except a pane of their stamps, but winners may sell prints of their designs, which are sought by hunters, conservationists, and art collectors.

### Proposed Changes to the Regulations at 50 CFR Part 91

The regulations governing the contest are at 50 CFR part 91. Our proposed amendments would update our phone number and Web site information; update the common names and spellings of species on our list of potential contest design subjects; update the regulations to require the inclusion of a secondary non-waterfowl migratory bird species on entries beginning with the 2016 contest; and correct minor grammar errors.

#### *Service Contact Information*

We propose to correct the telephone number at § 91.11 and the Web site address at §§ 91.1(b) and 91.11 of the Duck Stamp Office. These changes would ensure that the public can contact us and locate information about our program and the contest.

#### *Updating Species' Common Names or Spellings*

Section 91.4 contains our list of eligible waterfowl species. For each year's contest, we choose five or fewer species from the list; one or more of those species (or a combination thereof; see § 91.14) are the only acceptable subjects for entries during that contest year. We announce each year's eligible species in a **Federal Register** notice, as well as in other publicly available materials. Our list at § 91.4 contains scientific and common names accepted by the American Ornithologists' Union (AOU) (<http://www.aou.org/>; see also the AOU Checklist at <http://checklist.aou.org/taxa/>; this checklist is our standard reference on taxonomy, nomenclature, and capitalization). Since we last revised our regulations, the AOU has changed the listing order among species and updated several species names. Our proposed changes reflect changes in the order species are listed, revises the entry of "American Green-winged Teal (*Anas crecca carolinensis*)" to read "Green-winged Teal (*Anas crecca*)," and corrects the scientific name of Black Scoter from *Melanitta*

*nigra* to *Melanitta americana*. We propose to make these changes to our list at § 91.4 to reflect the most current scientific and common names.

#### *Including a Secondary Migratory Bird Species in 2016 Artwork Entries*

Current § 91.14 explains that a live portrayal of any bird(s) of the five or fewer identified eligible waterfowl species must be the dominant feature of the design, but that the design may depict other appropriate elements such as hunting dogs, as long as an eligible waterfowl species is in the foreground and clearly the focus of attention. We propose to add to this section the requirement that an appropriate non-waterfowl migratory bird species must also appear in any entry submitted to beginning with the 2016 contest. We propose this change beginning with the 2016 contest in recognition of the 2016 Centennial anniversary of the Migratory Bird Treaty between the United States and Great Britain (on behalf of Canada) and to emphasize that habitat conservation benefits all wetland-dependent species.

### Public Comments Procedures

To ensure that any final action resulting from this proposed rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. We will accept public comments we receive on or before the date listed in the **DATES** section. We are striving to ensure that any amendments to the regulations resulting from this proposed rule would be in effect in plenty of time for the June opening of the 2016 contest. The comments that will be most useful and likely to influence our decisions are those that you support by quantitative information or studies and those that include citations to, and analyses of, the applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

You must submit your comments and materials concerning this proposed rule by one of the methods listed above in the **ADDRESSES** section. We will not accept comments sent by email or fax or to an address not listed in **ADDRESSES**. If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information, such as your address, telephone number, or email address—will be posted on the Web site. Please note that comments submitted to this Web site are not immediately

viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publically viewable until we post it, which might not occur until several days after submission.

If you mail or hand-carry a hardcopy comment directly to us that includes personal information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy comments on <http://www.regulations.gov>.

In addition, comments and materials we receive, as well as supporting documentation used in preparing this proposed rule, will be available for public inspection in two ways:

(1) You can view them on <http://www.regulations.gov>. In the Search box, enter FWS-HQ-MB-2015-0161, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, select the type of documents you want to view under the Document Type heading.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### Public Availability of Comments

As stated above in more detail, 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 publically 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.

#### Required Determinations

##### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative,

and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

##### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

The changes we propose are intended primarily to clarify the requirements for the contest. These changes would affect individuals, not businesses or other small entities as defined in the Regulatory Flexibility Act. The requirement to include an appropriate secondary non-waterfowl migratory bird species in artwork for the 2016 contest may increase the appeal of the stamp to other conservation supporters. Currently stamp sales average approximately 1.8 million each year; with over 46 million self-identified bird watchers, 25 million wildlife photographers, and 45 million visitors to National Wildlife Refuges, it is hoped that an increase in Duck Stamp sales would occur from this change, but we are unable to quantify that possible increase. In recent years, we have received an average of 200 entries per

year to our annual contest. It is assumed that, with the proposed regulatory changes, the quality and numbers of entries would reflect a broader artistic interest.

We therefore certify that, if adopted, this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act. A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

##### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rulemaking is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Would not have an annual effect on the economy of \$100 million or more.

b. Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

##### *Federalism*

These proposed revisions to part 91 do not contain significant Federalism implications. A federalism summary impact statement under Executive Order 13132 is not required.

##### *Unfunded Mandates Reform Act*

This proposed rule would not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rulemaking does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

##### *Takings*

In accordance with E.O. 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required.

##### *Civil Justice Reform*

In accordance with E.O. 12988, the Office of the Solicitor has determined that this proposed rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act of 1995 (PRA)*

This proposed rule does not contain any information collection requirements for which Office of Management and Budget approval is required under the PRA (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

This proposed rule is categorically excluded. It reflects an administrative modification of procedures and the impacts are limited to administrative effects (516 DM 8.5(a)(3)). A detailed statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) is therefore not required.

*Government-to-Government Relationship With Tribes*

Under the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), and 512 DM 2, we have evaluated possible effects on federally recognized Indian Tribes and have determined that there are no effects. Individual tribal members must meet the same regulatory requirements as other individuals who enter the duck stamp contest.

*Energy Supply, Distribution, or Use*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. This proposed rule would revise the current regulations at 50 CFR part 91 that govern the Federal duck stamp contest. This rule would not significantly affect energy supplies, distribution, or use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

*Clarity of This Rule*

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

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one

of the methods listed in the **ADDRESSES** section. To better help us revise the rulemaking, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**List of Subjects in 50 CFR Part 91**

Hunting, Wildlife.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 91, subchapter G of chapter I, title 50 of the Code of Federal Regulations, as follows:

**PART 91—MIGRATORY BIRD HUNTING AND CONSERVATION STAMP CONTEST**

- 1. The authority citation for part 91 continues to read as follows:

**Authority:** 5 U.S.C. 301; 16 U.S.C. 718j; 31 U.S.C. 9701.

- 2. Amend § 91.1(b) by revising the third sentence to read as follows:

**§ 91.1 Purpose of regulations.**

\* \* \* \* \*

(b) \* \* \* These documents can also be downloaded from our Web site at: <http://www.fws.gov/birds/get-involved/duck-stamp.php>.

\* \* \* \* \*

- 3. Revise § 91.4 to read as follows:

**§ 91.4 Eligible species.**

Five or fewer of the species listed below will be identified as eligible each year; those eligible species will be provided to each contestant with the information provided in § 91.1.

- (a) *Whistling-Ducks*. (1) Black-bellied Whistling-Duck (*Dendrocygna autumnalis*)
- (2) Fulvous Whistling-Duck (*Dendrocygna bicolor*)
- (b) *Geese*. (1) Greater White-fronted Goose (*Anser albifrons*)
- (2) Emperor Goose (*Chen canagica*)
- (3) Snow Goose (including "white" and "blue" morphs) (*Chen caerulescens*)
- (4) Ross's Goose (*Chen rossii*)
- (5) Brant (*Branta bernicla*)
- (6) Canada Goose (*Branta canadensis*)
- (7) Cackling Goose (*Branta hutchinsii*)
- (c) *Swans*. (1) Trumpeter Swan (*Cygnus buccinator*)
- (2) Tundra Swan (*Cygnus columbianus*)
- (d) *Dabbling Ducks*. (1) Wood Duck (*Aix sponsa*)
- (2) Gadwall (*Anas strepera*)
- (3) American Wigeon (*Anas americana*)
- (4) American Black Duck (*Anas rubripes*)
- (5) Mallard (*Anas platyrhynchos*)

- (6) Mottled Duck (*Anas fulvigula*)
- (7) Blue-winged Teal (*Anas discors*)
- (8) Cinnamon Teal (*Anas cyanoptera*)
- (9) Northern Shoveler (*Anas clypeata*)
- (10) Northern Pintail (*Anas acuta*)
- (11) Green-winged Teal (*Anas crecca*)
- (e) *Diving Ducks*. (1) Canvasback (*Aythya valisineria*)
- (2) Redhead (*Aythya americana*)
- (3) Ring-necked Duck (*Aythya collaris*)
- (4) Greater Scaup (*Aythya marila*)
- (5) Lesser Scaup (*Aythya affinis*)
- (f) *Sea-Ducks*. (1) Steller's Eider (*Polysticta stelleri*)
- (2) Spectacled Eider (*Somateria fischeri*)
- (3) King Eider (*Somateria spectabilis*)
- (4) Common Eider (*Somateria mollissima*)
- (5) Harlequin Duck (*Histrionicus histrionicus*)
- (6) Surf Scoter (*Melanitta perspicillata*)
- (7) White-winged Scoter (*Melanitta fusca*)
- (8) Black Scoter (*Melanitta americana*)
- (9) Long-tailed Duck (*Clangula hyemalis*)
- (10) Bufflehead (*Bucephala albeola*)
- (11) Common Goldeneye (*Bucephala clangula*)
- (12) Barrow's Goldeneye (*Bucephala islandica*)
- (g) *Mergansers*. (1) Hooded Merganser (*Lophodytes cucullatus*)
- (2) Common Merganser (*Mergus merganser*)
- (3) Red-breasted Merganser (*Mergus serrator*)
- (h) *Stiff Tails*. (1) Ruddy Duck (*Oxyura jamaicensis*)
- (2) [Reserved]

- 4. Revise § 91.11 to read as follows:

**§ 91.11 Contest opening date and entry deadline.**

The contest officially opens on June 1 of each year. Entries must be postmarked no later than midnight, August 15. For the latest information on contest time and place as well as all deadlines, please visit our Web site at <http://www.fws.gov/birds/get-involved/duck-stamp.php> or call (703) 358-2145.

- 5. Revise § 91.14 to read as follows:

**§ 91.14 Restrictions on subject matter for entry.**

A live portrayal of any bird(s) of the five or fewer identified eligible waterfowl species must be the dominant feature of the design. Additionally, beginning with the 2016 contest, a live portrayal of an appropriate, identifiable non-waterfowl, migratory bird species is also required to be included in the design. An appropriate species includes any non-waterfowl species on the List of Migratory Birds at 50 CFR 10.13 that would naturally occur with the depicted eligible waterfowl species in the same

season and habitat setting. Designs may also include, but are not limited to, hunting dogs, hunting scenes, use of waterfowl decoys, National Wildlife Refuges as the background of habitat scenes, noneligible species, or other designs that depict uses of the stamp for sporting, conservation, and collecting purposes. Judges' overall mandate is to select the best design that will make an interesting, useful, and attractive duck stamp that will be accepted and prized by hunters, stamp collectors,

conservationists, and others. The design must be the contestant's original hand-drawn creation. The entry design may not be copied or duplicated from previously published art, including photographs, or from images in any format published on the Internet. Photographs, computer-generated art, or art produced from a computer printer or other computer/mechanical output device (airbrush method excepted) are not eligible to be entered into the contest and will be disqualified. An

entry submitted in a prior contest that was not selected for a Federal or State stamp design may be submitted in the current contest if the entry meets the above criteria.

Date: January 28, 2016.

**Karen Hyun,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2016-02665 Filed 2-10-16; 8:45 am]

**BILLING CODE 4333-15-P**

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

### Animal and Plant Health Inspection Service

[Docket No. APHIS–2015–0095]

#### Notice of Request for an Extension of Approval of an Information Collection; Specimen Submission

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with livestock disease surveillance programs.

**DATES:** We will consider all comments that we receive on or before April 11, 2016.

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

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0095>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2015–0095, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2015-0095> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information regarding livestock disease surveillance programs, contact Dr. Thomas Kasari, Veterinary Medical Officer, Surveillance, Preparedness, and Response Services, APHIS, 2150 Centre Avenue, Bldg B, Fort Collins, CO 80526; (970) 494–7351. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2727.

**SUPPLEMENTARY INFORMATION:** *Title:* Specimen Submission.

*OMB Control Number:* 0579–0090.

*Type of Request:* Extension of approval of an information collection.

*Abstract:* The United States Department of Agriculture (USDA) is responsible for, among other things, preventing the interstate spread of livestock diseases and for eradicating such diseases from the United States when feasible.

In connection with this mission, Veterinary Services (VS) within USDA's Animal and Plant Health Inspection Service (APHIS) conducts numerous disease surveillance programs. A critical operational component of any surveillance program is the ability to systematically track the presence of disease pathogens as well as any vectors germane to the transmission of these pathogens. VS Forms 10–4/10–4A and VS Form 5–38 are a means to facilitate this tracking capability whenever specimens are submitted to APHIS' National Veterinary Services Laboratories for diagnostic testing. The VS Form 10–4 and its supplemental sheet (VS Form 10–4A) are routinely used whenever requests are made to perform laboratory diagnostic tests to identify disease pathogens in specimens, such as blood, milk, urine, or other tissues(s) collected from any animal, including cattle, swine, sheep, goats, horses, cervids, fish, and poultry. The VS Form 5–38, Parasite Submission Form, is used to track submission of ticks for identification as to their genus and species. The ticks are collected under the auspices of the Cattle Fever Tick Eradication Program and the National Tick Surveillance Program.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.315 hours per response.

*Respondents:* State veterinarians and other State personnel whom are qualified and authorized to collect and submit specimens for laboratory analysis, accredited veterinarians, private veterinarians, animal health technicians, herd owners, private laboratories, and research institutions.

*Estimated annual number of respondents:* 5,240.

*Estimated annual number of responses per respondent:* 5.278.

*Estimated annual number of responses:* 27,659.

*Estimated total annual burden on respondents:* 8,715 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 5th day of February 2016.

**Kevin Shea,**  
Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016–02751 Filed 2–10–16; 8:45 am]

**BILLING CODE 3410–34–P**

**DEPARTMENT OF AGRICULTURE****Food Safety and Inspection Service**

[Docket No. FSIS–2014–0023]

**New Performance Standards for Salmonella and Campylobacter in Not-Ready-to-Eat Comminuted Chicken and Turkey Products and Raw Chicken Parts and Changes to Related Agency Verification Procedures: Response to Comments and Announcement of Implementation Schedule****AGENCY:** Food Safety and Inspection Service, USDA.**ACTION:** Notice.

**SUMMARY:** The Food Safety and Inspection Service (FSIS or “the Agency”) is announcing that it will begin assessing whether establishments meet the pathogen reduction performance standards for *Salmonella* and *Campylobacter* in raw chicken parts and not-ready-to-eat (NRTE) comminuted chicken and turkey products. It will also begin posting, based on FSIS sampling results and depending on the standard for the particular product, whether an establishment meets the FSIS pathogen reduction performance standards, or what category an establishment is in. This notice also responds to comments received on the January 2015 **Federal Register** notice that proposed the standards and announced changes to FSIS’s verification sampling program.

**DATES:** FSIS will begin assessing whether establishments meet the new pathogen reduction performance standards for chicken parts and comminuted chicken and turkey products on May 11, 2016. Also beginning no sooner than May 11, 2016, FSIS will begin posting on its Web site the category status of all eligible establishments subject to the existing poultry carcass pathogen reduction performance standards based on sample results from May 2015 (when FSIS stopped set-based, consecutive day testing and began routine sampling throughout the year of broiler and turkey carcasses) to the present. See the **SUPPLEMENTARY INFORMATION** section for more information about implementation dates.

**FOR FURTHER INFORMATION CONTACT:** Daniel L. Engeljohn, Ph.D., Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495, or by Fax: (202) 720–2025.

**SUPPLEMENTARY INFORMATION:****Background**

FSIS is responsible for verifying that the nation’s commercial supply of meat,

poultry, and egg products is safe, wholesome, and properly labeled and packaged.

As FSIS explained in the January 26, 2015 (80 FR 3940), **Federal Register** notice (“January 2015 notice”) in which the Agency proposed the new pathogen reduction performance standards, *Salmonella* and *Campylobacter* bacteria are among the most frequent causes of human foodborne illness in the United States. Currently, events that cause contamination of raw carcasses cannot be eliminated through the commercial production and slaughter practices employed by the U.S. industry. Contamination can be minimized, however, with the use of proper sanitary dressing procedures and by the application of interventions during slaughter and fabrication of the carcasses into parts and comminuted product.

Significantly, even though FSIS set standards for ground turkey and chicken in 1996 (61 FR 38806; July 25, 1996), the Agency has not set standards for other comminuted chicken and turkey products. These products have been associated with outbreaks (see 77 FR 72686; December 6, 2012). In addition, the Agency has not set a standard for chicken parts even though about 80 percent of chicken product is in the form of raw chicken parts fabricated from broiler carcasses (80 FR at 3941; January 26, 2015).

In the absence of standards, the *Salmonella* and *Campylobacter* present on raw poultry will survive on that product if it is not subjected to a full lethality treatment such as thorough cooking. In addition, cross contamination occurs when bacteria (such as *Salmonella* or *Campylobacter*) are spread from a contaminated source—a contaminated food or an infected food handler—to other foods or objects in the environment (80 FR 3940; January 26, 2015). FSIS will monitor the sampling results and the Centers for Disease Control and Prevention (CDC) illness data to evaluate the industry’s progress in reducing product contamination and reducing illnesses.

A reduction in illness rates should result from the implementation of these performance standards because a smaller proportion of raw chicken parts and NRTE comminuted chicken and turkey products will likely be contaminated with *Salmonella* and *Campylobacter* than has been the case without standards (80 FR at 3942; January 26, 2015).

Recognizing the need for standards, FSIS began sampling and testing NRTE comminuted chicken and turkey

products on June 1, 2013.<sup>1</sup> The Agency posted the aggregate results of this testing as part of its quarterly *Salmonella* report.<sup>2</sup>

In addition, FSIS conducted the Nationwide Microbiological Baseline Data Collection Programs: Raw Chicken Parts Baseline Survey, from January 2012 to August 2012, to estimate the percent positive of various raw chicken parts sampled and the levels of *Salmonella*, *Campylobacter*, and indicator bacteria on these products. FSIS used this information to estimate the national prevalence of *Salmonella* and *Campylobacter* in four pound portions of raw chicken parts. An overview of the Raw Chicken Parts Baseline Survey is available at [http://www.fsis.usda.gov/wps/wcm/connect/a9837fc8-0109-4041-bd0c-729924a79201/Baseline\\_Data\\_Raw\\_Chicken\\_Parts.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/a9837fc8-0109-4041-bd0c-729924a79201/Baseline_Data_Raw_Chicken_Parts.pdf?MOD=AJPERES).

In the January 2015 notice, FSIS also announced and requested comment on proposed pathogen reduction performance standards for *Salmonella* and *Campylobacter* in raw chicken parts and NRTE comminuted chicken and turkey products (80 FR at 3946; January 26, 2015). FSIS developed these proposed standards using the baseline data for parts and the on-going sampling data for NRTE comminuted chicken and turkey products. It also factored in what reduction in these two pathogens would be necessary to meet the Healthy People 2020 (HP2020) goals. The Agency developed *Salmonella* performance standards that would achieve at least a 30 percent reduction in illness rates from *Salmonella* for chicken parts, comminuted chicken, and comminuted turkey. FSIS developed a *Campylobacter* standard for chicken parts and comminuted chicken that it estimated would achieve a 33 percent reduction in illness rates.

Because FSIS found the prevalence for *Campylobacter* in 325 gram samples of comminuted turkey to be especially low, the highest practical reduction in illness rates for this product without establishing a zero-tolerance standard was estimated to be 19 percent. So, the reduction in illness rates estimated for the proposed standard for this one product-pathogen pair was less than the Healthy People goal of a 33-percent reduction (80 FR at 3942; January 26, 2015).

In the same **Federal Register** notice, for all FSIS-regulated products subject

<sup>1</sup> This sampling and testing for *Salmonella* and *Campylobacter* did not include heat-treated NRTE comminuted chicken or turkey.

<sup>2</sup> <http://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/microbiology/quarterly-reports-salmonella>.

to *Salmonella* and *Campylobacter* verification testing, FSIS announced that it would begin using routine, random sampling throughout the year rather than the set-based consecutive day approach that it had used in the past (80 FR at 3945; January 26, 2015), and that it would assess performance using a moving window of FSIS sampling results (80 FR at 3946). FSIS explained that it intended to collect samples on a weekly basis in high volume establishments and less frequently in lower volume establishments. In addition, FSIS announced that it would begin exploratory sampling of raw chicken parts (80 FR at 3945), raw pork products (80 FR at 3942), and imported raw poultry products (80 FR at 3944).

Finally, FSIS announced that it intended to post the category status for all eligible establishments because web-posting provides the public with the tools and information it needs to make informed food safety decisions (80 FR at 3948). Because a pathogen reduction performance standard already exists for young chicken (broiler) and turkey carcasses, FSIS announced that it would begin web-posting individual establishment category information for these establishments after it had

considered the comments it received. FSIS stated that it would assess what category these establishments are in using combined historical set data and sample results beginning March 2015.

In response to a coalition of trade associations that requested that FSIS extend the comment period to provide additional time to formulate meaningful comments, FSIS extended the comment period by an additional 60 days to May 26, 2015 (80 FR 12618; March 10, 2015).

The coalition also requested that FSIS extend all implementation dates announced in the January 2015 notice. The Agency did not delay implementation of all actions announced in the January 2015 notice because FSIS made available much of the information in that notice in other **Federal Register** notices.<sup>3</sup> Therefore, in March 2015, FSIS began sampling raw chicken parts to gain information on the prevalence of *Salmonella* and *Campylobacter* (in four pound sample units) of those products and to gain experience in scheduling, collecting, and analyzing raw chicken parts for these pathogens.<sup>4</sup> In April 2015, FSIS began sampling raw pork products for pathogens of public health concern, as well as for indicator organisms.<sup>5</sup> In May 2015, FSIS began routine sampling,

rather than set-based consecutive day sampling, of young chicken (broiler) and turkey carcasses.<sup>6</sup> FSIS began sampling imported poultry carcasses, imported raw chicken parts, and imported NRTE comminuted chicken and turkey for *Salmonella* and *Campylobacter* in July 2015.<sup>7</sup> FSIS has begun posting aggregate results from this testing as part of its quarterly *Salmonella* report.<sup>8</sup>

Because FSIS needed additional time to fully evaluate the comments submitted on posting information on establishment performance under the standards, FSIS did delay, and has yet to web-post, individual establishment information for establishments subject to poultry carcass sampling. On August 14, 2015, FSIS announced that it was temporarily removing the Category 3 list from its Web site until the new moving window sampling procedure is fully implemented.<sup>9</sup>

**Final Performance Standards, Follow-up Sampling, Food Safety Assessments, and Establishment Posting**

FSIS will begin assessing whether establishments meet the new pathogen reduction performance standards on May 11, 2016. The new standards are:

Product	Maximum acceptable percent positive		Performance standard *	
	<i>Salmonella</i>	<i>Campylobacter</i>	<i>Salmonella</i>	<i>Campylobacter</i>
Comminuted Chicken (325 g sample) .....	25.0	1.9	13 of 52 .....	1 of 52
Comminuted Turkey (325 g sample) .....	13.5	1.9	7 of 52 .....	1 of 52
Chicken Parts (4 lb. sample) .....	15.4	7.7	8 of 52 .....	4 of 52

\* FSIS intends to interpret results within a moving window comprising fewer than 52 samples (n) by establishing a number of positive samples (s) such that (s-1)/n < p <= s/n, where p is the maximum percent positive that would meet the performance standards.

These standards are the same as what FSIS proposed in the January 2015 notice.

Following publication of that notice, FSIS continued sampling and testing comminuted poultry products for *Salmonella* and *Campylobacter*. Also, as noted above, FSIS implemented ongoing sampling and testing of chicken parts for *Salmonella* and *Campylobacter*. FSIS found no notable difference between the results from this testing and the earlier test results for comminuted product and the chicken parts baseline

results. Therefore, FSIS has made no changes to the standards based on these additional test results.

In addition, consistent with the January 2015 notice, FSIS will collect samples based on the volume of production at an establishment. FSIS will sample eligible product from the largest-volume establishments four or five times per month (once per week), on average, and will decrease incrementally the number of samples it collects from establishments producing less volume. FSIS may sample a small

number of establishments up to six times per month. The frequency will be determined on the basis of their production volume and history of sampling results.<sup>10</sup> Establishments likely to get six samples are those that produce high volumes of several products. Furthermore, FSIS will attempt to collect at least the minimum number of samples outlined in the chart below per year in order to assess process control in all establishments subject to performance standards.

<sup>3</sup> 78 FR 53017; Aug. 28, 2013, and 79 FR 32436; Jun. 5, 2014.

<sup>4</sup> FSIS Notice 16-15; <http://www.fsis.usda.gov/wps/wcm/connect/5233e84c-f4a6-4959-b861-926a4d912eff/16-15.pdf?MOD=AJPERES>.

<sup>5</sup> FSIS Notice 23-15; <http://www.fsis.usda.gov/wps/wcm/connect/41f2bd6b-2c06-4384-935d-2ac31e3e77e9/23-15.pdf?MOD=AJPERES>.

<sup>6</sup> FSIS Notice 22-15; <http://www.fsis.usda.gov/wps/wcm/connect/3379df49-cc8d-47f7-83c3-d4d802668f6c/22-15.pdf?MOD=AJPERES>.

<sup>7</sup> FSIS Notice 32-15; <http://www.fsis.usda.gov/wps/wcm/connect/41a60d0e-060e-479c-a2c0-4096d8a542f2/32-15.pdf?MOD=AJPERES>.

<sup>8</sup> <http://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/microbiology/quarterly-reports-salmonella>.

<sup>9</sup> <http://www.fsis.usda.gov/wps/portal/fsis/newsroom/meetings/newsletters/constituent-updates/archive/2015/ConstUpdate081415>.

<sup>10</sup> <http://www.fsis.usda.gov/wps/wcm/connect/99b43489-0e14-40c0-b13e-53163d68bf1f/Sampling-Program-Plan-FY2016.pdf?MOD=AJPERES>.

Product	Minimum number of samples to assess process control in a moving window	
	<i>Salmonella</i>	<i>Campylobacter</i>
Broiler Carcass .....	11	10
Turkey Carcass .....	14	19
Comminuted Chicken .....	10	52
Comminuted Turkey .....	10	52
Chicken Parts .....	10	13

Because the *Salmonella* performance standard for broiler carcasses is 9.8 percent positive or less, FSIS has changed the minimum number of *Salmonella* samples to assess process control in a moving window for broiler carcasses to eleven. The minimum number identified in the January 2015 notice (10) would have effectively allowed zero positives. This would have constituted a zero tolerance standard. FSIS did not want to create a zero tolerance standard but did want to maintain the level of precision that underlay the proposal. FSIS accomplished this by increasing the minimum number of samples collected for *Salmonella* on broiler carcasses by one.

Consistent with what FSIS announced in the January 2015 **Federal Register** notice, the moving window for all products will be 52 weeks. However, the number of samples collected in the window can vary, depending on the volume of the product the establishment produces, and depending on whether FSIS collects follow up samples in response to an establishment not meeting the standard. Therefore, FSIS will assess establishment performance based on the maximum acceptable percent positive.

Because the comminuted chicken and turkey pathogen reduction performance standards permit only one positive result for *Campylobacter* in order to pass the standard, essentially eliminating Category 2, FSIS will only categorize eligible establishments producing these products as either passing or failing. FSIS will categorize establishments following the criteria below:

I. Category 1. Consistent Process Control: Establishments that have achieved 50 percent or less of the *Salmonella* or *Campylobacter* maximum allowable percent positive during all completed 52-week moving windows over the last three months.

II. Category 2. Variable Process Control: Establishments that meet the *Salmonella* or *Campylobacter* maximum allowable percent positive for all completed 52-week moving windows but have results greater than 50 percent of the maximum allowable percent positive during any completed 52-week moving window over the last three months.

III. Category 3. Highly Variable Process Control: Establishments that have exceeded the *Salmonella* or *Campylobacter* maximum allowable percent positive during any completed 52-week moving window over the last three months.

IV. Passing. Establishments that meet the *Campylobacter* maximum allowable percent positive for NRTE comminuted chicken or turkey during all completed 52-week moving windows over the last three months.

V. Failing. Establishments that have exceeded the *Campylobacter* maximum allowable percent positive for NRTE comminuted chicken or turkey during any completed 52-week moving window over the last three months.

Note that when FSIS collects multiple samples within a week, all those samples will be included in the window for that week.

In the January 2015 notice, FSIS stated that it intended to determine categories based on moving windows over the last six months. FSIS is changing this timeframe to every three months to provide more timely information on the establishment's status. As FSIS explained in the January 2015 notice, FSIS has determined that a 6-month time component will have minimal impact on the categorization of establishments that are most likely to meet the standard (80 FR at 3947). Similarly, the 3-month time component will have minimal effect on establishments that are most likely to meet the standard.

As part of its verification sampling program, consistent with its exploratory sampling program for comminuted product, FSIS will collect finished NRTE ground chicken and turkey and other types of NRTE comminuted chicken and turkey products. FSIS will not sample dumplings, wontons, egg rolls, or other comminuted chicken or turkey products wrapped in dough or other similar covering at this time. However, FSIS will sample raw sausage in casing.

FSIS will continue to sample mechanically separated chicken and turkey that is not intended to be processed into a ready-to-eat (RTE) product in a domestic official establishment, just as it has done during the on-going exploratory testing. At this

time, mechanically separated poultry will not be subject to the pathogen reduction performance standard for comminuted poultry. Given that mechanically separated chicken and turkey are not typically added to NRTE comminuted poultry products, results for these products were not used in developing the *Salmonella* contamination distribution used in the risk assessment (80 FR at 3943; January 26, 2015).

FSIS may consider implementing a pathogen reduction performance standard for mechanically separated poultry in the future, particularly if there is evidence that this product is being used in domestic NRTE product available to consumers, if the FSIS results for this product exhibit an unchanged or upward trend in positives, or if there is evidence that industry is not taking steps to reduce contamination of source carcass frame materials within the year following the publication of this notice. FSIS is concerned about the ongoing wholesomeness of this product if establishments do not take steps to reduce the high frequency of contamination of mechanically separated poultry,<sup>11</sup> even if it is to be used in a finished product that is RTE. FSIS recommends that the industry at least begin implementing quality control procedures for ensuring that extraneous materials, including intestinal tract and other internal organ fragments, do not contaminate the source carcass frames regardless of whether or not the product is destined for RTE processing. These steps, at a minimum, will better ensure the wholesomeness of the product.

Consistent with the January 2015 notice, FSIS will sample the following chicken parts to assess whether they meet the standards: legs (comprised of the drumstick and thigh portions either

<sup>11</sup> From January 1, 2015, through March 31, 2015, the percent positive rate for *Salmonella* in mechanically separated chicken was 88.52 percent and for mechanically separated turkey was 52.78 percent. (Available at <http://www.fsis.usda.gov/wps/portal/fsis/topics/data-collection-and-reports/microbiology/quarterly-reports-salmonella/quarterly-progress-reports>.)

separately or combined), wings, and breasts.

Also, consistent with what it announced in the January 2015 notice, as soon as practical after May 11, 2016, FSIS will begin sampling 3–4 times per year product that has been excluded from *Salmonella* verification testing: chicken in poultry slaughter establishments operating under a religious exemption; the minor species carcasses under FSIS jurisdiction and inspection (species other than chicken, turkey, pork, and cattle, such as squab, ratites, goose and lamb); and product otherwise eligible for sampling that FSIS has excluded because it is produced in low volume establishments that produce 1,000 pounds or less per day. FSIS expects to eventually implement pathogen reduction performance standards to assess process control for these products. However, before FSIS begins using these sample results to assess whether establishments previously excluded from verification sampling meet performance standards, it will provide notice and request comment on such standards in the **Federal Register**. Meanwhile, FSIS will treat these sample results as separate populations and report the aggregate results quarterly, including such information as percentage positive at the 25th, 50th, and 75th percentile.

No sooner than May 11, 2016, FSIS will begin web-posting the category status of all establishments subject to the existing poultry carcass pathogen reduction performance standards. At that time, FSIS will post these establishments' *Salmonella* and *Campylobacter* category status based on sample results from May 2015 (when FSIS began routine sampling of broiler and turkey carcasses) to the present.

After completion of the first year of sampling (*i.e.*, the first 52-week moving window), for chicken parts and comminuted poultry products subject to sampling under the new pathogen reduction performance standards, FSIS will begin web-posting whether, based on FSIS results, the establishment is passing, or what category the establishment is in, depending on the standard for the particular product. However, based on at least the minimum number of samples to assess process control for that product/pathogen pair and other available information about establishments, such as noncompliance rates, if establishment performance overall does not improve or appears to be worsening before the completion of the first moving window, FSIS may begin web-posting individual establishment category information sooner.

In the January 2015 notice, FSIS announced that it intended to web-post the categories for all establishments subject to the *Campylobacter* pathogen reduction performance standards. However, because, as comments pointed out, the comminuted chicken and turkey pathogen reduction performance standards permit only one positive result for *Campylobacter* in order to pass the standard, essentially eliminating Category 2, FSIS will not, at this time, web-post the category status of individual establishments that do not meet the *Campylobacter* standard for comminuted chicken or turkey products (*i.e.*, those in Category 3). Instead, FSIS will web-post whether the eligible establishment is passing or failing. Consistent with the January 2015 notice, FSIS will update individual establishment postings on a monthly basis.

Starting August 9, 2016, FSIS will web-post quarterly aggregate information relative to categories for all establishments subject to sampling under the new performance standards for which FSIS has collected the minimum number of samples, using the most recent sample results. This information will be aggregated and will not single out any specific establishment. This information will give industry and other stakeholders timely information about progress being made to reduce contamination in NRTE poultry of all types sampled. FSIS will also web-post calendar year prevalence estimates in its *Salmonella* and *Campylobacter* annual report. Results of follow-up sampling will be excluded for the purposes of these prevalence estimates. FSIS will not include follow-up sampling in prevalence estimates because these samples are non-random and targeted.

FSIS will schedule a Public Health Risk Evaluation (PHRE), and possibly a Food Safety Assessment (FSA), based on FSIS test results, for establishments that do not meet the pathogen reduction performance standards; for establishments that have produced products with repetitive *Salmonella* or *Campylobacter* serotypes of public health concern or repetitive antibiotic resistant *Salmonella*; and for establishments with *Salmonella* or *Campylobacter* pulsed-field gel electrophoresis (PFGE) (or whole-genome sequencing, as it becomes available) patterns matching those found in recent outbreaks or epidemiologically linked to illnesses. FSIS intends to do the PHRE because it can reasonably be inferred that establishments in these categories have not adequately addressed *Salmonella* or

*Campylobacter* in their Hazard Analysis and Critical Control Point (HACCP) systems. Based on PHRE analysis, FSIS will determine whether to schedule a FSA<sup>12</sup> at the establishment.

FSIS will collect 16 or 8 follow-up samples (depending on the product volume) on a daily or per shift basis, as soon as possible after an establishment has not met a pathogen reduction performance standard. The follow-up samples will count towards the samples collected as part of the moving window procedure for that establishment. In the January 2015 notice, FSIS stated that it did not intend to count the follow up samples in the moving window for assessing whether establishments are meeting the standards. FSIS has decided to change its approach so that it can more quickly assess whether establishments have regained process control, and because, when establishments have regained control, FSIS believes their posted category status should reflect that fact. FSIS is also making this change in response to comments.

As we currently do for outbreak investigations, for at least 90 days after an establishment has not met a standard, FSIS will monitor CDC PulseNet database for matching food isolates to those obtained by FSIS in its sampling of products produced by the establishment. This monitoring will give FSIS early warning if an outbreak involving the establishment's products is developing. Moreover, as new tools such as whole genome sequencing become available, FSIS will also search for official sequencing databases matches between FSIS-regulated NRTE products and human illness. FSIS will alert its public health partners when an establishment does not meet the standard, so that they can also be on the lookout for an emerging outbreak. In addition, FSIS may collect the consignee list for product produced when an establishment has not met the standard so that the Agency can focus its attention on the area in which the product was distributed.

Consistent with existing practices,<sup>13</sup> after notifying an establishment that it has not met a performance standard, FSIS will conduct an assessment of the establishment's HACCP plan and

<sup>12</sup> The purpose of an FSA is to assess and analyze an establishment's food safety system to verify that the establishment is able to produce safe and wholesome meat or poultry products in accordance with FSIS statutory and regulatory requirements.

<sup>13</sup> FSIS stated in a **Federal Register** notice published April 16, 2003 (68 FR 18593), that it was using *Salmonella* sample-set failures as an indication that there is something wrong in the establishment's HACCP system, and that the system needs to be carefully evaluated by the Agency.

Sanitation Standard Operating Procedures, through a PHRE, focusing on the establishment's planned corrective actions. In addition, FSIS will develop a plan to verify whether the establishment implemented corrective actions. FSIS may also conduct a FSA, when it deems it appropriate. If, after 90 days, the establishment has not been able to gain process control, as determined from FSIS's follow-up sampling and from the results of the PHRE or FSA, and the establishment has not taken corrective actions, FSIS will likely take enforcement actions, such as by issuing a Notice of Intended Enforcement (NOIE) or by suspending inspection, under the conditions and according to the procedures described in 9 CFR part 500. FSIS will not issue a NOIE or suspend inspection based solely on the fact that an establishment did not meet a performance standard.

If the establishment produced product associated with an outbreak, even if the establishment is in category 1, FSIS will scrutinize its corrective actions with particular care, including performing an Incident Investigation Team review (see FSIS Directive 5500.3).

Generally, if an establishment produces product associated with an outbreak or has failed to meet a pathogen reduction performance standard for *Salmonella* or *Campylobacter* and has not addressed those hazards in its HACCP plan, the establishment would need to reassess its HACCP plan for that product to determine whether the plan needs to be modified to address the hazard (9 CFR 417.3(b)). Thus, the establishment, to maintain an adequate HACCP system, will have to address the pathogen in its HACCP plan, rather than through a prerequisite program like the Sanitation Standard Operating Procedures.

Finally, consistent with FSIS testing of imported beef and poultry products for pathogens, FSIS will begin testing imported pork for *Salmonella* later in Fiscal Year 2016 (FY2016).

#### Summary of Implementation Dates

FSIS will begin assessing whether establishments meet the new pathogen reduction performance standards for chicken parts and comminuted chicken and turkey products on May 11, 2016. Also beginning no sooner than May 11, 2016, FSIS will begin posting on its Web site the category status of all eligible establishments subject to the existing poultry carcass pathogen reduction performance standards based on sample results from May 2015 (when FSIS stopped set-based, consecutive day testing and began routine sampling throughout the year of broiler and

turkey carcasses) to the present. After completion of the first moving window of product sampled under the new pathogen reduction performance standards for chicken parts, comminuted chicken, and turkey products (approximately 1 year from publication of this notice), FSIS will begin web-posting whether individual establishments are in Category 1, 2, or 3, or whether they are passing the standards (in the case of NRTE comminuted chicken or turkey for *Campylobacter*). However, based on at least the minimum number of samples to assess process control for that product/pathogen pair and other available information about establishments, such as noncompliance rates, if establishment performance overall does not improve or appears to be worsening before the completion of the first moving window, FSIS may begin web-posting individual establishment category information sooner. As soon as practical after May 11, 2016, FSIS will begin sampling 3–4 times per year the following products which have been excluded from *Salmonella* verification testing: Broilers produced in poultry slaughter establishments operating under a religious exemption, minor species carcasses (minor species are those other than classes of chicken, turkey, pork and beef for which FSIS has previously set pathogen reduction performance standards and that are produced and consumed in larger quantities than other classes of these species or other species under FSIS jurisdiction and inspection, such as squab, ratites, lamb, and goose), and product from low volume establishments that produce up to 1,000 pounds per day of poultry product subject to sampling. This fiscal year, FSIS will also begin sampling imported pork products for *Salmonella*.

#### Summary of Comments and Responses

In the January 2015 notice, FSIS requested comment on specific issues: The proposed pathogen reduction performance standards for *Salmonella* and *Campylobacter* in raw chicken parts and NRTE comminuted chicken and turkey products; sampling of raw chicken parts that have been marinated or injected; the Agency's implementation strategy, including how it plans to assess process control in low volume establishments and the planned modifications to its categorization system; how it plans to web-post the category status of eligible establishments; and the accuracy of the information and assumptions used in its cost-benefit analysis. FSIS received 15 comments in response to these and

other issues in the notice. The comments were from consumer advocacy groups, organizations representing the meat/poultry industry, meat/poultry processors, a food ingredient supplier, and an individual.

FSIS has summarized and responded to the relevant issues raised by commenters below.

#### A. General Comments on Actions Announced in the Notice

*Comments:* Many comments from both industry and consumer groups supported FSIS establishing pathogen reduction performance standards for *Salmonella* and *Campylobacter* in NRTE chicken parts and comminuted chicken and turkey products because the commenters agreed that the standards are likely to benefit public health. In addition, many comments supported FSIS replacing set-based, consecutive-day sampling with routine sampling, including weekly sampling in high volume operations, and using a moving window approach for assessing process control to gain a better sense of ongoing establishment performance. Likewise, several comments supported FSIS using a more sensitive enrichment-based method to analyze samples for *Campylobacter*, sampling imported raw chicken products, and sampling raw chicken parts other than breasts, legs, and wings to better understand the incidence of *Salmonella* and *Campylobacter* in these products and to assess whether additional performance standards may be needed. Finally, several comments supported FSIS's planned action to web-post the individual category status of establishments subject to FSIS sampling to assess whether they meet performance standards because it will provide the public with specific, geographical, and process capability information and will provide industry with incentives for making changes to their operations or from whom they purchase source materials.

Meanwhile, other commenters, mostly representing industry interests, generally were opposed to the issuance of new pathogen reduction performance standards and to web-posting individual establishment performance.

*Response:* FSIS has determined that it is prudent to issue of new pathogen reduction performance standards and to web-post establishment-specific performance as noted in detail below.

#### B. Proposed Performance Standards

*Comment:* An organization representing the chicken industry objected to the method and scientific evidence used to develop the

performance standards. Rather than use the Healthy People 2020 (HP2020) goals to set the standards, the organization argued that FSIS should identify the most significant sources of illnesses from these pathogens and focus its resources on these products. In addition, the organization argued that chicken and turkey are not the most significant sources of illnesses associated with these pathogens.

**Response:** The Healthy People Initiatives have served as a science-based framework for public health activities by FSIS, CDC, the Food and Drug Administration, and across other sections of the public health community for years. Furthermore, FSIS disagrees that the proposed pathogen reduction performance standards were not based on sufficient valid scientific evidence. Using a common analytical framework,<sup>14</sup> FSIS developed the standards based on a variety of data sources, including Agency sampling data, the CDC foodborne illness and outbreak data, and the most recent available research, as well as the HP2020 national health objectives.

Recent research supports that poultry represents the largest fraction of *Salmonella* and *Campylobacter* illnesses attributed to FSIS-regulated products.<sup>15 16 17</sup> Furthermore, data from the National Antimicrobial Resistance Monitoring System (NARMS) show that the incidence of *Salmonella* in poultry products is five to ten times higher than that in ground beef or pork chops.<sup>18</sup> Because FSIS can only directly affect those food commodities that fall under its jurisdiction, FSIS is addressing the product it regulates that poses the highest public health risk.

In addition, evidence of the connection of salmonellosis and contaminated NRTE comminuted poultry products can be found in the recent outbreaks that have been

associated with these products. In 2011, there were two outbreaks involving ground turkey product. The 2011 *Salmonella* Hadar outbreak associated with turkey burgers sickened 12 people in 10 states and led to a recall of 54,960 pounds of turkey burger.<sup>19</sup> The 2011 *Salmonella* Heidelberg outbreak associated with ground turkey product sickened 136 people in 34 states and led to one death. Approximately 36 million pounds of ground turkey were ultimately recalled.<sup>20</sup> The CDC reported a 2013–2014 *Salmonella* Heidelberg illness outbreak associated with the consumption of chicken parts that sickened 634 people in 29 states and Puerto Rico.<sup>21</sup>

In addition, in 2015, the CDC investigated two separate outbreaks of *Salmonella* Enteritidis infections linked to raw, frozen, stuffed chicken entrees associated with two separate establishments that produced these products. These two outbreaks stemmed from poultry product in which the source materials were either comminuted chicken breast meat or whole chicken breast parts and resulted in twelve illnesses and five hospitalizations. In both outbreaks, the establishment involved did not consider implementing effective controls for the source materials or for the production process to know the frequency of contamination of source materials with *Salmonella*.

Thus, FSIS has concluded, using the available data and the public health science principles contained in a quantitative risk assessment, that adopting new pathogen reduction performance standards for comminuted poultry and chicken parts to reduce the *Salmonella* on these types of products would reduce consumer exposure to this pathogen and thus reduce the occurrence of illness.

**Comment:** An organization representing the turkey industry stated that the industry has already made great strides in lowering illness that, according to the commenter, FSIS did not account for in setting the standards. This organization also stated that it will be very difficult to achieve further reduction in illness through the proposed NRTE comminuted turkey product standards.

**Response:** FSIS agrees that the turkey industry, particularly, has collectively

taken steps to reduce the incidence of pathogens in comminuted product following the *Salmonella* Heidelberg multistate outbreak in 2011 that infected more than 100 individuals. Nonetheless, setting pathogen reduction performance standards is an important tool in targeting reductions and in protecting public health, and FSIS has decided to proceed to do so.

In setting the performance standards, FSIS did not explicitly account for the decrease in pathogen contamination observed following the *Salmonella* Heidelberg outbreak. To do this, FSIS would have needed to use the most up-to-date attribution data. Given that there is about a two year lag in the CDC outbreak data, it was not possible for the Agency to do so. FSIS did, however, use the most up-to-date published attribution data available (Painter et al., 2013). In addition, FSIS used the most recent contamination data available at the time it developed the performance standards (2013–2014). These contamination data reflect some of the reduction in pathogen contamination seen in comminuted turkey.

Still, FSIS recognizes that the performance standard for *Campylobacter*, allowing only one positive sample in the moving window, is quite rigorous. Regardless, such a performance standard is necessary to maintain industry focus on continuous improvement. However, as discussed later in this document, FSIS has agreed that, because the comminuted chicken and turkey pathogen reduction performance standards permit only one positive result for *Campylobacter* in order to pass the standard, there is no Category 2. Thus, FSIS will web-post these establishments as either passing or failing.

**Comment:** Several comments criticized the proposed pathogen reduction performance standards for comminuted poultry because they were not based on a full year of data. The commenters also stated that the standards were based on data from the high prevalence season for the pathogens.

**Response:** At the time that the pathogen reduction performance standards for comminuted poultry were developed and subsequently published, the standards were based on eight months of data. Meanwhile, FSIS has analyzed the first twelve months of data for NRTE comminuted chicken and turkey and compared the results to that of the 8-month analysis.<sup>22</sup> FSIS found

<sup>14</sup> <http://www.fsis.usda.gov/wps/wcm/connect/afe9a946-03c6-4f0d-b024-12aba4c01aef/Effects-Performance-Standards-Chicken-Parts-Comminuted.pdf?MOD=AJPERES>.

<sup>15</sup> Batz, M.B., et al. 2012. "Ranking the disease burden of 14 pathogens in food sources in the United States using attribution data from outbreak investigations and expert elicitation." *J. Food Prot* 75(7):1278–91.

<sup>16</sup> Painter, J.A., et al. 2013. "Attribution of foodborne illnesses, hospitalizations, and deaths to food commodities by using outbreak data, United States, 1998–2008." *Emerg Infect Dis* 19(3): 407–15.

<sup>17</sup> Interagency Food Safety Analytics Collaboration, 2015. "Foodborne Illness Source Attribution Estimates for *Salmonella*, *Escherichia coli* O157:H7, *Listeria monocytogenes*, and *Campylobacter* using Outbreak Surveillance Data."

<sup>18</sup> Table 6 in NARMS. 2013. *Retail Meat Report 2011*. At: <http://www.fda.gov/downloads/AnimalVeterinary/SafetyHealth/AntimicrobialResistance/NationalAntimicrobialResistanceMonitoringSystem/UCM334834.pdf>.

<sup>19</sup> [http://www.fsis.usda.gov/wps/wcm/connect/fsis-archives-content/internet/main/topics/recalls-and-public-health-alerts/recall-case-archive/archives/ct\\_index295a](http://www.fsis.usda.gov/wps/wcm/connect/fsis-archives-content/internet/main/topics/recalls-and-public-health-alerts/recall-case-archive/archives/ct_index295a).

<sup>20</sup> <http://www.cdc.gov/salmonella/2011/ground-turkey-11-10-2011>.

<sup>21</sup> <http://www.cdc.gov/salmonella/heidelberg-10-13/>.

<sup>22</sup> Additional data is available at <http://www.fsis.usda.gov/wps/wcm/connect/25bc47ad-d59d-48d6-b90f-4865d1483f4a/Q2-CY2014>.

no notable difference between these results and earlier test results for comminuted product. Therefore, FSIS made no changes to the standards based on these additional test results.

However, FSIS acknowledges that setting the performance standards on data from a true high prevalence season (*i.e.*, a period in which there was more frequent exposure of the public to pathogens of public health concern) could create an unintended consequence of permitting more exposure of the public to pathogens of public health concern during a true low prevalence season. FSIS's published analysis of seasonal patterns of *Salmonella* contamination in FSIS regulated products did not identify a significant seasonal pattern in ground chicken or turkey.<sup>23</sup> Therefore, FSIS concludes that the performance standards have been appropriately designed, and that no change is necessary.

*Comment:* As more data become available (and regularly thereafter), several consumer advocacy groups requested that FSIS re-evaluate the performance standards. In addition, comments requested that FSIS assess whether the performance standards need to be updated to account for the actual compliance fraction and other assumptions made during initial calculations. The comments also requested that FSIS periodically measure the impact of the performance standards on public health goals.

*Response:* FSIS will periodically assess the effect of the performance standards. This assessment will include an estimation of all the parameters used in the risk assessment model and their contribution to a potential reduction in illnesses. FSIS will assess each pathogen reduction performance standard on at least a five-year basis to determine whether the standard should be adjusted. FSIS will calculate ongoing pathogen prevalence for all products subject to standards and will determine whether the pathogen prevalence has been significantly reduced in deciding whether to revise the performance standards.

*Comment:* A consumer advocacy group requested that FSIS also establish a performance standard for live animals entering the slaughter facility.

*Response:* FSIS disagrees that it should establish pathogen reduction

performance standards for live animals because FSIS does not have jurisdiction on the farm and has not conducted testing on live animals. However, FSIS does recommend that establishments develop pathogen prevention targets for products derived from live animals that an establishment would apply as early as safely possible in its slaughter process. Sampling at this early stage would enable an establishment to determine whether its food safety system is adequately designed to mitigate the incoming load of pathogens.

The rehang or pre-evisceration sampling point used in the FSIS carcass baseline best represents the contamination on the carcass before there is secondary contamination from the evisceration process. FSIS provides information to industry on median indicator organism values at rehang in its compliance guide, "Modernization of Poultry Slaughter Inspection—Microbiological Sampling of Raw Poultry" (June 2015).<sup>24</sup> When an establishment compares its rehang or pre-evisceration sample results to the ones in the table in the compliance guide, a sample value that is higher than the corresponding one listed in the table indicates that the incoming bacterial load on the bird may be higher than expected, and that the establishment may not be able to maintain process control. As a result, the establishment would be less likely to meet the applicable performance criteria.

*Comments:* An organization representing the chicken industry urged FSIS to not apply the performance standard for raw chicken parts to any products not consistently sampled in the Raw Chicken Parts Baseline Survey. The organization stated that FSIS has no basis for concluding that the Raw Chicken Parts Baseline Survey is applicable to parts that were marinated with a clear solution. If the Agency has a means to identify which samples in the Survey were from marinated parts, the organization requested that FSIS remove those samples from its calculations.

In addition, the organization stated that necks and giblets should not be subject to a pathogen reduction performance standard because they are typically sold to (and used by) consumers differently than breasts, legs, and wings. However, several consumer advocacy groups requested that FSIS apply the pathogen reduction

performance standard for raw chicken parts to necks, giblets, half carcasses, quarter carcasses, and parts injected or marinated with a clear solution until the Agency has developed a pathogen reduction performance standard specific to those items.

A consumer advocacy group requested that FSIS establish a sampling program for raw chicken livers. The group cited a CDC report detailing outbreaks linked to the consumption of chicken livers<sup>25</sup> as support for its request. The group also requested that FSIS sample and develop pathogen reduction performance standards for raw turkey parts because turkey parts are commonly purchased by consumers.

*Response:* As FSIS explained in the January 2015 **Federal Register** notice, during the baseline some inspection personnel sampled parts that were injected with a solution or otherwise marinated (80 FR at 3943). Because FSIS did not identify the samples as injected or otherwise marinated at the time of collection, FSIS is unable to remove these results from its calculations and will apply the performance standards to marinated, injected, tumbled, or tenderized parts. For its ongoing exploratory sampling of parts, FSIS issued instructions to inspection program personnel to make explicit that such parts are to be sampled.<sup>26</sup> Based on the first 3–4 months of exploratory chicken parts sampling, *Salmonella* results for injected, tenderized, or vacuum tumbled parts were not significantly higher than those for intact parts. These products are available to the consumer and do present a risk of exposure. FSIS does not believe it appropriate to set a different pathogen reduction performance standard for these products than for other parts.

FSIS will not, however, apply the pathogen reduction performance standard for raw chicken parts to necks, giblets, half carcasses, and quarter carcasses at this time. In FY2016, FSIS will begin exploratory sampling of necks, giblets (*i.e.*, gizzards, hearts, and livers), half carcasses, and quarter carcasses to better understand the prevalence of *Salmonella* and *Campylobacter* in these parts. FSIS will post the aggregate results of this testing as part of its *Salmonella* reporting. In addition, FSIS plans to analyze these data to better understand the potential differences in contamination for gizzards, hearts, and livers.

<sup>25</sup> Available at <http://www.cdc.gov/salmonella/heidelberg-chickenlivers/011112/index.html>.

<sup>26</sup> FSIS Notice 16–15; available at <http://www.fsis.usda.gov/wps/wcm/connect/5233e84c-f4a6-4959-b861-926a4d912eff/16-15.pdf?MOD=AJPERES>

*Salmonella*-Testing.pdf?MOD=AJPERES (see Table 8a and 8b).

<sup>23</sup> Williams, M.S., et al. (2014). Temporal Patterns in the Occurrence of *Salmonella* in Raw Meat and Poultry Products and Their Relationship to Human Illnesses in the United States. *Food Control* 35, 267–273.

<sup>24</sup> Available at <http://www.fsis.usda.gov/wps/wcm/connect/a18d541e-77d2-40cf-a045-b2d2d13b070d/Microbiological-Testing-Raw-Poultry.pdf?MOD=AJPERES>

FSIS will use these data to determine whether further sampling is needed. Such information could then be used by the Agency to decide whether pathogen reduction performance standards for these products are necessary.

*Comment:* An organization representing the chicken industry opposed FSIS using the more sensitive, enrichment-based method for *Campylobacter* testing that the Agency is using for comminuted product and chicken parts because, according to the commenter, the method increases the likelihood of establishments not meeting the performance standard when actual prevalence may not have changed.

Several consumer advocacy groups requested that the performance standard for *Campylobacter* in NRTE comminuted chicken and turkey be based on the most sensitive enrichment-based testing method.

*Response:* In 2013, FSIS began testing NRTE comminuted poultry for *Campylobacter* using a direct plating method (1 mL test portion). Later, in August 2015, FSIS began concurrently analyzing all NRTE comminuted poultry samples for *Campylobacter* using the direct plating method and an enrichment-based method (30 mL test portion).<sup>27</sup> The Agency took this step because the enrichment-based method can detect a higher percent of positive samples, as determined from the results of an analysis comparing the direct plating method with the enrichment-based method.

FSIS found that the 1 mL direct plating method identified about 3–4 percent *Campylobacter*-positive samples for comminuted chicken and about 1 percent *Campylobacter*-positive samples for comminuted turkey. In contrast, the 30 mL enrichment-based method identified about 15 percent of the samples *Campylobacter*-positive in comminuted chicken, *i.e.* about a 4-fold increase in percent positive results between the 30 mL enrichment-based method and the 1 mL direct plating method for comminuted chicken.<sup>28</sup> FSIS has not completed a similar evaluation for comminuted turkey.

Regardless, FSIS developed the pathogen reduction performance standards for *Campylobacter* using a direct plating laboratory method of analysis with a 1 mL test portion. Therefore, FSIS will proceed with

assessing establishment performance relative to those standards based on the 1 mL portion size.

The Agency will continue to perform the 1 mL direct plating method alongside the 30 mL enrichment-based method and analyze data generated from both analytical approaches. These analyses will show whether significant differences exist, and whether these differences support that there is a need to change the combined analytical approach, the pathogen reduction performance standards, and the associated method of analysis for *Campylobacter* in NRTE comminuted chicken and turkey. If FSIS determines that it needs to change the standards, it will propose changes in the **Federal Register**.

#### *C. Implementation of Final Performance Standards*

*Comment:* Several industry comments requested that FSIS provide at least a 1- or 2-year transition period after FSIS announces the final performance standards, and before FSIS begins assessing whether establishments meet the standards, to allow industry time to adjust to the new standards.

*Response:* FSIS does not agree. FSIS notes that the poultry industry has been aware of the FSIS intent to develop pathogen reduction performance standards for chicken parts since at least 2012 when the baseline study got underway. Multiple recent outbreaks for both chicken parts and comminuted poultry heighten the need for industry to collectively address more optimal process control to limit exposure of the public to pathogens of public health concern. Thus, FSIS is providing a short but practical implementation period sufficient for establishments to adjust their food safety system. FSIS will begin assessing whether establishments meet the new *Salmonella* and *Campylobacter* performance standards for NRTE comminuted chicken and turkey and raw chicken parts on May 11, 2016. This 90-day delay is appropriate because 9 CFR 304.3 provides establishments up to 90 days to validate changes to their food safety system. Consequently, sample results affecting whether establishments meet the new standards begin with the first sample collected as part of a moving window on or after May 11, 2016. This 90-day period will effectively provide for a sufficient period of time for establishments to validate that their food safety systems can consistently control for enteric pathogens of public health concern, in accordance with 9 CFR 417.4.

#### *D. Routine Verification Sampling and Testing*

*Comment:* An individual and several consumer advocacy groups stated that routine verification sampling should be unannounced, unpredictable, and completely random to prevent establishments from temporarily altering their food safety systems to “pass” tests.

In addition, two consumer advocacy groups noted that antimicrobial agents used as interventions in poultry establishments may be masking the presence of *Salmonella* (*i.e.*, in the neutralizing solution used by the Agency during sample collection) resulting in “false negatives.”

*Response:* The fact that FSIS no longer collects samples on consecutive days provides establishment less awareness about when a sample is to be collected. FSIS personnel notify establishment management just before collecting each sample that a routine *Salmonella* and *Campylobacter* sample is being collected. In addition, FSIS personnel use a method for randomly selecting specific product for sampling such that all product from all shifts, rails, chillers, coolers, and grinders have an equal chance of being selected for sampling.

FSIS has issued instructions to inspection program personnel, directing them to report changes in establishment practices when FSIS samples are collected.<sup>29</sup> FSIS has not noted any significant concern with changed production practices during FSIS sampling. Further, based on experience in-plant, FSIS does not believe that establishments can readily adjust their food safety systems to eliminate pathogens without such a change being obvious and inconsistent with their routine food safety system or HACCP flow chart. FSIS inspection personnel are present every day and are aware of the design of the food safety system in each establishment.

FSIS continues to work with USDA's Agricultural Research Service to investigate the potential impact of carryover of antimicrobial agents on sampling results. The findings of this research will inform any actions the Agency may take. Regardless, in 2016, FSIS plans to begin evaluating the use of a new buffer solution to reduce the potential impact from carryover of antimicrobial agents. If an effective buffering media is identified, the buffer media will be used by inspection

<sup>27</sup> <http://www.fsis.usda.gov/wps/portal/portal/pressroom/meetings/newsletters/constituent-updates/archive/2015/ConstUpdate032015>.

<sup>28</sup> Though comminuted turkey was not tested in this methods comparison, FSIS expects there would also be an increase in the *Campylobacter* percent positive using the enrichment-based method.

<sup>29</sup> See Chapter VIII, Section II of FSIS Directive 10,250.1; available at <http://www.fsis.usda.gov/wps/wcm/connect/ebf83112-4c3b-4650-8396-24cc8d38b6fc/10250.1.pdf?MOD=AJPERES>.

program personnel when sampling poultry carcasses and parts to reduce carryover from the common antimicrobial interventions that may potentially impact sampling results.

*Comment:* An organization representing the chicken industry and a meat and poultry processor requested that raw chicken parts only be eligible for sampling in the primary producing establishment.

*Response:* FSIS disagrees with this comment. Establishment handling and processing of raw chicken parts at secondary processing facilities presents additional opportunity for contamination with pathogens, particularly when new source materials are incorporated. Thus, FSIS will continue sampling finished raw chicken parts at slaughter establishments, as well as at those that further process the product. By doing so, exposure of the public to pathogens of public health concern will be reduced at each practical step in the production process. FSIS has issued instructions to its inspection program personnel that make clear that product that is only repackaged and not subject to further reprocessing is not subject to sampling (see Section V, Part D, of FSIS Notice 16–15).<sup>30</sup>

*Comment:* An organization representing the chicken industry requested that FSIS provide more detail about how each sample will be collected, where in the process the product will be sampled, and how the products will be tested.

*Response:* FSIS has issued necessary notices and directives<sup>31</sup> on this matter and will issue additional instructions as necessary.

*Comment:* A consumer advocacy group requested that FSIS verification sampling include raw chicken parts derived from carcasses set aside for in-plant “reprocessing” and “salvage” activities.

*Response:* Parts derived from “reprocessing” and “salvage” activities most commonly end up as comminuted product or as parts destined for further processing—both of which are subject to FSIS verification sampling and testing. If FSIS finds that these parts are being handled in a manner that consistently circumvents Agency verification testing, FSIS will consider sampling of this product.

*Comment:* A meat and poultry processor requested that FSIS enumerate all of its *Salmonella* results and focus its resources on facilities with

higher levels of *Salmonella* and not focus on presence of the pathogen alone.

*Response:* FSIS agrees that high levels of pathogens should be considered in FSIS sampling considerations and is exploring options for enumerating more samples. However, because the occurrence of any *Salmonella* poses a potential hazard for consumers, FSIS will continue to primarily focus upon the presence or absence of the pathogen. In addition, based on sampling results from establishments linked to outbreaks, FSIS has found low level but frequent contamination does contribute to adverse public health outcomes. Furthermore, pathogen reduction through performance standards results in fewer contaminated products overall, regardless of the levels of *Salmonella* present. Thus, by setting new performance standards for these products that are based on presence or absence testing, FSIS anticipates establishments will adopt practices that will reduce all pathogens in their products, resulting in a greater overall impact on reducing human illnesses associated with FSIS-regulated products than would result from a focus on enumeration.

*Comment:* A consumer advocacy group suggested that FSIS sample the neck skins of several birds in a flock (defined as one broiler house) immediately after the kill step, as is done in Sweden.

*Response:* FSIS questions whether such a sampling program would derive different results than those found through other FSIS sampling. Sampling of the neck skins immediately after the slaughter step is one component of Sweden’s *Salmonella* control program which primarily regulates on-farm production. The testing of the neck skins at the time of slaughter is done to verify the effectiveness of on-farm screening activities.

FSIS encourages establishments to determine the incoming pathogen load on live birds to determine whether its processes can effectively address the pathogens. For example, these data could be used by establishments to determine which farms to obtain birds from for slaughtering, and how to schedule the order of flocks or houses of birds to decrease cross contamination during slaughter.

In addition, FSIS requires that slaughter establishments sample most poultry pre-chill (9 CFR 381.65(g)(1))—a valuable source of data about how well an establishment is minimizing

contamination with enteric pathogens and fecal material on live birds presented for slaughter and on carcasses throughout the evisceration and dressing process.

*Comment:* An organization representing the chicken industry requested that FSIS share reserve rinsate (the solution obtained and sent to FSIS laboratories for analysis after mixing/washing product) with establishments at the time of sample collection.

*Response:* FSIS does not intend to share rinsate with establishments. FSIS is satisfied with the competency of its laboratory personnel and the procedures they implement, which are able to reliably detect pathogens. FSIS encourages establishments to conduct their own sampling rather than rely upon FSIS sampling results. In fact, FSIS assumes that establishments will choose to increase sampling and testing as a means of verifying process control, and that they are meeting the new pathogen reduction performance standards. FSIS included additional costs associated with increased sampling and testing by establishments in our cost-benefit analysis posted with this notice.

#### *E. Proposed Moving Window Approach for Assessing Process Control*

*Comment:* In lieu of the moving window approach, an organization representing the meat/poultry industry suggested that FSIS consider other alternative approaches to evaluate process control in which observations are weighted; e.g., the exponentially weighted moving average in which observations are weighted with the highest weight given to the most recent data.

*Response:* While an exponentially weighted moving average could move some establishments out of a failing status more quickly, it would also move some potentially passing establishments into a failing status. Thus, FSIS concludes the equally weighted 12-month moving average is the best approach.

In the January 2015 notice, FSIS stated that 10 would be the minimum number of samples (over 52 weeks) required to assess process control (80 FR at 3947). Upon further consideration, FSIS has discovered that the proposed minimum number of *Salmonella* samples for broiler carcasses (10) would effectively equate to a zero tolerance standard. Therefore, FSIS has revised the minimum number of samples to 11

<sup>30</sup> Available at <http://www.fsis.usda.gov/wps/wcm/connect/5233e84c-f4a6-4959-b861-926a4d912eff/16-15.pdf?MOD=AJPERES>.

<sup>31</sup> See Directive 10,250.1 and FSIS Notices 16–15, 22–15, 23–15, 31–15 and 32–15.

for broiler carcasses only. The following table sets out what FSIS has determined to be the revised minimum number of

samples to assess process control for each product class by pathogen.

Product	Maximum acceptable percent positive		Minimum number of samples to assess process control	
	<i>Salmonella</i>	<i>Campylobacter</i>	<i>Salmonella</i>	<i>Campylobacter</i>
Broiler Carcass .....	9.8	15.7	11	10
Turkey Carcass .....	7.1	5.4	14	19
Comminuted Chicken (325 g sample) .....	25.0	1.9	10	52
Comminuted Turkey (325 g sample) .....	13.5	1.9	10	52
Chicken Parts (4 lb. sample) .....	15.4	7.7	10	13

*Comment:* Commenters opposed assessing poultry carcass performance categories by combining old and new samples because the results are inconsistent and cannot be compared. In addition, a comment noted that some poultry carcass data may be relatively old and not necessarily indicative of current establishment conditions. Rather than combining old and new sample results to assess performance, comments requested that FSIS “reset” the performance standards for poultry carcasses and begin building new datasets.

*Response:* FSIS agrees that for categorization purposes of individual establishments, category status should be reflective of the most current sample results. Therefore, beginning May 11, 2016, FSIS will begin web-posting the category status of all establishments subject to the existing poultry carcass pathogen reduction performance standards based on sample results from May 2015 (when FSIS began routine sampling of broiler and turkey carcasses) to the present.

*Comment:* Several commenters from industry stated that assessing process control in an establishment over 52 weeks, based solely on one FSIS verification sample per week, will not reflect current or very recent conditions in the establishment. These commenters also requested that FSIS consider supplemental establishment test results and other establishment measures when assessing process control before determining individual establishment category determinations and presumably posting of establishments’ name and category.

To facilitate data sharing between establishments and FSIS, several comments provided recommendations for “supplemental data” that could be submitted by establishments, such as *Salmonella* enumeration data, indicator organism process control monitoring, or corrective actions. If an establishment elects to share data to demonstrate process control, an organization representing the chicken industry

suggested that FSIS incorporate those data into the establishment’s dataset and assess the establishment based on the most recent 52 samples—whether they are FSIS verification samples or establishment samples. In addition, if FSIS proceeds with web-posting establishment-specific data, several industry commenters requested that the Agency allow establishments to review the data and to provide any comments, objections, or explanations, which could be included with released data.

*Response:* The concept of data sharing between establishments and FSIS could have merit. This approach could provide an incentive for establishments to gain better process control of individual production lots whereby microbiological independence and improved lotting practices can be incorporated. For example, establishments performing their own robust sampling and testing of microbiologically independent lots of raw poultry product could use the results to assess whether they are maintaining ongoing process control. In addition, such lotting and sampling could provide valuable data for establishments when making final decisions on product disposition during corrective actions and HACCP decisions in performing pre-shipment review. FSIS intends to find a mechanism for ensuring that these data are available to the public if FSIS decides to supplement its decision making based on these data.

However, there are a number of challenges, such as variation in industry sampling and testing methodologies, collection of on-going establishment data, and data interpretation. Mechanisms need to be identified and implemented to ensure that these non-FSIS data are reliable, and that they remain reliable over time. FSIS intends to make available compliance guidelines for standardizing data collection and reporting.

FSIS, therefore, is considering initiating a pilot project using volunteer establishments to evaluate the feasibility

of the concept. As part of the pilot project, FSIS may request establishment isolates and use them in the same manner as it uses FSIS isolates; data on how the establishment determines and controls risk; and information on corrective actions taken by the establishment when its risk control parameters are not met. If the pilot project is successful, FSIS would then determine how best to use non-FSIS data in Agency decision making. FSIS will make information available to the public on any pilot or any changes to posting as it moves forward.

*Comment:* A consumer advocacy group requested that FSIS use data collected to evaluate whether establishment performance for different products (e.g., whole carcasses and parts) is correlated.

*Response:* FSIS disagrees with the suggestion that setting performance standards requires such data because of how samples are collected, and how organisms attach to product. Attachment of the microorganisms, recovery from injury, and other factors impact the detection of pathogens throughout the production process. Consequently, it is appropriate to set pathogen reduction performance standards on different product types at all feasible points in the production process where control can be exerted and effective (e.g., for carcasses, parts, and comminuted products). Furthermore, process control demonstrated on carcasses may have no bearing on the level of process control demonstrated for parts or comminuted product.

#### F. Proposed Changes to Categorization System and Web-Posting

*Comment:* An organization representing the chicken industry stated that the proposed categorization system will result in categories that fail to reflect current conditions in the establishment. The commenter stated that an establishment could remain in categories 2 or 3 up to eighteen months after addressing whatever conditions

caused the establishment to be classified in the category. Instead of re-categorizing establishments based on their performance over the last six months, as FSIS proposed, the organization requested that FSIS categorize establishments based on the results of a continuous moving window of the last 52 samples and post categories monthly based on the most recent 52-sample dataset. If the most recent 52-sample dataset indicates that the establishment should be moved into a lower category (Category 2 or 3), the commenter stated that FSIS should provide the establishment with an additional two months to provide supplemental data for FSIS to consider before making its final category determination.

An organization representing the turkey industry and a meat/poultry processor stated that because the proposed standards for NRTE comminuted turkey product allow for so few positive results, there would be very little difference between a Category 1 or 3 turkey establishment. The organization also stated that web-posting individual turkey establishment category information will put turkey establishments at a competitive disadvantage relative to chicken product because the proposed performance standards allow for fewer positives for turkey establishments. To demonstrate this point, the industry comments argued that consumers may choose a Category 1 chicken product over a Category 2 turkey product thinking the chicken product is "safer" or "better," when the turkey product may actually have lower numbers of *Salmonella*. If FSIS proceeds with web-posting establishment-specific data for all eligible turkey establishments, the comments requested that FSIS also post information on the data represented.

An organization representing the turkey industry stated that posting individual establishments' categories has not historically been a substantial factor in driving industry to reduce pathogens. Rather, the organization stated that posting individual establishments' categories may be harmful to industry and confusing to consumers. Likewise, several industry comments supported posting aggregate data rather than individual establishment-specific data to minimize unintended consequences to industry. An organization representing the chicken industry recommended posting Category 3 establishments only.

An organization representing the meat industry stated improvements in controlling *Escherichia coli* O157:H7 in beef were more the result of industry's

implementation of new processes and interventions than to public accessibility of establishment-specific data. In addition, for consistency, the organization requested that FSIS outline its Category 1/2/3 posting procedures in the draft *Establishment-specific Data Release Strategic Plan*.

An organization representing the chicken industry stated that consumers are only able to associate web-posting with branded products. As a result, the organization stated that web-posting would disproportionately harm establishments producing branded products compared to establishments producing non-branded product.

**Response:** FSIS has decided to re-categorize establishments monthly based on their performance over the last three months. For example, if an establishment has exceeded the *Salmonella* or *Campylobacter* maximum allowable percent positive during any completed 52-week moving window over the last three months, it will be placed in Category 3 at least until establishments are re-categorized a month later.

In addition, because the comminuted chicken and turkey pathogen reduction performance standards permit only one positive result for *Campylobacter* in order to pass the standard, essentially eliminating Category 2, FSIS will categorize eligible establishments producing these products as either passing or failing. Thus, FSIS has revised its category classification system as follows:

I. Category 1. Consistent Process Control: Establishments that have achieved 50 percent or less of the *Salmonella* or *Campylobacter* maximum allowable percent positive during all completed 52-week moving windows over the last three months.

II. Category 2. Variable Process Control: Establishments that meet the *Salmonella* or *Campylobacter* maximum allowable percent positive for all completed 52-week moving windows but have results greater than 50 percent of the maximum allowable percent positive during any completed 52-week moving window over the last three months.

III. Category 3. Highly Variable Process Control: Establishments that have exceeded the *Salmonella* or *Campylobacter* maximum allowable percent positive during any completed 52-week moving window over the last three months.

IV. Passing. Establishments that meet the *Campylobacter* maximum allowable percent positive for NRTE comminuted chicken or turkey during all completed 52-week moving windows over the last three months.

V. Failing. Establishments that have exceeded the *Campylobacter* maximum allowable percent positive for NRTE comminuted chicken or turkey during any completed 52-week moving window over the last three months.

FSIS disagrees that a delay in web-posting should occur if an establishment's performance is trending in an adverse direction. One purpose of the pathogen reduction performance standards is to ensure that industry is taking steps to continuously improve its food safety system. Therefore, FSIS will begin web-posting as follows:

- No sooner than May 11, 2016, for establishments that produce poultry carcasses and that have the minimum number of samples, FSIS will begin posting individual establishment category status based on sample results from May 2015 (when FSIS began routine sampling of broiler and turkey carcasses) to the present. Thereafter, FSIS will update the category status for each eligible establishment monthly.

- For establishments that produce chicken parts and comminuted poultry products, FSIS intends to begin web-posting quarterly aggregate information relative to categories beginning about May 11, 2016. This information will give industry and other stakeholders timely information about progress being made to reduce contamination in NRTE poultry of all types sampled.

- For all establishments subject to the new pathogen reduction performance standards, after completion of the first 52-week moving window (approximately one year), FSIS will begin posting whether establishments meet the standards, or what category establishments are in, depending on the standard for the particular product, based on FSIS results. However, as is discussed above, based on at least the minimum number of samples to assess process control for that product/pathogen pair and other available information about establishments, such as noncompliance rates, if establishment performance overall does not improve or appears to be worsening before the completion of the first moving window, FSIS may begin web-posting individual establishment category information sooner.

FSIS does not agree that the category approach has not been effective. Our experience with performance standards shows that industry does respond to new pathogen reduction performance standards. For example, the proportion of positive *Salmonella* carcasses fell after implementation of 1996 Pathogen Reduction/Hazard Analysis and Critical Control Point (PR/HACCP) final rule but then began to rise in the mid-2000s. FSIS speculates that this rise was because there were rarely significant consequences to failing a *Salmonella* set. In 2006, this trend of rising *Salmonella* positive carcasses was reversed when FSIS instituted

categorization and web-posting of Category 2 and 3 establishments. In fact, the number of establishments not meeting the standard fell by 50 percent in the 2-year period following the time FSIS started posting category information.

On January 15, 2015, FSIS published a notice in the **Federal Register** that requested comment on the Agency's draft *Establishment-specific Data Release Strategic Plan* for sharing with the public data on federally inspected meat and poultry establishments (80 FR 2092). Although outside the scope of this policy initiative, FSIS will consider the issue raised by the commenter as it considers other comments received on the draft Plan.

Finally, FSIS disagrees that web-posting will disproportionately harm establishments producing branded products compared to those producing non-branded product. Any establishment could be potentially affected by the postings because consumers and wholesale buyers in the poultry supply chain can equally view the Web site. Therefore, it is in any establishment's interest, whether branded or non-branded, to put the processes in place to ensure that it meets or exceeds the pathogen reduction performance standards.

*Comment:* A consumer advocacy group requested that FSIS post aggregate data for *Campylobacter* in imported poultry products and post aggregate reports showing the Category 1/2/3 distribution for each product class.

*Response:* FSIS disagrees with the comment because FSIS does not collect enough samples from individual foreign establishments to assess whether they meet the standards. The foreign government conducts verification activities at the foreign establishment to make that type of determination. Through records reviews and audits, FSIS verifies that foreign inspection systems include these types of verification activities.

FSIS plans to develop and implement a voluntary pilot project to explore mechanisms for reporting aggregate data specific to foreign countries that export NRTE poultry to the United States. FSIS will continue to verify whether those governments assess individual establishment process control as part of the equivalency process.

#### H. Enforcement

*Comment:* Several consumer advocacy groups stated that certain serotypes of *Salmonella* should be considered adulterants. The comments cited other actions that FSIS should take to enforce the performance standards,

including suspending inspection at facilities that do not meet a performance standard until the establishment meets the standard and recommending the recall of product produced during periods when the establishment has inadequate process control.

*Response:* FSIS disagrees with the comment. The pathogen reduction performance standards are not lot-release standards. Product produced by an establishment that does not meet the standard is not necessarily adulterated. However, failing to meet the standard provides evidence that the production process is not well controlled, and FSIS will take steps to ensure that the establishment improves its production process to reduce variability and to gain more consistent process control. FSIS does agree that persistent failure to meet the pathogen reduction performance standards can be used as a rationale to progressively encourage the establishment to implement more effective food safety system controls or to discontinue production of product.

In May 2011, the Center for Science in the Public Interest (CSPI) petitioned FSIS to issue an interpretive rule to declare certain strains of antibiotic-resistant (ABR) *Salmonella* to be adulterants in raw ground meat and raw ground poultry.<sup>32</sup> On July 31, 2014, FSIS denied the petition without prejudice because the Agency concluded that the data do not support giving the four strains of ABR *Salmonella* identified in the petition a different status as an adulterant in raw ground meat and raw ground poultry than *Salmonella* strains that are susceptible to antibiotics.<sup>33</sup> The Agency concluded that additional data on the characteristics of ABR *Salmonella* are needed to determine whether certain strains of ABR *Salmonella* could qualify as adulterants under the Federal Meat Inspection Act and Poultry Products Inspection Act. On October 14, 2014, CSPI refiled its petition to provide additional data and requested that FSIS declare certain strains of ABR *Salmonella* adulterants in all raw meat and raw poultry products. FSIS is evaluating the new request.

*Comment:* A consumer advocacy group requested that FSIS instruct inspection personnel on when and how to increase enforcement at facilities that do not meet the performance standards. In addition, the commenter requested that FSIS initiate increased enforcement

action when an establishment repeatedly fails to meet the performance standard.

*Response:* FSIS recently revised FSIS Directive 5100.4<sup>34</sup> to provide instructions to its personnel on how to conduct a PHRE. Enforcement, Investigations, and Analysis Officers (EIAOs) will conduct a PHRE (in priority order) at every establishment that does not meet a performance standard (*i.e.*, the establishment is in Category 3); at establishments that have produced products with repetitive *Salmonella* serotypes of public health concern, indicating potential higher risk for being identified as contributing to an outbreak; and establishments with *Salmonella* PFGE patterns matching those found in recent outbreaks or epidemiological evidence linking them to illness to determine the need for a FSA. If, during the PHRE, the EIAO determines that the establishment is shipping or producing adulterated product, operating without a HACCP plan, or engaging in any other type of non-compliance that supports taking a withholding or suspension action without prior notification (9 CFR 500.3), the EIAO will take immediate steps to stop the wrongful practice. Next, the EIAO will consult with the District Office (DO) to determine whether additional enforcement action is needed. For an EIAO to recommend that the DO issue a NOIE, he or she must support that the conditions in the establishment, or the actions of establishment personnel, constitute a situation that would justify the action under 9 CFR 500.4, and that such conditions have resulted in adulterated product or create insanitary conditions that could cause product to be adulterated.

As stated above, if, after 90 days, the establishment has not been able to gain process control, as determined from FSIS's follow-up sampling and from the results of the PHRE or FSA, and the establishment has not taken corrective actions, FSIS will likely take enforcement actions, such as by issuing a NOIE or by suspending inspection, under the conditions and according to the procedures described in 9 CFR part 500. FSIS will not issue an NOIE or suspend inspection based solely on the fact that an establishment did not meet a performance standard.

*Comment:* A consumer advocacy group requested that FSIS refuse entry of imported raw poultry product that FSIS finds positive for *Salmonella*. On

<sup>32</sup> [http://www.fsis.usda.gov/wps/wcm/connect/04cb5fad-c13e-4de7-b391-acd95191a95/Petition\\_CSPI\\_052511.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/04cb5fad-c13e-4de7-b391-acd95191a95/Petition_CSPI_052511.pdf?MOD=AJPERES).

<sup>33</sup> <http://www.fsis.usda.gov/wps/wcm/connect/73037007-59d6-4b47-87b7-2748eda1d3e/FSIS-response-CSPI-073114.pdf?MOD=AJPERES>.

<sup>34</sup> Available at <http://www.fsis.usda.gov/wps/wcm/connect/6c30c8b0-ab6a-4a3c-bd87-fbce9bd71001/5100.4.pdf?MOD=AJPERES>.

the other hand, an organization representing the chicken industry stated that denying entry of imported products (or determining foreign country equivalency) based on import verification sampling results may result in international trade ramifications.

*Response:* *Salmonella* is not an adulterant in NRTE poultry products. Therefore, a positive test result for *Salmonella* in imported NRTE poultry product sampled by FSIS import inspection personnel would not result in regulatory control actions at port-of-entry (*i.e.*, refused entry of the product). However, foreign countries that are eligible to export poultry products to the United States must apply inspection, sanitation, and other standards that are equivalent to those that FSIS applies to poultry products. Thus, in evaluating whether a foreign country maintains an equivalent inspection system to that of FSIS, FSIS considers whether the country's pathogen reduction performance standards, testing, and other verification procedures related to *Salmonella* or *Campylobacter* are equivalent to those that FSIS uses.

#### I. Other Agency Actions

*Comment:* A consumer advocacy group requested that FSIS make detailed testing data available to public health officials (*e.g.*, through PulseNet).

*Response:* FSIS routinely shares subtyping data for positive samples with public health officials for data analysis, interpretation, and application. This sharing includes submission of serotype and PFGE data to PulseNet and antimicrobial resistance data to the National Antimicrobial Resistance Monitoring System for Enteric Bacteria (NARMS). FSIS has also recently begun using whole genome sequencing to analyze positive isolates in certain cases and will continue to expand this testing as resources allow. FSIS is submitting this sequencing data to the National Center for Biotechnology Information, a publicly accessible database.

*Comment:* An organization representing the meat industry requested that FSIS evaluate the correlation between higher sanitary dressing noncompliances and the probability of positive sample results in poultry products, as it did for beef products.

*Response:* FSIS will assess this issue and report its findings in FY2016. Meanwhile, outbreaks associated with *Salmonella* in raw poultry products continue. Improvement in sanitary dressing and other process controls can reduce the levels of *Salmonella* and other enteric bacteria, such as *Campylobacter*, on poultry carcasses.

Therefore, FSIS believes that establishments should focus more closely on their sanitary dressing and process control procedures to prevent carcass contamination. Importantly, the recent final rule on poultry inspection modernization mandates that establishments prevent contamination of poultry product with feces throughout the slaughter and dressing operation rather than permit carcasses to be contaminated and then reconditioned (9 CFR 381.45(g)).

*Comment:* An organization representing the meat/poultry industry requested that FSIS explain how the Agency intends to assess whether the raw beef follow-up sampling model (*i.e.*, either 16 or eight follow-up samples will be collected when an establishment does not meet the standard) is working for *Salmonella* and *Campylobacter* testing, and, if changes are made, how FSIS plans to communicate the changes to industry.

*Response:* FSIS has found follow-up sampling to be effective at finding additional positives in raw beef samples. FSIS will analyze the data and information collected during follow-up sampling (which will be part of the moving window sampling) of poultry and make any necessary changes to the follow-up sampling procedures based on that analysis.

*Comment:* A consumer advocacy group requested that FSIS include improving poultry welfare and living conditions and protecting bird health in its recommended pre-harvest strategies for producers for controlling *Salmonella* and *Campylobacter*. The group stated that research has shown that environmental stresses (*e.g.*, depriving a bird of feed, overcrowding) can result in increased incoming poultry pathogen loads.

*Response:* FSIS agrees with the comment. FSIS has reviewed available information, including the information provided by the commenter, regarding the impact of animal welfare and living conditions on food safety. FSIS has updated the Compliance Guideline for Controlling *Salmonella* and *Campylobacter* in Raw Poultry to include interventions and best practices that should assist producers in providing for animal welfare, living conditions, and bird health at pre-harvest, which should in turn minimize stress in poultry and reduce pathogens in birds presented at slaughter.

*Comment:* An organization representing the chicken industry stated that a shift from Category 1 to Category 2 does not warrant a for-cause FSA because Category 2 establishments are technically meeting the standard. The

organization requested that FSIS outline situations in which verification sampling would trigger a for-cause FSA and clarify what the Agency means by a "higher number of positives."

The same organization also opposed FSIS conducting for-cause FSAs when it finds serotypes of public health significance because, according to the organization, doing so would effectively impose a zero-tolerance standard for these serotypes. The organization argued that using this approach would encourage establishments to focus only on certain serotypes rather than manage overall pathogen levels through a process control program.

*Response:* FSIS will not typically schedule an FSA based on an establishment moving from Category 1 to Category 2. As mentioned above, during the PHRE, EIAOs use the decision-making process outlined in FSIS Directive 5100.4 to determine whether the DO needs to schedule an FSA.

FSIS will focus on *Salmonella* serotypes of public health concern because the incidence rate of infection by these serotypes is higher than for other serotypes. Moreover, for-cause PHREs in response to serotypes of public health concern will in fact stimulate improvement in industry performance in controlling *Salmonella* generally.

As for "higher number of positives," FSIS intends to analyze results of the routine sampling to identify data trends indicative of an establishment moving in an adverse direction. Once identified, these trends may prompt FSIS to conduct a PHRE or take other appropriate actions, such as additional sanitary dressing verification procedures, at the establishment that produced the product. FSIS provides *Salmonella* serotype results to establishments to facilitate their efforts in identifying the appropriate intervention.

FSIS is concerned that there is a misguided belief that new products do not need to be produced in a manner to reduce the presence of pathogens of public health concern. Since the 1996 PR/HACCP final rule, FSIS has stressed that properly operating food safety systems are designed to reduce the presence of pathogens of public health concern.

#### J. Cost-Benefit Analysis

*Comment:* Factoring in the costs of the additional FSAs and follow-up sampling associated with the high percentage of establishments not expected to initially meet the new standards, an organization representing

the meat industry questioned how FSIS does not expect to incur any additional costs as a result of setting new performance standards. The organization requested that FSIS calculate the number and cost of FSAs and follow-up samples the Agency expects to collect for the first three years after the changes are implemented. Other more general comments stated that the proposed changes would be overly resource intensive or potentially cost prohibitive for FSIS.

*Response:* To account for the sampling and enforcement actions associated with the new performance standards, FSIS will realign resources, rather than allocating any additional resources beyond what it currently budgets. FSIS will examine the following in a retrospective analysis to realign resources: the allocation of sampling and outcome of FSAs initiated as a result of the new pathogen reduction performance standards.

In addition, FSIS has updated its FSA methodology by shortening the timeline for completion of most FSAs from 2 to 4 weeks to 5 to 7 production days.<sup>35</sup> This change will enable FSIS personnel to perform a greater number of FSAs each year, thereby improving Agency efficiency.

**Cost-Benefit Analysis**

FSIS has considered the economic effects of new pathogen reduction performance standards for *Salmonella* and *Campylobacter* in NRTE chicken parts and comminuted poultry. FSIS published a preliminary cost-benefit analysis in support of the January 2015 Federal Register notice in which FSIS proposed the new performance standards and sought comment on the estimates and the methodology used.<sup>36</sup> After reviewing the comments received, FSIS updated the cost benefit analysis to reflect a change in a cost assumption. In

addition to making changes to their production processes in order to meet the new pathogen reduction performance standards, FSIS originally assumed that only 30, 40, or 50 percent of establishments that fail to meet the performance standard would re-assess their HACCP plan. However, FSIS now assumes that all, or 100 percent, of establishments that fail to meet the standard will re-assess their HACCP plans to comply with 9 CFR 417(3)(b). A summary of the analysis follows. The full analysis is published on the FSIS Web site as supporting documentation to this notice.

**Industry Costs**

Establishments will incur costs as they make changes to their processes to meet the new standards. FSIS estimates that approximately 63 percent of raw chicken parts producing establishments, 62 percent of NRTE comminuted chicken producing establishments, and 58 percent of NRTE comminuted turkey producing establishments will not meet the new *Salmonella* standards. FSIS estimates that approximately 46 percent of raw chicken parts producing establishments, 24 percent of NRTE comminuted chicken producing establishments, and 9 percent of NRTE comminuted turkey producing establishments will not meet the new *Campylobacter* standards.

Establishments that initially do not meet the standard but that choose to do so will need to make changes to their production processes to lower the prevalence of *Salmonella* and *Campylobacter* in their products. Changes made by poultry slaughter establishments could include pre-harvest interventions, such as vaccination programs; well-timed feed withdrawal; clean and dry litter and transportation; and supplier contract

guarantees of pathogen-free flocks. During processing, establishments could add additional cleaning procedures, apply chemical antimicrobial agents to parts and source materials for comminuted poultry product, and provide additional sanitation training to employees. For the purposes of the cost-benefit analysis, FSIS used the cost of adding antimicrobial agents to poultry parts as a proxy for the costs of interventions and changes that could be implemented. FSIS used this approach based on information from FSAs in response to broiler *Salmonella* sets not meeting the standards and information from the FSIS Poultry Checklist. Through FSAs, FSIS has found that the majority of establishments added antimicrobial agents to the production process as a corrective action, suggesting that an antimicrobial intervention would be the most likely response should an establishment not meet the proposed performance standards. Also, information from the FSIS Poultry Checklist showed that the majority of establishments are not applying antimicrobial agents to raw poultry parts and source materials for comminuted poultry product. FSIS accounted for uncertainty in the proportion of establishments making changes to their production processes by providing a range of 30, 40, and 50 percent (of establishments initially falling short of but eventually meeting the standards in two years) for cost estimates for capital equipment, antimicrobial agents, and microbial sampling. For HACCP plan re-evaluation and training costs, FSIS assumes that all establishments (100 percent) that do not meet the standard will re-evaluate their HACCP plan. These costs are summarized and annualized over 10 years at a discount rate of 7 percent in Table 1.

TABLE 1—TOTAL INDUSTRY COSTS ANNUALIZED <sup>1</sup>

Compliance level of establishments not meeting standard	Cost component	Primary estimate (\$mil)	Low estimate (\$mil)	High estimate (\$mil)
30% .....	Capital Equipment .....	2.15	.....	.....
	Antimicrobial Agent .....	6.54	4.61	8.46
	Microbiological Sampling .....	9.27	6.18	12.36
	HACCP Reassessment & Training .....	*	.....	.....
Total Costs .....	.....	17.96	12.94	22.97
40% .....	Capital Equipment .....	2.86	.....	.....
	Antimicrobial Agent .....	8.72	6.14	11.28
	Microbiological Sampling .....	9.82	6.52	13.05

<sup>35</sup> FSIS Directive 5100.1, Revision 4; available at: <http://www.fsis.usda.gov/wps/wcm/connect/31bb8000-fb33-4b51-964b-1db9dfb488dd/5100.1.pdf?MOD=AJPERES>.

<sup>36</sup> Chicken Parts and Not Ready-To-Eat Comminuted Poultry Performance Standards Preliminary Cost-Benefit Analysis; available at: <http://www.fsis.usda.gov/wps/wcm/connect/e146ef97-c269-44ee-bea2-0c04fcc6f463/CBA-Chicken-Parts-Comminuted.pdf?MOD=AJPERES>.

e146ef97-c269-44ee-bea2-0c04fcc6f463/CBA-Chicken-Parts-Comminuted.pdf?MOD=AJPERES .

TABLE 1—TOTAL INDUSTRY COSTS ANNUALIZED <sup>1</sup>—Continued

Compliance level of establishments not meeting standard	Cost component	Primary estimate (\$mil)	Low estimate (\$mil)	High estimate (\$mil)
	HACCP Reassessment & Training .....	*	.....	.....
Total Costs .....		21.41	15.52	27.19
50% .....	Capital Equipment .....	3.58	.....	.....
	Antimicrobial Agent .....	10.89	7.68	14.12
	Microbiological Sampling .....	10.40	6.91	13.81
	HACCP Reassessment & Training .....	*	.....	.....
Total Costs .....		24.88	18.17	31.51

<sup>1</sup> Costs annualized at a discount rate of 7 percent over 10 years.

\* Approximately \$12,216, a value too small to display in table.

**Agency Costs**

FSIS will not request additional funding as a result of introducing new performance standards. FSIS allocates a fixed number of samples by product class, sampling project, and pathogen each year. The two major components of the pathogen reduction performance standards—product sampling and follow-up actions—will be implemented in such a way that they are resource neutral. FSIS is not expanding the number of samples it will analyze. Instead, it will reallocate samples from other programs, specifically the young chicken and turkey sampling programs for Salmonella and Campylobacter, as FSIS moves towards assessing performance using a moving window

(described above) of sampling results. FSIS does not anticipate the need to exclude any of the other testing programs allocated to other product classes. FSIS intends to test carcasses at the level that is needed to document establishment performance status. Furthermore, enforcement actions taken as a result of the new performance standards, namely FSAs, will not require additional FSIS resources. FSIS has updated its FSA methodology and has shortened the timeline for the completion of most FSAs from 2 to 4 weeks to 5 to 7 production days.<sup>37</sup> The shortened FSA will enable FSIS Enforcement, Investigations and Analysis Officers to perform more FSAs each year. Therefore, FSIS will not expend additional resources to

implement the proposed performance standards.

**Public Health Benefits**

As establishments make changes to their production processes and reduce the prevalence of *Salmonella* and *Campylobacter* in chicken parts and NRTE comminuted poultry, public health benefits will be realized in the form of averted illnesses. For each assumed compliance level FSIS estimated the cost savings associated with the percentage reduction in human illnesses as calculated in the 2015 Risk Assessment. The results of this calculation were annualized over 10 years at a discount rate of 7 percent and are displayed in Table 2.

TABLE 2—PUBLIC HEALTH BENEFITS ANNUALIZED <sup>1</sup>

Compliance level of establishments not meeting the standard %	Primary estimate (\$mil)	Low estimate (\$mil)	High estimate (\$mil)
30 .....	50.87	31.84	79.89
40 .....	79.66	50.43	125.89
50 .....	109.10	68.80	171.24

<sup>1</sup> Benefits annualized over 10 years at a discount rate of 7 percent.

**Summary of Net Benefits**

Table 3 displays the total costs and benefits expected from the

implementation of performance standards for chicken parts and comminuted poultry. All values have been annualized over 10 years at a 7

percent discount rate. For all compliance levels considered, the performance standards result in net benefits.

TABLE 3—SUMMARY OF NET BENEFITS <sup>1</sup>

Compliance level of establishments not meeting the standard %	Cost/benefit component	Primary estimate (\$mil)	Low estimate (\$mil)	High estimate (\$mil)
30 .....	Industry Costs .....	(18.0)	(12.9)	(23.0)
	FSIS Costs .....	.....	.....	.....
	Public Health Benefits .....	50.9	31.8	79.9
Net Benefits .....		32.9	18.9	56.9

<sup>37</sup> FSIS Directive 5100.1, Revision 4; available at: <http://www.fsis.usda.gov/wps/wcm/connect/>

[31bb8000-fb33-4b51-964b-1db9dfb488dd/5100.1.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/31bb8000-fb33-4b51-964b-1db9dfb488dd/5100.1.pdf?MOD=AJPERES).

TABLE 3—SUMMARY OF NET BENEFITS<sup>1</sup>—Continued

Compliance level of establishments not meeting the standard %	Cost/benefit component	Primary estimate (\$mil)	Low estimate (\$mil)	High estimate (\$mil)
40 .....	Industry Costs .....	(21.4)	(15.5)	(27.2)
	FSIS Costs .....	.....	.....	.....
	Public Health Benefits .....	79.7	50.4	125.9
Net Benefits .....	.....	58.3	34.9	98.7
50 .....	Industry Costs .....	(24.9)	(18.2)	(31.5)
	FSIS Costs .....	.....	.....	.....
	Public Health Benefits .....	109.1	68.8	171.2
Net Benefits .....	.....	84.2	50.6	139.7

<sup>1</sup> All costs and benefits annualized over 10 years at a 7 percent discount rate.

**USDA Nondiscrimination Statement**

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at [http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain\\_combined\\_6\\_8\\_12.pdf](http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf), or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

**Mail**

U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250-9410.

**Fax**

(202) 690-7442.

**Email**

[program.intake@usda.gov](mailto:program.intake@usda.gov).

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

**Additional Public Notification**

FSIS will announce this notice online through the FSIS Web page located at <http://www.fsis.usda.gov/federal-register>.

FSIS will also make copies of this **Federal Register** publication available 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 constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at <http://www.fsis.usda.gov/subscribe>. Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on: February 4, 2016.

**Alfred V. Almanza,**

*Acting Administrator.*

[FR Doc. 2016-02586 Filed 2-10-16; 8:45 am]

**BILLING CODE 3410-DM-P**

**DEPARTMENT OF AGRICULTURE**

**Food Safety and Inspection Service**

[Docket No. FSIS-2015-0047]

**Codex Alimentarius Commission: Meeting of the Codex Committee on Contaminants in Food**

**AGENCY:** Office of the Deputy Under Secretary for Food Safety, USDA.

**ACTION:** Notice of public meeting and request for comments.

**SUMMARY:** The Office of the Deputy Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and

the Food and Drug Administration (FDA), U.S. Department of Health and Human Services, are sponsoring a public meeting on March 7, 2016. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States (U.S.) positions to be discussed at the 10th Session of the Codex Committee on Contaminants in Food (CCCF) of the Codex Alimentarius Commission (Codex), taking place in Rotterdam, The Netherlands, April 4-8, 2016. The Deputy Under Secretary for Food Safety and FDA recognize the importance of providing interested parties the opportunity to obtain background information on the 10th Session of the CCCF and to address items on the agenda.

**DATES:** The public meeting is scheduled for Monday, March 7, 2016, from 1:00 p.m.-4:00 p.m.

**ADDRESSES:** The public meeting will take place at the Food and Drug Administration (FDA), Harvey W. Wiley Federal Building, Room 1A-001, Center for Food Safety and Applied Nutrition (CFSAN), 5100 Paint Branch Parkway, College Park, MD 20740. Documents related to the 10th Session of the CCCF will be accessible via the Internet at <http://www.codexalimentarius.org/meetings-reports/en/>.

Dr. Lauren Posnick Robin, U.S. Delegate to the 10th Session of the CCCF invites interested U.S. parties to submit their comments electronically to the following email address [henry.kim@fda.hhs.gov](mailto:henry.kim@fda.hhs.gov).

*Call-in-Number:*

If you wish to participate in the public meeting for the 10th Session of the CCCF by conference call. Please use the call-in-number.

Call-in-Number: 1-888-844-9904.

The participant code will be posted on the Web page below: <http://www.fsis.usda.gov/wps/portal/fsis/>

*topics/international-affairs/us-codex-alimentarius/public-meetings.*

**Registration:**

Attendees may register electronically at the same email address provided above by March 3, 2016. The meeting will be held in a Federal building. Early registration is encouraged as it will expedite entry into the building and parking area. Attendees should bring photo identification and plan for adequate time to pass through security screening systems. If you require parking, please include the vehicle make and tag number when you register. Attendees that are not able to attend the meeting in person, but wish to participate, may do so by phone.

**Further Information About the 10th Session of the CCCF Contact:** Henry Kim, Ph.D., Office of Food Safety, CFSAN/FDA, HFS-317, 5100 Paint Branch Parkway, College Park, MD 20740, Telephone: (240) 402-2023, Fax: (301) 436-2651, email: [henry.kim@fda.hhs.gov](mailto:henry.kim@fda.hhs.gov)

**For Further Information About the Public Meeting Contact:** Henry Kim, Ph.D., Office of Food Safety, CFSAN/FDA, HFS-317, 5100 Paint Branch Parkway, College Park, MD 20740, Telephone: (240) 402-2023, Fax: (301) 436-2651, email: [henry.kim@fda.hhs.gov](mailto:henry.kim@fda.hhs.gov)

**SUPPLEMENTARY INFORMATION:**

**Background**

Codex was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure that fair practices are used in the food trade.

The CCCF is responsible for:

- (a) Establishing or endorsing permitted maximum levels, and where necessary, revising existing guideline levels for contaminants and naturally occurring toxicants in food and feed;
- (b) Preparing priority lists of contaminants and naturally occurring toxicants for risk assessment by the Joint FAO/WHO Expert Committee on Food Additives (JECFA);
- (c) Considering and elaborating methods of analysis and sampling for the determination of contaminants and naturally occurring toxicants in food and feed;
- (d) Considering and elaborating standards or codes of practice for related subjects; and

(e) Considering other matters assigned to it by the Commission in relation to contaminants and naturally occurring toxicants in food and feed.

The Committee is chaired by The Netherlands.

**Issues To Be Discussed at the Public Meeting**

The following items on the Agenda for the 10th Session of the CCCF will be discussed during the public meeting:

- Matters referred to the CCCF by the Codex Alimentarius Commission or its subsidiary bodies;
- Matters of interest arising from FAO and WHO (including JECFA);
- Matters of interest arising from other international organizations;
- Draft maximum level for inorganic arsenic in husked rice (at Step 7 of the Codex Decision Process);
- Proposed draft revision of maximum levels for lead in selected fruits and vegetables (fresh and processed) in the General Standard for Contaminants and Toxins in Food and Feed (at Step 4 of the Codex Decision Process);
- Proposed draft Code of Practice for the prevention and reduction of arsenic contamination in rice;
- Proposed draft maximum levels for cadmium in cocoa and cocoa derived products (at Step 4 of the Codex Decision Process);
- Draft Revision of the Code of Practice for the prevention of mycotoxin contamination in cereals (general provisions) (at Step 7 of the Codex Decision Process);
- Proposed draft Annexes to the Code of Practice for the prevention and reduction of mycotoxin contamination in cereals (at Step 4 of the Codex Decision Process);
- Proposed draft Code of Practice for the prevention and reduction of mycotoxin contamination in spices;
- Discussion paper on an Annex for ergot alkaloids to the Code of Practice for the prevention and reduction of mycotoxin contamination in cereals;
- Discussion paper on the development of maximum levels for mycotoxins in spices;
- Discussion paper on maximum levels for methylmercury in fish; and
- Priority list of contaminants and naturally occurring toxicants for evaluation by JECFA.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat before the meeting. Members of the public may access or request copies of these documents (see **ADDRESSES**).

**Public Meeting**

At the March 7, 2016, public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Dr. Henry Kim for the 10th Session of the CCCF (see **ADDRESSES**). Written comments should state that they relate to activities of the 10th Session of the CCCF.

**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: <http://www.fsis.usda.gov/federal-register>.

FSIS also will make copies of this publication available 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 Update is available on the FSIS Web page. Through the Web page, FSIS is able to 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: <http://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**

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**How To File a Complaint of Discrimination**

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at [http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain\\_combined\\_6\\_8\\_](http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_)

12.pdf, or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250-9410.

Fax: (202) 690-7442.

Email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

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Done at Washington, DC, on February 8, 2016.

**Paulo Almeida,**

*Acting U.S. Manager for Codex Alimentarius.*

[FR Doc. 2016-02807 Filed 2-10-16; 8:45 am]

**BILLING CODE 3410-DM-P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

#### Submission for OMB Review; Comment Request

February 5, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by March 14, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) or fax (202) 395-5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250-7602. Copies of the submission(s) may be obtained by calling (202) 720-8958.

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

#### Food and Nutrition Service

*Title:* Child Nutrition Program Operations Study II (CN-OPS II).

*OMB Control Number:* 0584-NEW.

*Summary of Collection:* The objective of the Child Nutrition Program Operations Study II (CN-OPS II) is to collect timely data on policy, administrative, and operational issues for the Child Nutrition Programs. The ultimate goal of this study is to analyze these data and to provide input for new legislation on Child Nutrition Programs as well as to provide pertinent technical assistance and training to program implementation staff. The CN-OPS II will help the Food and Nutrition Service (FNS) better understand and address current policy issues related to Child Nutrition Programs (CNP) operations. The policy and operational issues include, but are not limited to, the preparation of the program budget, development and implementation of program policy and regulations, and identification of areas for technical assistance and training.

*Need and Use of the Information:* This study will provide FNS with the data needed for the evaluation of various policy and operational issues related to CNP operations. This study will assist FNS in obtaining general descriptive data on the Child Nutrition program characteristics needed to respond to questions about the nutrition programs in schools; obtaining data related to program administration for designing and revising program regulations, managing resources, and reporting requirements; and in obtaining data related to program operations to help FNS develop and provide training and technical assistance for the School Food Authorities (SFAs) and State Agencies responsible for administering the Child Nutrition programs.

*Description of Respondents:* State, Local, or Tribal Government.

*Number of Respondents:* 3,345.

*Frequency of Responses:* Reporting: Annually.

*Total Burden Hours:* 3,792.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2016-02742 Filed 2-10-16; 8:45 am]

**BILLING CODE 3410-30-P**

## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

### Meetings

**AGENCY:** Architectural and Transportation Barriers Compliance Board.

**ACTION:** Notice of meetings.

**SUMMARY:** The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Monday through Wednesday, March 7-9, 2016 at the times and location listed below.

**DATES:** The schedule of events is as follows:

#### Monday, March 7, 2016

10:30-Noon Ad Hoc Committee on Frontier Issues

1:30-2:30 p.m. Technical Programs Committee

2:30-3:00 Ad Hoc Committee on Design Guidance

3:00-4:00 Ad Hoc Committees: Closed to Public

#### Wednesday, March 9, 2016

11:00-Noon Planning and Evaluation Committee

1:30-3:00 Board Meeting

**ADDRESSES:** Meetings will be held at the Access Board Conference Room, 1331 F Street NW., Suite 800, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272-0010 (voice); (202) 272-0054 (TTY).

**SUPPLEMENTARY INFORMATION:** At the Board meeting scheduled on the afternoon of Wednesday, March 9, 2016, the Access Board will consider the following agenda items:

- Approval of draft meeting minutes (vote): November 10, 2015 and January 13, 2016
- Ad Hoc Committee Reports: Design Guidance; Frontier Issues; and Information and Communication Technology
- Technical Programs Committee
- Planning and Evaluation Committee
- Election Assistance Commission Report

- Election of Officers
- Executive Director's Report
- Public Comment (final 15 minutes of the meeting)

Members of the public can provide comments either in-person or over the telephone during the final 15 minutes of the Board meeting on Wednesday, March 9, 2016. Any individual interested in providing comment is asked to pre-register by sending an email to [bunales@access-board.gov](mailto:bunales@access-board.gov) with the subject line "Access Board meeting—Public Comment" with your name, organization, state, and topic of comment included in the body of your email. All emails to register for public comment must be received by Wednesday, March 2, 2016.

Commenters will be called on in the order by which they pre-registered. Due to time constraints, each commenter is limited to two minutes. Commenters on the telephone will be in a listen-only capacity until they are called on. Use the following call-in number: (877) 701-1628; passcode: 9837 8152 and dial in 5 minutes before the meeting begins at 1:30 p.m.

All meetings are accessible to persons with disabilities. An assistive listening system, Communication Access Realtime Translation (CART), and sign language interpreters will be available at the Board meeting and committee meetings.

Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (see [www.access-board.gov/the-board/policies/fragrance-free-environment](http://www.access-board.gov/the-board/policies/fragrance-free-environment) for more information).

You may view the Wednesday, March 9, 2016 meeting through a live webcast from 1:30 p.m. to 3:00 p.m. at: [www.access-board.gov/webcast](http://www.access-board.gov/webcast).

**David M. Capozzi,**

*Executive Director.*

[FR Doc. 2016-02787 Filed 2-10-16; 8:45 am]

**BILLING CODE 8150-01-P**

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## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the North Carolina (State) Advisory Committee (SAC) for a Meeting To Discuss Potential Project Topics

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Notice 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 that the North Carolina (State) Advisory Committee will hold a meeting on Friday, January 29, 2016, for the purpose of discussing and approving a project proposal on environmental justice issues in North Carolina.

This meeting is available to the public through the following toll-free call-in number: 888-572-7033, conference ID: 9946088. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement at the end of the meeting. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur charges for calls they initiate over wireless lines, and 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. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-977-8339 and providing the Service with the conference call number and conference ID number.

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 mailed to the Southern Regional Office, U.S. Commission on Civil Rights, 61 Forsyth Street, Suite 16T126, Atlanta, GA 30303. They may also be faxed to the Commission at (404) 562-7005, or emailed to Regional Director, Jeffrey Hinton at [jhinton@usccr.gov](mailto:jhinton@usccr.gov). Persons who desire additional information may contact the Southern Regional Office at (404) 562-7000.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <http://facadatabase.gov/committee/meetings.aspx?cid=266>. Click on the "Meeting Details" and "Documents" links to download. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, <http://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

### Agenda

Welcome and Introductions

Matty Lazo-Chadderton, Chair  
Discussion and vote on Environmental Justice proposal (Coal Ash)

North Carolina Advisory Committee  
Open Comment  
Adjournment

**DATES:** The meeting will be held on Monday, February 22, 2016, 12:00 p.m. EST.

Public Call Information: Toll-free call-in number: 888-572-7033; Conference ID: 9946088.

**FOR FURTHER INFORMATION CONTACT:** Jeff Hinton at [jhinton@usccr.gov](mailto:jhinton@usccr.gov) or 404-562-7006.

Dated February 5, 2016.

**David Mussatt,**

*Chief, Regional Programs Unit.*

[FR Doc. 2016-02760 Filed 2-10-16; 8:45 am]

**BILLING CODE 6335-01-P**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[B-67-2015]

#### Foreign-Trade Zone (FTZ) 183—Austin, Texas, Authorization of Production Activity, Flextronics America, LLC (Automatic Data Processing Machines), Austin, Texas

On October 9, 2015, Flextronics America, LLC submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board for its facility within Subzone 183C, in Austin, Texas.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (80 FR 63533-63534, October 20, 2015). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: February 8, 2016.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. 2016-02803 Filed 2-10-16; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

## Bureau of Industry and Security

**In the Matter of: Qiang Hu, a/k/a Johnson Hu, #602, No. 39, Nong #78, Shou Guang Road, Pu Dong, Shanghai PRC; Order Denying Export Privileges**

On July 24, 2014, in the U.S. District Court for the District of Massachusetts, Qiang Hu, a/k/a Johnson Hu (“Hu”) was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. § 1701, *et seq.* (2006 & Supp. IV 2010)) (“IEEPA”). Specifically, Hu knowingly and willfully conspired, combined, confederated and agreed with other persons known and unknown to cause the export of U.S. origin pressure transducers (manometer types 622B, 623B, 626A, 626B, 627B, 722A, and 722B), from the United States to end-users in China and elsewhere in violation of the Regulations, Executive Order 13222, and IEEPA. Hu was sentenced to 34 months in prison and a special assessment of \$100.00.

Section 766.25 of the Export Administration Regulations (“EAR” or “Regulations”)<sup>1</sup> provides, in pertinent part, that “[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the Export Administration Act (“EAA”), the EAR, or any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. § 1701–1706); 18 U.S.C. §§ 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. § 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. § 2778).” 15 CFR § 766.25(a); *see also* Section 11(h) of the EAA, 50 U.S.C. app. § 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR § 766.25(d); *see also* 50 U.S.C. app. § 2410(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security’s Office of

Exporter Services may revoke any Bureau of Industry and Security (“BIS”) licenses previously issued in which the person had an interest in at the time of his conviction.

BIS has received notice of Hu’s conviction for violating IEEPA, and in accordance with Section 766.25 of the Regulations, BIS has provided notice and an opportunity for Hu to make a written submission to BIS. BIS has received a submission from Hu.

Based upon my review and consultations with BIS’s Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Hu’s export privileges under the Regulations for a period of 10 years from the date of Hu’s conviction.

Accordingly, it is hereby *ordered*:  
*First*, from the date of this Order until July 24, 2024, Qiang Hu, a/k/a Johnson Hu with a last known address of #602, No. 39, Nong #78, Shou Guang Road, Pu Dong, Shanghai PRC, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (the “Denied Person”), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

- A. Applying for, obtaining, or using any license, License Exception, or export control document;
- B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or
- C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

*Second*, no person may, directly or indirectly, do any of the following:

- A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United

States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

*Third*, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Hu by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

*Fourth*, in accordance with Part 756 of the Regulations, Hu may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

*Fifth*, a copy of this Order shall be delivered to the Hu. This Order shall be published in the **Federal Register**.

*Sixth*, this Order is effective immediately and shall remain in effect until July 24, 2024.

Issued this 3rd day of February, 2016.

**Karen H. Nies-Vogel,**

*Director, Office of Exporter Services.*

[FR Doc. 2016–02771 Filed 2–10–16; 8:45 am]

**BILLING CODE P**

<sup>1</sup> The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2015). The Regulations issued pursuant to the Export Administration Act (50 U.S.C. app. §§ 2401–2420 (2000)) (“EAA”). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 7, 2015 (80 FR 48233 (August 11, 2015)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. § 1701, *et seq.* (2006 & Supp. IV 2010)).

**DEPARTMENT OF COMMERCE****International Trade Administration**

[A-570-956]

**Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Final Results of the Expedited Sunset Review of the Antidumping Duty Order**

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

**SUMMARY:** The Department of Commerce ("the Department") finds that revocation of the antidumping duty order on seamless carbon and alloy steel standard, line, and pressure pipe from the People's Republic of China ("PRC")<sup>1</sup> would likely lead to continuation or recurrence of dumping, at the levels indicated in the "Final Results of Sunset Review" section of this notice.

**DATES:** *Effective Date:* February 11, 2016.

**FOR FURTHER INFORMATION CONTACT:**

Aleksandras Nakutis, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 4823147.

**SUPPLEMENTARY INFORMATION:****Background**

On October 1, 2015, the Department initiated a sunset review of the antidumping duty order on seamless carbon and alloy steel standard, line, and pressure pipe from the PRC.<sup>2</sup> On October 14, 2015, the Department received a timely notice of intent to participate in the sunset review from TMK IPSCO, United States Steel Corporation ("U.S. Steel"), and Vallourec Star, L.P. ("Vallourec"), domestic interested parties. On November 2, 2015, TMK IPSCO, U.S. Steel, and Vallourec filed a timely substantive response with the Department. The Department did not receive a response from any respondent interested party. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited sunset review of the *Order*.

<sup>1</sup> See *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 75 FR 69052 (November 10, 2010) ("Order").

<sup>2</sup> See *Initiation of Five-year ("Sunset") Review*, 80 FR 59133 (October 1, 2015).

**Scope of the Order**

The merchandise covered by this order is certain seamless carbon and alloy steel. The merchandise covered by the order is currently classified in the Harmonized Tariff Schedule of the United States ("HTSUS") under item numbers: 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the merchandise subject to this scope is dispositive.

For a complete description of the order, see the Department Memorandum, "Issues and Decision Memorandum for the Expedited Sunset Review of the Antidumping Duty Order on Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China" (Decision Memorandum), dated concurrently with, and hereby adopted by, this notice. The Decision Memorandum is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Services System ("ACCESS"). ACCESS is available to registered users at <http://access.trade.gov> and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Decision Memorandum is available directly on the Web at <http://enforcement.trade.gov/frn/index.html>. The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

**Analysis of Comments Received**

All issues raised in this sunset review are addressed in the Decision Memorandum. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping, and the magnitude of the margins likely to prevail if the *Order* were to be revoked. Parties may find a

complete discussion of all issues raised in the review and the corresponding recommendations in this public memorandum.

**Final Results of Sunset Review**

Pursuant to section 752(c)(3) of the Act, the Department determines that revocation of the *Order* would be likely to lead to continuation or recurrence of dumping, and the magnitude of the margins of dumping likely to prevail would be weighted-average margins up to 98.74 percent.

**Notification Regarding Administrative Protective Orders**

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

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

Dated: February 4, 2016.

**Paul Piquado,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2016-02804 Filed 2-10-16; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE****International Trade Administration**

[Application No. 03-2A007]

**Export Trade Certificate of Review**

**ACTION:** Notice of application for an amended Export Trade Certificate of Review by The Great Lakes Fruit Exporters Association, LLC, Application No. 03-2A007.

**SUMMARY:** The Secretary of Commerce, through the International Trade Administration, Office of Trade and Economic Analysis (OTEA), has received an application for an amended Export Trade Certificate of Review ("Certificate") from The Great Lakes Fruit Exporters Association, LLC. This notice summarizes the proposed amendment and seeks public comments on whether the amended Certificate should be issued.

**FOR FURTHER INFORMATION CONTACT:**

Joseph E. Flynn, Director, Office of Trade and Economic Analysis, International Trade Administration, by telephone at (202) 482-5131 (this is not a toll-free number) or email at [etca@trade.gov](mailto:etca@trade.gov).

**SUPPLEMENTARY INFORMATION:** Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. The regulations implementing Title III are found at 15 CFR part 325 (2016). Section 302(b)(1) of the Export Trading Company Act of 1982 and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its application. Under 15 CFR 325.6 (a), interested parties may, within twenty days after the date of this notice, submit written comments to the Secretary through OTEA on the application.

**Request for Public Comments:** Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as privileged or confidential business information will be deemed to be nonconfidential.

An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce, Room 21028, Washington, DC 20230.

Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the amended Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 14-2A004."

**Summary of the Application**

**Applicant:** The Great Lakes Fruit Exporters Association, LLC.

**Contact:** c/o Shirlee M. Bobryk, White Schneider PC, 2300 Jolly Oak Road, Okemos MI 48864.

**Application No.:** 03-2A007.

**Date Deemed Submitted:** January 28, 2016.

**Proposed Amendments:**

1. Add as new Member:
  - a. All Fresh GPS, LLC.
2. Delete the following members:
  - a. Greg Orchards and Produce, Inc.;

Applewood Orchards, Inc.; Heeren Brothers Inc.; AJ's Produce Inc.; Appletree Marketing LLC; and Michigan Fresh Marketing LLC.

*The Great Lakes Fruit Exporters Association, LLC's proposed amendment of its Export Trade Certificate of Review would result in the following entities as Members under the Certificate:*

1. Riveridge Produce Marketing, Inc.
2. North Bay Produce, Inc.
3. Greenridge Fruit, Inc.
4. Jack Brown Produce, Inc.
5. BelleHarvest Sales, Inc.
6. All Fresh GPS, LLC.

Dated: February 8, 2016.

**Joseph Flynn,**

*Director, Office of Trade and Economic Analysis, International Trade Administration.*

[FR Doc. 2016-02806 Filed 2-10-16; 8:45 am]

**BILLING CODE 3510-DR-P**

**DEPARTMENT OF COMMERCE****National Institute of Standards and Technology****Manufacturing Extension Partnership Advisory Board**

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** The National Institute of Standards and Technology (NIST) announces that the Manufacturing Extension Partnership (MEP) Advisory Board will hold an open meeting on Tuesday March 1, 2016, from 8:30 a.m. to 3:45 p.m. Eastern Standard Time.

**DATES:** The meeting will be held Tuesday, March 1, 2016, from 8:30 a.m. to 3:45 p.m. Eastern Standard Time.

**ADDRESSES:** The meeting will be held at the Ronald Reagan and International Trade Center, 1300 Pennsylvania Ave NW., Washington, DC 20004. Please note admittance instructions in the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** Zara Brunner, Manufacturing Extension

Partnership, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, Maryland 20899-4800, telephone number (301) 975-2001, email: [zara.brunner@nist.gov](mailto:zara.brunner@nist.gov).

**SUPPLEMENTARY INFORMATION:** The MEP Advisory Board (Board) is authorized under Section 3003(d) of the America COMPETES Act (Pub. L. 110-69); codified at 15 U.S.C. 278k(e), as amended, in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. The Board is composed of 10 members, appointed by the Director of NIST. Hollings MEP is a unique program, consisting of centers across the United States and Puerto Rico with partnerships at the state, federal, and local levels. The Board provides a forum for input and guidance from Hollings MEP program stakeholders in the formulation and implementation of tools and services focused on supporting and growing the U.S. manufacturing industry, provides advice on MEP programs, plans, and policies, assesses the soundness of MEP plans and strategies, and assesses current performance against MEP program plans.

Background information on the Board is available at <http://www.nist.gov/mep/about/advisory-board.cfm>.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the MEP Advisory Board will hold an open meeting on Tuesday, March 1, 2016, from 8:30 a.m. to 3:45 p.m. Eastern Standard Time. This meeting will focus on an update from the Advisory Board Sub-committee on Technology Acceleration, an update on MEP's Strategic Planning activities, and the 2017 National Summit. The final agenda will be posted on the MEP Advisory Board Web site at <http://www.nist.gov/mep/about/advisory-board.cfm>. This meeting is being held in conjunction with the MEP Center Board Member Distinctive Practice Meeting that will be held March 1, 2016 also at the Ronald Reagan and International Trade Center.

**Admittance Instructions:** Anyone wishing to attend the MEP Advisory Board meeting should submit their name, email address, and phone number to Monica Claussen ([monica.claussen@nist.gov](mailto:monica.claussen@nist.gov) or 301-975-4852) no later than Monday, February 22, 2016, 5:00 p.m. Eastern Standard Time.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the MEP Advisory Board's business are invited to request a place on the agenda.

Approximately 15 minutes will be reserved for public comments at the end of the meeting. Speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received but is likely to be no more than three to five minutes each. The exact time for public comments will be included in the final agenda that will be posted on the MEP Advisory Board Web site at <http://www.nist.gov/mep/about/advisory-board.cfm>. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to the MEP Advisory Board, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 4800, Gaithersburg, Maryland 20899-4800, via fax at (301) 963-6556, or electronically by email to [zara.brunner@nist.gov](mailto:zara.brunner@nist.gov).

Kevin Kimball,  
Chief of Staff.

[FR Doc. 2016-02768 Filed 2-10-16; 8:45 am]

BILLING CODE 3510-13-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XE343

#### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the U.S. Air Force Conducting Maritime Weapon Systems Evaluation Program Operational Testing Within the Eglin Gulf Test and Training Range

**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 Marine Mammal Protection Act (MMPA) implementing regulations, NMFS, we, hereby give notice that we have issued an Incidental Harassment Authorization (Authorization) to the U.S. Air Force, Eglin Air Force Base (Eglin AFB), to take two species of marine mammals, the Atlantic bottlenose dolphin (*Tursiops truncatus*) and Atlantic spotted dolphin (*Stenella frontalis*), by harassment, incidental to a Maritime Weapon Systems Evaluation Program (Maritime WSEP) within the

Eglin Gulf Test and Training Range in the Gulf of Mexico from February 4, 2016 through February 3, 2017. Eglin AFB's activities are military readiness activities per the MMPA, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year 2004.

**DATES:** Effective February 4, 2016, through February 3, 2017.

**ADDRESSES:** An electronic copy of the final Authorization, Eglin AFB's application and their final Environmental Assessment (EA) titled, "Maritime Weapons System Evaluation Program are available by writing to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; by telephoning the contacts listed here, or by visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm>.

**FOR FURTHER INFORMATION CONTACT:** Jeannine Cody, Office of Protected Resources, NMFS, (301) 427-8401.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act of 1972, as amended (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 of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if, after NMFS provides a notice of a proposed authorization to the public for review and comment: (1) NMFS makes certain findings; and (2) the taking is limited to harassment.

An Authorization for incidental takings for marine mammals 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 taking are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

The National Defense Authorization Act of 2004 (NDAA; Pub. L. 108-136) removed the "small numbers" and

"specified geographical region" limitations indicated earlier and amended the definition of harassment as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

#### Summary of Request

On February 5, 2015, we issued an Authorization to Eglin AFB to take marine mammals, by harassment, incidental to a Maritime Weapon Systems Evaluation Program (Maritime WSEP) within the Eglin Gulf Test and Training Range (EGTTR) in the Gulf of Mexico from February through April 2015 (see 80 FR 17394, April 1, 2015). Eglin AFB conducted the Maritime WSEP training activities between February 9-12, and March 16-19, 2015. However, due to unavailability of some of the live munitions, Eglin AFB released only 1.05 percent of the munitions proposed for the 2015 military readiness activities. On May 28, 2015, we received a renewal request for an Authorization from Eglin AFB to complete the missions authorized in 2015. Following the initial application submission, Eglin AFB submitted a revised version of the renewal request on December 3, 2015. We considered the revised renewal request as adequate and complete on December 10, 2015 and published a notice of proposed Authorization on December 23, 2015 (80 FR 79843). The notice afforded the public a 30-day comment period on the proposed MMPA Authorization.

Eglin AFB proposes to conduct Maritime WSEP missions within the EGTTR airspace over the Gulf of Mexico, specifically within Warning Area 151 (W-151). The proposed Maritime WSEP training activities would occur February through April (spring) in the daytime; however, the activities could occur between February 2016 and February 2017.

Eglin AFB proposes to use multiple types of live munitions (*e.g.*, gunnery rounds, rockets, missiles, and bombs) against small boat targets in the EGTTR. These activities qualify as a military readiness activities under the MMPA and NDAA.

The following aspects of the proposed Maritime WSEP training activities have the potential to take marine mammals: exposure to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water. Take, by Level B harassment of individuals of common bottlenose dolphin or Atlantic spotted dolphin could potentially result from the specified activity. Additionally, although NMFS does not expect it to occur, Eglin AFB has also requested authorization for Level A Harassment of a small number of individuals of either common bottlenose dolphins or Atlantic spotted dolphins. Therefore, Eglin AFB has requested authorization to take individuals of two cetacean species by Level A and Level B harassment.

Eglin AFB's Maritime WSEP training activities may potentially impact marine mammals at or near the water surface in the absence of mitigation. Marine mammals could potentially be harassed, injured, or killed by exploding projectiles. However, based on analyses provided in Eglin AFB's 2015 Authorization renewal request; 2014 application; 2015 Environmental Assessment (EA); the 2015 monitoring report for the authorized activities conducted in February and March 2015; and for reasons discussed later in this document, we do not anticipate that Eglin AFB's Maritime WSEP activities would result in any serious injury or mortality to marine mammals.

For Eglin AFB, this would be the second issued Authorization following the Authorization issued effective from February through April 2015 (80 FR 17394, April 1, 2015). The monitoring report associated with the 2015 Authorization is available at [www.nmfs.noaa.gov/pr/permits/](http://www.nmfs.noaa.gov/pr/permits/)

*incidental/military.htm* and provides additional environmental information related to proposed issuance of this Authorization for public review and comment.

**Description of the Specified Activity**

*Overview*

Eglin AFB proposes to conduct live ordnance testing and training in the Gulf of Mexico as part of the Maritime WSEP operational testing missions. The Maritime WSEP test objectives are to evaluate maritime deployment data, evaluate tactics, techniques and procedures, and to determine the impact of techniques and procedures on combat Air Force training. The need to conduct this type of testing has developed in response to increasing threats at sea posed by operations conducted from small boats which can carry a variety of weapons; can form in large or small numbers; and may be difficult to locate, track, and engage in the marine environment. Because of limited Air Force aircraft and munitions testing on engaging and defeating small boat threats, Eglin AFB proposes to employ live munitions against boat targets in the EGTTR in order to continue development of techniques and procedures to train Air Force strike aircraft to counter small maneuvering surface vessels. Thus, the Department of Defense considers the Maritime WSEP training activities as a high priority for national security.

**Dates and Duration**

Eglin AFB proposes to schedule the Maritime WSEP training missions over an approximate three-week period that would begin in early February 2016. The proposed missions would occur in the spring, on weekdays, during

daytime hours only, with one or two missions occurring per day. Some minor deviation from Eglin AFB's requested dates is possible and the proposed Authorization, if issued, would be effective from February 4, 2016 through February 3, 2017.

**Specified Geographic Region**

The specific planned mission location is approximately 17 miles (mi) (27.3 kilometers [km]) offshore from Santa Rosa Island, Florida, in nearshore waters of the continental shelf in the Gulf of Mexico. All activities would take place within the EGTTR, defined as the airspace over the Gulf of Mexico controlled by Eglin AFB, beginning at a point three nautical miles (nmi) (3.5 miles [mi]; 5.5 kilometers [km]) from shore. The EGTTR consists of subdivided blocks including Warning Area 151 (W-151) where the proposed activities would occur, specifically in sub-area W-151A.

NMFS provided detailed descriptions of the activity area in a previous notice for the proposed Authorization (80 FR 7984, December 23, 2015). The information has not changed between the notice of proposed Authorization and this final notice announcing the issuance of the Authorization.

**Detailed Description of Activities**

The Maritime WSEP training missions, classified as military readiness activities, include the release of multiple types of inert and live munitions from fighter and bomber aircraft, unmanned aerial vehicles, and gunships against small, static, towed, and remotely-controlled boat targets. Munition types include bombs, missiles, rockets, and gunnery rounds (Table 1).

TABLE 1—LIVE MUNITIONS AND AIRCRAFT

Munitions	Aircraft (not associated with specific munitions)
GBU-10 laser-guided Mk-84 bomb .....	F-16C fighter aircraft.
GBU-24 laser-guided Mk-84 bomb .....	F-16C+ fighter aircraft.
GBU-12 laser-guided Mk-82 bomb .....	F-15E fighter aircraft.
GBU-54 Laser Joint Direct Attack Munition (LJDAM), laser-guided Mk-82 bomb .....	A-10 fighter aircraft.
CBU-105 (WCMD) (inert) .....	B-1B bomber aircraft.
AGM-65 Maverick air-to-surface missile .....	B-52H bomber aircraft.
GBU-38 Small Diameter Bomb II (Laser SDB) .....	MQ-1/9 unmanned aerial vehicle.
AGM-114 Hellfire air-to-surface missile .....	AC-130 gunship.
AGM-176 Griffin air-to-surface missile.	
2.75 Rockets.	
PGU-13/B high explosive incendiary 30 mm rounds.	
7.62 mm/.50 Cal (inert).	

Key: AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; LJDAM = Laser Joint Direct Attack Munition; Laser SDB = Laser Small Diameter Bomb; mm = millimeters; PGU = Projectile Gun Unit; WCMD = wind corrected munition dispenser.

The proposed Maritime WSEP training activities involve detonations

above the water, near the water surface, and under water within the EGTTR.

However, because the tests will focus on weapons/target interaction, Eglin AFB

will not specify a particular aircraft for a given test as long as it meets the delivery parameters.

Eglin AFB would deploy the munitions against static, towed, and remotely-controlled boat targets within the W-151A. Eglin AFB would operate the remote-controlled boats from an

instrumentation barge (*i.e.*, the Gulf Range Armament Test Vessel; GRATV) anchored on site within the test area. The GRATV would provide a platform for video cameras and weapons-tracking equipment. Eglin AFB would position the target boats approximately 182.8 m

(600 ft) from the GRATV, depending on the munition type.

Table 2 lists the number, height, or depth of detonation, explosive material, and net explosive weight (NEW) in pounds (lbs) of each munition proposed for use during the Maritime WSEP activities.

TABLE 2—MARITIME WSEP MUNITIONS PROPOSED FOR USE IN THE W-151A TEST AREA

Type of munition	Total # of live munitions	Detonation type	Warhead—explosive material	Net explosive weight per munition
GBU-10 or GBU-24 .....	2	Surface .....	MK-84—Tritonal .....	945 lbs.
GBU-12 or GBU-54 (LJDAM) .....	6	Surface .....	MK-82—Tritonal .....	192 lbs.
AGM-65 (Maverick) .....	6	Surface .....	WDU-24/B penetrating blast-fragmentation warhead.	86 lbs.
CBU-105 (WCMD) .....	4	Airburst .....	10 BLU-108 sub-munitions each containing 4 projectiles parachute, rocket motor and altimeter.	Inert.
GBU-38 (Laser Small Diameter Bomb) .....	4	Surface .....	AFX-757 (Insensitive munition) .....	37 lbs.
AGM-114 (Hellfire) .....	15	Subsurface (10 msec delay) .....	High Explosive Anti-Tank (HEAT) tandem anti-armor metal augmented charge.	20 lbs.
AGM-176 (Griffin) .....	10	Surface .....	Blast fragmentation .....	13 lbs.
2.75 Rockets .....	100	Surface .....	Comp B-4 HEI .....	Up to 12 lbs.
PGU-12 HEI 30 mm .....	1,000	Surface .....	30 x 173 mm caliber with aluminized RDX explosive. Designed for GAU-8/A Gun System.	0.1 lbs.
7.62 mm/50 cal .....	5,000	Surface .....	N/A .....	Inert.

Key: AGL = above ground level; AGM = air-to-ground missile; CBU = Cluster Bomb Unit; GBU = Guided Bomb Unit; JDAM = Joint Direct Attack Munition; LJDAM = Laser Joint Direct Attack Munition; mm = millimeters; msec = millisecond; lbs = pounds; PGU = Projectile Gun Unit; HEI = high explosive incendiary.

At least two ordnance delivery aircraft will participate in each live weapons release training mission which lasts approximately four hours. Before delivering the ordnance, mission aircraft would make a dry run over the target area to ensure that it is clear of commercial and recreational boats. Jets will fly at a minimum air speed of 300 knots (approximately 345 miles per hour, depending on atmospheric conditions) and at a minimum altitude of 305 m (1,000 ft). Due to the limited flyover duration and potentially high speed and altitude, the pilots would not participate in visual surveys for protected species.

NMFS provided detailed descriptions of the WSEP training operations in a previous notice for the proposed Authorization (80 FR 7984, December 23, 2015). This information has not changed between the notice of proposed Authorization and this final notice announcing the issuance of the Authorization.

**Comments and Responses**

A notice of receipt of Eglin AFB’s application and NMFS’ proposal to issue an Authorization to the USAF, Eglin AFB, published in the **Federal Register** on December 23, 2015 (80 FR 7984). During the 30-day public

comment period, NMFS received comments from the Marine Mammal Commission (Commission) only. Following are the comments from the Commission and NMFS’ responses.

*Comment 1:* The Commission notes that Eglin AFB has applied for MMPA authorizations to take marine mammals on an activity-by-activity basis (*e.g.*, naval explosive ordnance disposal school, precision strike weapon, air-to-surface gunnery, and maritime strike operations) rather than through a programmatic basis. The Commission believes that the agencies should evaluate the impacts of all training and testing activities under a single letter of authorization application and National Environmental Policy Act (NEPA) document rather than segmenting the analyses based on specific types of missions under various authorizations.

*Response:* Both Eglin AFB and NMFS concur with the Commission’s recommendation to streamline the rulemaking process for future activities conducted within the EGGTR. In 2015, Eglin AFB developed a Programmatic Environmental Assessment as for all testing and training activities that would occur in the EGGTR over the next five years. Eglin AFB has also developed and submitted a request for a Letter of Authorization under the MMPA to

NMFS for all testing and training activities that would also occur in the EGGTR over the same five year period. Both of these efforts will facilitate a more comprehensive review of actions occurring within the EGGTR that have the potential to take marine mammals incidental to military readiness activities and NMFS will be able to evaluate the impacts of all training and testing activities under a single letter of authorization application rather than segmenting our analyses based on specific types of missions under separate authorizations.

*Comment 2:* The Commission states that Eglin AFB overestimated marine mammal take because they based estimates on a single detonation event of each munition type which multiplied the number of animals estimated to be taken by a single detonation event for each munition type by the total number of munitions that would be detonated, irrespective of when those detonations would occur. The Commission states that this method does not consider the accumulation of energy in a 24-hour period which would more accurately correspond to zones of exposure for the representative scenario and serve as more a realistic estimate of the numbers of animals that Eglin AFB could potentially take during the WSEP

activities. In estimating take, the Commission commented Eglin AFB's model approach was an additive process for estimating each zone of exposure, and thus the associated takes.

Effectively, The Commission states that Eglin AFB overestimated the number of take but is unsure to what degree.

Further, the Commission recommends that Eglin AFB and NMFS should treat fractions of estimated take appropriately, that is generally, round down if less than 0.50 and round up if greater than or equal to 0.50 before summing the estimates for each species.

*Response:* NMFS and Eglin AFB acknowledge that this approach contributes to the overestimation of take estimates. Eglin AFB's modeling approach for take estimates treated each munition detonation as a separate event impacting a new set of animals which results in a worst case scenario of potential take and is an overestimate of potential harassment.

NMFS agrees with the Commission's recommendations and has recalculated the takes by accounting for the accumulation of energy in a 24-hour period and by eliminating the double counting of the estimated take for each species and appropriately rounding take estimates before summing the total take. Table 8 in this notice provides the revised number of marine mammals, by species, that Eglin AFB could potentially take incidental to the conduct of Maritime WSEP operations. The re-calculation results in zero take by mortality, zero take by slight lung injury, and zero take by gastrointestinal tract injury. Compared to the take levels that NMFS previously presented in the notice for the proposed Authorization (80 FR 7984, December 23, 2015), our re-estimation has reduced take estimates for Level A harassment (PTS) from 38 to 14 marine mammals. Based on the remodeling of the number of marine mammals potentially affected by the Maritime WSEP missions, NMFS would authorize take for Level A and Level B harassment presented in Table 8 of this notice.

*Comment 3:* The Commission states that Eglin AFB proposes to use live-feed video cameras to supplement its effectiveness in detecting marine mammals when implementing mitigation measures. However, the Commission is not convinced that those measures are sufficient to effectively

monitor for marine mammals entering the training areas during the 30 minute timeframe prior to detonation. In addition, the Commission states that it does not believe that Eglin AFB cannot deem the Level A harassment zone clear of marine mammals when using only three video cameras for monitoring. Thus, the Commission recommends that NMFS require Eglin AFB to supplement its mitigation measures with passive acoustic monitoring and determine the effectiveness of its suite of mitigation measures for activities at Eglin prior to incorporating presumed mitigation effectiveness into its take estimation analyses or negligible impact determinations.

*Response:* NMFS has worked closely with Eglin AFB over the past several Authorization cycles to develop proper mitigation, monitoring, and reporting requirements designed to minimize and detect impacts from the specified activities and ensure that NMFS can make the findings necessary for issuance of an Authorization.

Monitoring also includes vessel-based observers for marine species up to 30 minutes prior to deploying live munitions in the area. Eglin AFB has submitted annual reports to NMFS every year that describes all activities that occur in the EGTTR. In addition, Eglin AFB submitted annual reports to NMFS at the conclusion of the Maritime Strike Operations. These missions are similar in nature to the proposed maritime WSEP operations and the Eglin AFB provided information on sighting information and results from post-mission survey observations. Based on those results, NMFS determined that the mitigation measures ensured the least practicable adverse impact to marine mammals. There were no observations of injured marine mammals and no reports of marine mammal mortality during the Maritime Strike Operation activities. The measures proposed for Maritime WSEP are similar, except they will include larger survey areas based on updated acoustic analysis and previous discussions with the Commission and NMFS.

Eglin AFB will continue to research the feasibility of supplementing existing monitoring efforts with passive acoustic monitoring devices for future missions and is in the process of discussing alternatives with the Commission and

NMFS during the review of the environmental planning efforts discussed earlier in Comment 1.

*Comment 4:* The MMC expressed their belief that all permanent hearing loss should be considered a serious injury and recommends that NMFS propose to issue regulations under section 101(a)(5)(A) of the MMPA and a letter of authorization, rather than an incidental harassment authorization, for any proposed activities expected to cause a permanent threshold shift (PTS).

*Response:* NMFS considers PTS to fall under the injury category (Level A Harassment). However, an animal would need to stay very close to the sound source for an extended amount of time to incur a serious degree of PTS, which could increase the probability of mortality. In this case, it would be highly unlikely for this scenario to unfold given the nature of any anticipated acoustic exposures that could potentially result from a mobile marine mammal that NMFS generally expects to exhibit avoidance behavior to loud sounds within the EGTTR.

NMFS has recalculated the takes presented in the notice for the proposed Authorization (80 FR 7984, December 23, 2015) and the results of the recalculation show zero takes for mortality, zero takes by slight lung injury, and zero takes by gastrointestinal tract injury. Further, the re-estimation has reduced the number of take by Level A harassment (from PTS) from 38 to 14. Based on this re-estimation, NMFS does not believe that serious injury will result from this activity and that therefore it is not necessary to issue regulations through section 101(a)(5)(A), rather, an Incidental Harassment Authorization may be issued.

#### **Description of Marine Mammals in the Area of the Specified Activity**

Table 3 lists marine mammal species with potential or confirmed occurrence in the proposed activity area during the project timeframe and summarizes key information regarding stock status and abundance. Please see NMFS' draft 2015 and 2014 Stock Assessment Reports (SAR), available at [www.nmfs.noaa.gov/pr/sars](http://www.nmfs.noaa.gov/pr/sars) and Garrison *et al.*, 2008; Navy, 2007; Davis *et al.*, 2000 for more detailed accounts of these stocks' status and abundance.

TABLE 3—MARINE MAMMALS THAT COULD OCCUR IN THE PROPOSED ACTIVITY AREA

Species	Stock name	Regulatory status <sup>1 2</sup>	Estimated abundance	Relative occurrence in W-151
Common bottlenose dolphin .....	Choctawatchee Bay .....	MMPA—S, ESA—NL .....	179, CV = 0.04 <sup>3</sup> .....	Uncommon.
	Pensacola/East Bay .....	MMPA—S, ESA—NL .....	33, CV = 0.80 <sup>4</sup> .....	Uncommon.
	St. Andrew Bay .....	MMPA—S, ESA—NL .....	124, CV = 0.57 <sup>4</sup> .....	Uncommon.
	Gulf of Mexico Northern Coastal	MMPA—S, ESA—NL .....	7,185, CV = 0.21 <sup>3</sup> .....	Common.
	Northern Gulf of Mexico Continental Shelf.	MMPA—NC, ESA—NL .....	51,192, CV = 0.10 <sup>3</sup> ...	Uncommon.
	Northern Gulf of Mexico Oceanic.	MMPA—NC, ESA—NL .....	5,806, CV = 0.39 <sup>4</sup> .....	Uncommon.
Atlantic spotted dolphin .....	Northern Gulf of Mexico .....	MMPA—NC, ESA—NL .....	37,611 <sup>4</sup> , CV = 0.28 ...	Common.

<sup>1</sup> MMPA: D = Depleted, S = Strategic, NC = Not Classified.  
<sup>2</sup> ESA: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.  
<sup>3</sup> NMFS Draft 2015 SAR (Waring *et al.*, 2015).  
<sup>4</sup> NMFS 2014 SAR (Waring *et al.*, 2014).

An additional 19 cetacean species could occur within the northeastern Gulf of Mexico, mainly occurring at or beyond the shelf break (*i.e.*, water depth of approximately 200 m (656.2 ft)) located beyond the W-151A test area. NMFS and Eglin AFB consider these 19 species to be rare or extralimital within the W-151A test location area. These species are the Bryde’s whale (*Balaenoptera edeni*), sperm whale (*Physeter macrocephalus*), dwarf sperm whale (*Kogia sima*), pygmy sperm whale (*K. breviceps*), pantropical spotted dolphin (*Stenella attenuata*), Blainville’s beaked whale (*Mesoplodon densirostris*), Cuvier’s beaked whale (*Ziphius cavirostris*), Gervais’ beaked whale (*M. europaeus*), Clymene dolphin (*S. clymene*), spinner dolphin (*S. longirostris*), striped dolphin (*S. coeruleoalba*), killer whale (*Orcinus orca*), false killer whale (*Pseudorca crassidens*), pygmy killer whale (*Feresa attenuata*), Risso’s dolphin (*Grampus griseus*), Fraser’s dolphin (*Lagenodelphis hosei*), melon-headed whale (*Peponocephala electra*), rough-toothed dolphin (*Steno bredanensis*), and short-finned pilot whale (*Globicephala macrorhynchus*).

Of these species, only the sperm whale is listed as endangered under the ESA and as depleted throughout its range under the MMPA. Sperm whale occurrence within W-151A is unlikely because almost all reported sightings have occurred in water depths greater than 200 m (656.2 ft).

Because these species are unlikely to occur within the W-151A area, Eglin AFB has not requested and NMFS has not issued take authorizations for them. Thus, NMFS does not consider these species further in this notice.

*Other Marine Mammals in the Proposed Action Area*

The endangered West Indian manatee (*Trichechus manatus*) rarely occurs in the area (USAF, 2014). The U.S. Fish and Wildlife Service has jurisdiction over the manatee; therefore, we would not include a proposed Authorization to harass manatees and do not discuss this species further in this notice.

**Potential Effects of the Specified Activity on Marine Mammals and Their Habitat**

This section of the notice of the proposed Authorization (80 FR 7984, December 23, 2015) included a summary and discussion of the ways that components (*e.g.*, exposure to impulsive noise and pressure waves generated by live ordnance detonation at or near the surface of the water) of the specified activity, including mitigation may impact marine mammals and their habitat. The “Estimated Take by Incidental Harassment” section later in this document will include a quantitative analysis of the number of individuals that we expect Eglin AFB to take during this activity. The “Negligible Impact Analysis” section will include the analysis of how this specific activity would impact marine mammals. We will consider the content of the following sections: “Estimated Take by Incidental Harassment” and “Proposed Mitigation” to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals—and from that consideration—the likely impacts of this activity on the affected marine mammal populations or stocks.

In summary, the Maritime WSEP training exercises proposed for taking of marine mammals under an Authorization have the potential to take marine mammals by exposing them to impulsive noise and pressure waves

generated by live ordnance detonation at or near the surface of the water. Exposure to energy or pressure resulting from these detonations could result in Level A harassment (PTS) and by Level B harassment (TTS and behavioral). In addition, NMFS also considered the potential for harassment from vessel operations.

The potential effects of impulsive sound sources (underwater detonations) from the proposed training activities may include one or more of the following: Tolerance, masking, disturbance, hearing threshold shift, stress response, and mortality. NMFS provided detailed information on these potential effects in the notice of the proposed Authorization (80 FR 7984, December 23, 2015). The information presented in that notice has not changed.

*Anticipated Effects on Habitat*

Detonations of live ordnance would result in temporary changes to the water environment. Munitions could hit the targets and not explode in the water. However, because the targets are located over the water, in water explosions could occur. An underwater explosion from these weapons could send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. However, these effects would be temporary and not expected to last more than a few seconds.

Similarly, Eglin AFB does not expect any long-term impacts with regard to hazardous constituents to occur. Eglin AFB considered the introduction of fuel, debris, ordnance, and chemical materials into the water column within its EA and determined the potential effects of each to be insignificant. Eglin AFB analyzed the potential effects of each in their EA and determined them

to be insignificant. NMFS provided a summary of the analyses in the notice for the proposed Authorization (80 FR 7984, December 23, 2015). The information presented in that notice has not changed.

**Mitigation**

In order to issue an incidental take authorization under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses (where relevant).

The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the incidental take authorization process such that “least practicable adverse impact” shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

NMFS and Eglin AFB have worked to identify potential practicable and effective mitigation measures, which include a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect

of that measure on personnel safety, practicality of implementation, and impact on the “military-readiness activity.” We refer the reader to Section 11 of Eglin AFB’s application for more detailed information on the proposed mitigation measures which include the following:

*Vessel-Based Monitoring:* Eglin AFB would station a large number of range clearing boats (approximately 20 to 25) around the test site to prevent non-participating vessels from entering the human safety zone. Based on the composite footprint, range clearing boats will be located approximately (see Figure 11–1 in Eglin AFB’s application). However, the actual distance will vary based on the size of the munition being deployed.

Trained protected species observers would be aboard five of these boats and will conduct protected species surveys before and after each test. The protected species survey vessels will be dedicated solely to observing for marine species during the pre-mission surveys while the remaining safety boats clear the area of non-authorized vessels. The protected species survey vessels will begin surveying the area at sunrise. The area to be surveyed will encompass the zone of influence (ZOI), which is 5 km (3.1 mi). Animals that may enter the area after Eglin AFB has completed the pre-mission surveys and prior to detonation

would not reach the predicted smaller slight lung injury and/or mortality zones.

Because of human safety issues, observers will be required to leave the test area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 15.28 km (9.5 mi) from the detonation point. Observers will continue to scan for marine mammals from the periphery.

*Determination of the Zone of Influence*

Eglin AFB has created a sample day reflecting the maximum number of munitions that could be released and resulting in the greatest impact in a single mission day. However, this scenario is only a representation and may not accurately reflect how Eglin AFB may conduct actual operations. However, NMFS and Eglin AFB are considering this conservative assumption to calculate the impact range for mitigation monitoring measures. Thus, Eglin AFB has modeled, combined, and compared the sum of all energies from these detonations against thresholds with energy metric criteria to generate the accumulated energy ranges for this scenario. Table 4 lists these ranges which form the basis of the mitigation monitoring.

**TABLE 4—DISTANCES (m) TO HARASSMENT THRESHOLDS FOR AN EXAMPLE MISSION DAY**

Munition	NEW (lbs)	Total # per day	Detonation scenario	Level A harassment	Level B harassment	
				PTS 187 dB SEL	TTS	Behavioral
					172 dB SEL	167 dB SEL
GBU–10 or GBU–24 .....	945	1	Surface .....	5,120	12,384	15,960
GBU–12 or GBU–54 .....	192	1	Surface.			
AGM–65 (Maverick) .....	86	1	Surface.			
GBU–39 (LSDB) .....	37	1	Surface.			
AGM–114 (Hellfire) .....	20	3	(10 ft depth).			
AGM–175 (Griffin) .....	13	2	Surface.			
2.75 Rockets .....	12	12	Surface.			
PGU–13 HEI 30 mm .....	0.1	125	Surface.			

AGM = air-to-ground missile; cal = caliber; CBU = Cluster Bomb Unit; ft = feet; GBU = Guided Bomb Unit; HEI = high explosive incendiary; lbs = pounds; mm = millimeters; N/A = not applicable; NEW = net explosive weight; PGU = Projectile Gun Unit; SDB = small diameter bomb; PTS = permanent threshold shift; TTS = temporary threshold shift; WCMD = wind corrected munition dispenser.

Based on the ranges presented in Table 4 and factoring operational limitations associated with survey-based vessel support for the missions, Eglin AFB estimates that during pre-mission surveys, the proposed monitoring area would be approximately 5 km (3.1 miles) from the target area, which corresponds to the Level A harassment threshold range. Eglin AFB proposes to survey the same-sized area for each

mission day, regardless of the planned munition expenditures. By clearing the Level A harassment threshold range of protected species, animals that may enter the area after the completed pre-mission surveys but prior to detonation would not reach the smaller slight lung injury or mortality zones (presented in Table 6 later in this document). Because of human safety issues, Eglin AFB would require observers to leave the test

area at least 30 minutes in advance of live weapon deployment and move to a position on the safety zone periphery, approximately 15 km (9.5 miles) from the detonation point. Observers would continue to scan for marine mammals from the periphery, but effectiveness would be limited as the boat would remain at a designated station.

*Video Monitoring:* In addition to vessel-based monitoring, Eglin AFB

would position three high-definition video cameras on the GRATV anchored on-site, as described earlier, to allow for real-time monitoring for the duration of the mission. The camera configuration and actual number of cameras used would depend on specific mission requirements. In addition to monitoring the area for mission objective issues, the camera(s) would also monitor for the presence of protected species. A trained marine species observer from Eglin Natural Resources would be located in Eglin AFB's Central Control Facility, along with mission personnel, to view the video feed before and during test activities. The distance to which objects can be detected at the water surface by use of the cameras is considered generally comparable to that of the human eye.

The GRATV will be located about 183 m (600 ft) from the target. The larger mortality threshold ranges correspond to the modified Goertner model adjusted for the weight of an Atlantic spotted dolphin calf, and extend from 0 to 237 m (0 to 778 ft) from the target, depending on the ordnance, and the Level A ranges for both common bottlenose and Atlantic spotted dolphins extend from 7 to 965 m (23 to 3,166 ft) from the target, depending on the ordnance and harassment criterion. Given these distances, observers could reasonably be expected to view a substantial portion of the mortality zone in front of the camera, although a small portion would be behind or to the side of the camera view. Based on previous monitoring reports for this activity, the pre-training surveys for delphinids and other protected species within the mission area are effective. Observers can view some portion of the Level A harassment zone, although the view window would be less than that of the mortality zone (a large percentage would be behind or to the side of the camera view).

If the high-definition video cameras are not operational for any reason, Eglin AFB will not conduct Maritime WSEP missions.

In addition to the two types of visual monitoring discussed earlier in this section, Eglin AFB personnel are present within the mission area (on boats and the GRATV) on each day of testing well in advance of weapon deployment, typically near sunrise. They will perform a variety of tasks including target preparation, equipment checks, etc., and will opportunistically observe for marine mammals and indicators as feasible throughout test preparation. However, we consider these observations as supplemental to the proposed mitigation monitoring and

would only occur as time and schedule permits. Eglin AFB personnel would relay information on these types of sightings to the Lead Biologist, as described in the following mitigation sections.

#### *Pre-Mission Monitoring*

The purposes of pre-mission monitoring are to: (1) Evaluate the mission site for environmental suitability, and (2) verify that the ZOI (in this case, 5 km [3.1 mi]) is free of visually detectable marine mammals, as well as potential indicators of these species. On the morning of the mission, the Test Director and Safety Officer will confirm that there are no issues that would preclude mission execution and that weather is adequate to support mitigation measures.

#### *Sunrise or Two Hours Prior to Mission*

Eglin AFB range clearing vessels and protected species survey vessels will be on site at least two hours prior to the mission. The Lead Biologist on board one survey vessel will assess the overall suitability of the mission site based on environmental conditions (sea state) and presence/absence of marine mammal indicators. Eglin AFB personnel will communicate this information to Tower Control and personnel will relay the information to the Safety Officer in Central Control Facility.

#### *One and One-Half Hours Prior to Mission*

Vessel-based surveys will begin approximately one and one-half hours prior to live weapons deployment. Surface vessel observers will survey the ZOI (in this case, 5 km [3.1 mi]) and relay all marine species and indicator sightings, including the time of sighting, GPS location, and direction of travel, if known, to the Lead Biologist. The lead biologist will document all sighting information on report forms which he/she will submit to Eglin Natural Resources after each mission. Surveys would continue for approximately one hour. During this time, Eglin AFB personnel in the mission area will also observe for marine species as feasible. If marine mammals or indicators are observed within the ZOI (5 km [3.1 mi]), the range will be declared "fouled," a term that signifies to mission personnel that conditions are such that a live ordnance drop cannot occur (e.g., protected species or civilian vessels are in the mission area). If there are no observations of marine mammals or indicators of marine mammals, Eglin AFB would declare the range clear of protected species.

#### *One-Half Hour Prior to Mission*

At approximately 30 minutes to one hour prior to live weapon deployment, marine species observers will be instructed to leave the mission site and remain outside the safety zone, which on average will be 15.28 km (9.5 mi) from the detonation point. The actual size is determined by weapon net explosive weight and method of delivery. The survey team will continue to monitor for protected species while leaving the area. As the survey vessels leave the area, marine species monitoring of the immediate target areas will continue at the Central Control Facility through the live video feed received from the high definition cameras on the GRATV. Once the survey vessels have arrived at the perimeter of the safety zone (approximately 30 minutes after leaving the area per instructions from Eglin AFB, depending on actual travel time), Eglin AFB will declare the range as "green" and the mission will proceed, assuming all non-participating vessels have left the safety zone as well.

#### *Execution of Mission*

Immediately prior to live weapons drop, the Test Director and Safety Officer will communicate to confirm the results of marine mammal surveys and the appropriateness of proceeding with the mission. The Safety Officer will have final authority to proceed with, postpone, or cancel the mission. Eglin AFB would postpone the mission if:

- Any of the high-definition video cameras are not operational for any reason;
- Any marine mammal is visually detected within the ZOI (5 km [3.1 mi]). Postponement would continue until the animal(s) that caused the postponement is: (1) confirmed to be outside of the ZOI (5 km [3.1 mi]) on a heading away from the targets; or (2) not seen again for 30 minutes and presumed to be outside the ZOI (5 km [3.1 mi]) due to the animal swimming out of the range;
- Any large schools of fish or large flocks of birds feeding at the surface are within the ZOI (5 km [3.1 mi]). Postponement would continue until Eglin AFB personnel confirm that these potential indicators are outside the ZOI (5 km [3.1 mi]):
- Any technical or mechanical issues related to the aircraft or target boats; or
- Any non-participating vessel enters the human safety zone prior to weapon release.

In the event of a postponement, protected species monitoring would continue from the Central Control Facility through the live video feed.

### Post-Mission Monitoring

Post-mission monitoring determines the effectiveness of pre-mission mitigation by reporting sightings of any marine mammals. Post-detonation monitoring surveys will commence once the mission has ended or, if required, as soon as personnel declare the mission area safe. Vessels will move into the survey area from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. This area is easily identifiable because of the floating debris in the water from impacted targets. Up to 10 Eglin AFB support vessels will be cleaning debris and collecting damaged targets from this area thus spending several hours in the area once Eglin AFB completes the mission. Observers will document and report any marine mammal species, number, location, and behavior of any animals observed to Eglin Natural Resources.

### Mission Delays Due to Weather

Eglin AFB would delay or reschedule Maritime WSEP missions if the Beaufort sea state is greater than number 4 at the time of the testing activities. The Lead Biologist aboard one of the survey vessels will make the final determination of whether conditions are conducive for sighting protected species or not.

We have carefully evaluated Eglin AFB's proposed mitigation measures in the context of ensuring that we prescribe the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed here:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).
2. A reduction in the numbers of marine mammals (total number or

number at biologically important time or location) exposed to stimuli expected to result in incidental take (this goal may contribute to 1, above, or to reducing takes by behavioral harassment only).

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to stimuli that we expect to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to training exercises that we expect to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing the severity of harassment takes only).

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of Eglin AFB's proposed measures, as well as other measures that may be relevant to the specified activity, we have determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicality of implementation, and the impact of effectiveness of the military readiness activity.

### Monitoring and Reporting

In order to issue an Authorization for an activity, section 101(a)(5)(D) of the MMPA states that we 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 an authorization must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and our expectations of the level of taking or impacts on

populations of marine mammals present in the proposed action area.

Eglin AFB submitted a marine mammal monitoring plan in their Authorization application. We have not modified or supplemented the plan based on comments or new information received from the public during the public comment period. Any monitoring requirement we prescribe should improve our understanding of one or more of the following:

- Occurrence of marine mammal species in action area (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) Affected species (*e.g.*, life history, dive patterns); (3) Co-occurrence of marine mammal species with the action; or (4) Biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas).
- Individual responses to acute stressors, or impacts of chronic exposures (behavioral or physiological).
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of an individual; or (2) Population, species, or stock.
- Effects on marine mammal habitat and resultant impacts to marine mammals.
- Mitigation and monitoring effectiveness.

The Authorization for Maritime WSEP operations will require the following measures. They are:

(1) Eglin AFB will track the use of the EGTR for test firing missions and protected species observations, through the use of mission reporting forms.

(2) Eglin AFB will submit a summary report of marine mammal observations and Maritime WSEP activities to the NMFS Southeast Regional Office (SERO) and the Office of Protected Resources 90 days after expiration of the current Authorization. This report must include the following information: (i) Date and time of each Maritime WSEP exercise; (ii) a complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of Maritime WSEP exercises on marine mammal populations; and (iii) results of the Maritime WSEP exercise monitoring, including number of marine mammals (by species) that may have been harassed due to presence within the activity zone.

(3) Eglin AFB will monitor for marine mammals in the proposed action area. If Eglin AFB personnel observe or detect

any dead or injured marine mammals prior to testing, or detects any injured or dead marine mammal during live fire exercises, Egin AFB must cease operations and submit a report to NMFS within 24 hours.

(4) Egin AFB must immediately report any unauthorized takes of marine mammals (*i.e.*, serious injury or mortality) to NMFS and to the respective Southeast Region stranding network representative. Egin AFB must cease operations and submit a report to NMFS within 24 hours.

#### Monitoring Results From Previously Authorized Activities

Egin AFB complied with the mitigation and monitoring required under the previous Authorization for 2015 WSEP activities. Marine mammal monitoring occurred before, during, and after each Maritime WSEP mission. During the course of these activities, Egin AFB's monitoring did not suggest that they had exceeded the take levels authorized under Authorization. In accordance with the 2015 Authorization, Egin AFB submitted a monitoring report (available at: [www.nmfs.noaa.gov/pr/permits/incidental/military.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/military.htm)).

Under the 2015 Authorization, Egin AFB anticipated conducting Maritime WSEP training missions over approximately two to three weeks, but actually conducted a total of eight mission days: four days (February 9, 10, 11, and 12, 2015) associated with inert ordnance delivery and four days (March 16, 17, 18, and 19, 2015) associated with live ordnance delivery.

During the February 2015 missions, Egin AFB released two inert CBU-105s in air which resulted in no acoustic impacts to marine mammals. The CBU-105 is a cluster bomb unit that detonates in air (airburst), contains 10 submunition cylinders with each cylinder containing four sub-munitions (skeets) which fire inert projectiles.

During the March 2015 live fire missions, Egin AFB expended four AGM-65 Mavericks and six AGM-114 Hellfire missiles against remotely-controlled boats approximately 27 km (17 mi) offshore Santa Rosa Island, FL. Net explosive weights of the munitions that detonated at the water surface or up to 3 m (10 ft) below the surface are 86 lbs for the AGM-65 Maverick missiles and 13 pounds for the AGM-114 Hellfire missiles. Egin AFB conducted the required monitoring for marine mammals or indicators of marine mammals (*e.g.*, flocks of birds, baitfish schools, or large fish schools) before, during, and after each mission and

observed only two species of marine mammals: the common bottlenose dolphin and Atlantic spotted dolphin. Total protected species observed during pre-mission surveys ranged between 149 and 156 individuals and Egin AFB confirmed that marine mammals were outside of the ZOI (5 km [3.1 mi]) at the conclusion of each pre-mission survey.

For one mission day (March 17, 2015), Egin AFB personnel extended the duration of the pre-mission surveys to continue to monitoring a pod of 10 bottlenose dolphins until the vessel captain could confirm that the pod remained outside the ZOI (5 km [3.1 mi]) and did not change travel direction. Egin AFB delayed weapons delivery as required by the Authorization. Egin AFB continued with their mission activities after all animals cleared the ZOI (5 km [3.1 mi]).

After each mission, Egin AFB re-entered the ZOI (5 km [3.1 mi]) to begin post-mission surveys for marine mammals and debris-clean-up operations. Egin AFB personnel did not observe reactions indicative of disturbance during the pre-mission surveys and did not observe any marine mammals during the post-mission surveys. In summary, Egin AFB reports that no observable instances of take of marine mammals occurred incidental to the Maritime WSEP training activities under the 2015 Authorization.

#### Estimated Numbers of Marine Mammals Taken by Harassment

The NDAA amended the definition of harassment as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

NMFS' analysis identified the physiological responses, and behavioral responses that could potentially result from exposure to underwater explosive detonations. In this section, we will relate the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B harassment. This section will also quantify the effects that might occur from the proposed military readiness activities in W-151.

At NMFS' recommendation, Egin AFB updated the thresholds used for onset of temporary threshold shift (TTS; Level B Harassment) and onset of permanent threshold shift (PTS; Level A Harassment) to be consistent with the thresholds outlined in the Navy's report titled, "Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis Technical Report," which the Navy coordinated with NMFS. NMFS believes that the thresholds outlined in the Navy's report represent the best available science. The report is available on the Internet at: [http://aftteis.com/Portals/4/aftteis/Supporting%20Technical%20Documents/Criteria\\_and\\_Thresholds\\_for\\_US\\_Navy\\_Acoustic\\_and\\_Explosive\\_Effects\\_Analysis-Apr\\_2012.pdf](http://aftteis.com/Portals/4/aftteis/Supporting%20Technical%20Documents/Criteria_and_Thresholds_for_US_Navy_Acoustic_and_Explosive_Effects_Analysis-Apr_2012.pdf).

#### Level B Harassment

Of the potential effects described earlier in this document, the following are the types of effects that fall into the Level B harassment category:

Behavioral Harassment—Behavioral disturbance that rises to the level described in the above definition, when resulting from exposures to non-impulsive or impulsive sound, is Level B harassment. Some of the lower level physiological stress responses discussed earlier would also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When predicting Level B harassment based on estimated behavioral responses, those takes may have a stress-related physiological component.

Temporary Threshold Shift (TTS)—As discussed previously, TTS can affect how an animal behaves in response to the environment, including conspecifics, predators, and prey. NMFS classifies TTS (when resulting from exposure to explosives and other impulsive sources) as Level B harassment, not Level A harassment (injury).

#### Level A Harassment

Of the potential effects that were described earlier, the following are the types of effects that fall into the Level A Harassment category:

Permanent Threshold Shift (PTS)—PTS (resulting either from exposure to explosive detonations) is irreversible and NMFS considers this to be an injury.

Table 5 in this document outlines the acoustic thresholds used by NMFS for this Authorization when addressing noise impacts from explosives.

TABLE 5—IMPULSIVE SOUND EXPLOSIVE THRESHOLDS USED BY EGLIN AFB IN ITS CURRENT ACOUSTICS IMPACTS MODELING

Group	Behavior		Slight injury			Mortality
	Behavioral	TTS	PTS	Gastro-Intestinal Tract	Lung	
Mid-frequency Cetaceans.	167 dB SEL	172 dB SEL or 23 psi.	187 dB SEL or 45.86 psi.	104 psi .....	39.1 M <sup>1/3</sup> (1+[D <sub>Rm</sub> /10.081]) <sup>1/2</sup> Pa-sec Where: M = mass of the animals in kg D <sub>Rm</sub> = depth of the receiver (animal) in meters.	91.4 M <sup>1/3</sup> (1+D <sub>Rm</sub> /10.081) <sup>1/2</sup> Pa-sec Where: M = mass of the animals in kg D <sub>Rm</sub> = depth of the receiver (animal) in meters

Eglin AFB modeled that all explosives would detonate at a 1.2 m (3.9 ft) water depth despite the training goal of hitting the target, resulting in an above water or on land explosion. For sources

detonated at shallow depths, it is frequently the case that the explosion may breach the surface with some of the acoustic energy escaping the water column. Table 6 provides the estimated

maximum range or radius, from the detonation point to the various thresholds described in Table 5.

TABLE 6—DISTANCES (m) TO HARASSMENT THRESHOLDS FROM EGLIN AFB'S EXPLOSIVE ORDNANCE

Munition	NEW (lbs)	Total #	Detonation scenario	Mortality	Level A harassment				Level B harassment		
				Modified Goertner Model 1	Slight Lung Injury	GI Track Injury	PTS		TTS		Behavioral
					Modified Goertner Model 2	237 dB SPL	187 dB SEL	230 dB peak SPL	172 dB SEL	224 dB peak SPL	167 dB SEL
<b>Bottlenose Dolphin</b>											
GBU-10 or GBU-24 ...	945	2	Surface .....	199	350	340	965	698	1,582	1,280	2,549
GBU-12 or GBU-54 ...	192	6	Surface .....	111	233	198	726	409	2,027	752	2,023
AGM-65 (Maverick) ...	86	6	Surface .....	82	177	150	610	312	1,414	575	1,874
GBU-39 (LSDB) .....	37	4	Surface .....	59	128	112	479	234	1,212	433	1,543
AGM-114 (Hellfire) .....	20	15	(10 ft depth) .....	110	229	95	378	193	2,070	354	3,096
AGM-175 (Griffin) .....	13	10	Surface .....	38	83	79	307	165	1,020	305	1,343
2.75 Rockets .....	12	100	Surface .....	36	81	77	281	161	1,010	296	1,339
PGU-13 HEI 30 mm ...	0.1	1,000	Surface .....	0	7	16	24	33	247	60	492
<b>Atlantic Spotted Dolphin and Unidentified Dolphin <sup>1</sup></b>											
GBU-10 or GBU-24 ...	945	2	Surface .....	237	400	340	965	698	1,582	1,280	2,549
GBU-12 or GBU-54 ...	192	6	Surface .....	138	274	198	726	409	2,027	752	2,023
AGM-65 (Maverick) ...	86	6	Surface .....	101	216	150	610	312	1,414	575	1,874
GBU-39 (LSDB) .....	37	4	Surface .....	73	158	112	479	234	1,212	433	1,543
AGM-114 (Hellfire) .....	20	15	(10 ft depth) .....	135	277	95	378	193	2,070	354	3,096
AGM-175 (Griffin) .....	13	10	Surface .....	47	104	79	307	165	1,020	305	1,343
2.75 Rockets .....	12	100	Surface .....	45	100	77	281	161	1,010	296	1,339
PGU-13 HEI 30 mm ...	0.1	1,000	Surface .....	0	9	16	24	33	247	60	492

AGM = air-to-ground missile; cal = caliber; CBU = Cluster Bomb Unit; ft = feet; GBU = Guided Bomb Unit; HEI = high explosive incendiary; lbs = pounds; mm = millimeters; N/A = not applicable; NEW = net explosive weight; PGU = Projectile Gun Unit; SDB = small diameter bomb; PTS = permanent threshold shift; TTS = temporary threshold shift; WCMD = wind corrected munition dispenser.

<sup>1</sup> Unidentified dolphin can be either bottlenose or Atlantic spotted dolphin. Eglin AFB based the mortality and slight lung injury criteria on the mass of a newborn Atlantic spotted dolphin.

Eglin AFB uses the distance information shown in Table 6 to calculate the radius of impact for a given threshold from a single detonation of each munition/detonation scenario, then combine the calculated impact radii with density estimates (adjusted for depth distribution) and the number of live munitions to provide an estimate of the number of marine mammals potentially exposed to the various impact thresholds. The ranges presented in Table 6 represent a radius of impact for a given threshold from a single detonation of each munition/detonation scenario. They do not consider

accumulated energies from multiple detonation occurring within the same 24-hour time period.

*Density Estimation*

Density estimates for bottlenose dolphin and spotted dolphin were derived from two sources (see Table 7). NMFS provided detailed information on Eglin AFB's derivation of density estimates for the common bottlenose and Atlantic spotted dolphins in a previous **Federal Register** notice for a proposed Authorization to Eglin AFB for the same activities (79 FR 72631, December 8, 2014). The information

presented in that notice has not changed and NMFS refers the reader to Section 3 of Eglin AFB's application for detailed information on all equations used to calculate densities presented in Table 7.

TABLE 7—MARINE MAMMAL DENSITY ESTIMATES WITHIN EGLIN AFB'S EGTR

Species	Density (animals/km <sup>2</sup> )
Bottlenose dolphin <sup>1</sup> .....	1.194
Atlantic spotted dolphin <sup>2</sup> .....	0.265

TABLE 7—MARINE MAMMAL DENSITY ESTIMATES WITHIN EGLIN AFB'S EGTR—Continued

Species	Density (animals/km <sup>2</sup> )
Unidentified bottlenose dolphin/Atlantic spotted dolphin <sup>2</sup> .....	0.009

<sup>1</sup> Source: Garrison, 2008; adjusted for observer and availability bias by the author.

<sup>2</sup>Source: Fulling *et al.*, 2003; adjusted for negative bias based on information provided by Barlow (2003; 2006).

*Take Estimation*

NMFS recalculated the takes proposed in previous notice for the proposed Authorization (80 FR 7984, December 23, 2015) based upon the Commission's recommendations to eliminate the double counting of the estimated take for each species and appropriately rounding take estimates before summing the total take. Table 8

indicates the modeled potential for lethality, injury, and non-injurious harassment (including behavioral harassment) to marine mammals in the absence of mitigation measures. Eglin AFB and NMFS estimate that approximately 14 marine mammals could be exposed to injurious Level A harassment noise levels (187 dB SEL) and approximately 671 animals could be exposed to Level B harassment (TTS and Behavioral) noise levels in the absence of mitigation measures.

TABLE 8—MODELED NUMBER OF MARINE MAMMALS POTENTIALLY AFFECTED BY MARITIME WSEP OPERATIONS

Species	Mortality	Level A Harassment (PTS only)	Level B Harassment (TTS)	Level B Harassment (Behavioral)
Bottlenose dolphin .....	0	14	255	353
Atlantic spotted dolphin .....	0	0	23	40
Unidentified bottlenose dolphin/Atlantic spotted dolphin .....	0	0	0	0
Total .....	0	14	278	393

Based on the mortality exposure estimates calculated by the acoustic model, zero marine mammals are expected to be affected by pressure levels associated with mortality or serious injury. Zero marine mammals are expected to be exposed to pressure levels associated with slight lung injury or gastrointestinal tract injury.

NMFS generally considers PTS to fall under the injury category (Level A Harassment). An animal would need to stay very close to the sound source for an extended amount of time to incur a serious degree of PTS, which could increase the probability of mortality. In this case, it would be highly unlikely for this scenario to unfold given the nature of any anticipated acoustic exposures that could potentially result from a mobile marine mammal that NMFS generally expects to exhibit avoidance behavior to loud sounds within the EGTR.

NMFS has relied on the best available scientific information to support the issuance of Eglin AFB's authorization. In the case of authorizing Level A harassment, NMFS has estimated that no more than 14 bottlenose dolphins and no Atlantic spotted dolphins could, although unlikely, experience minor permanent threshold shifts of hearing sensitivity (PTS). The available data and analyses, as described more fully in a previous notice for a proposed Authorization (80 FR 7984, December 23, 2015) and this notice include extrapolation results of many studies on marine mammal noise-induced temporary threshold shifts of hearing sensitivities. An extensive review of

TTS studies and experiments prompted NMFS to conclude that possibility of minor PTS in the form of slight upward shift of hearing threshold at certain frequency bands by a few individuals of marine mammals is extremely low, but not unlikely.

**Negligible Impact Analysis and Determinations**

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." 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 Level B harassment 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 behavioral harassment, we consider other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, and effects on habitat.

To avoid repetition, the discussion below applies to all the species listed in Table 8 for which we propose to authorize incidental take for Eglin AFB's activities.

In making a negligible impact determination, we consider:

- The number of anticipated injuries, serious injuries, or mortalities;
- The number, nature, and intensity, and duration of Level B harassment;
- The context in which the takes occur (*e.g.*, impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);
- The status of stock or species of marine mammals (*i.e.*, depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);
- Impacts on habitat affecting rates of recruitment/survival; and
- The effectiveness of monitoring and mitigation measures to reduce the number or severity of incidental take.

For reasons stated previously in this document and based on the following factors, Eglin AFB's specified activities are not likely to cause long-term behavioral disturbance, serious injury, or death.

The takes from Level B harassment would be due to potential behavioral disturbance and TTS. The takes from Level A harassment would be due to some form of PTS. Activities would only occur over a timeframe of two to three weeks in beginning in February 2016, with one or two missions occurring per day. It is possible that some individuals may be taken more than once if those individuals are located in the exercise area on two different days when exercises are occurring.

Noise-induced threshold shifts (TS, which includes PTS) are defined as increases in the threshold of audibility (*i.e.*, the sound has to be louder to be detected) of the ear at a certain frequency or range of frequencies (ANSI 1995; Yost 2000). Several important factors relate to the magnitude of TS, such as level, duration, spectral content (frequency range), and temporal pattern (continuous, intermittent) of exposure (Yost 2000; Henderson *et al.* 2008). TS occurs in terms of frequency range (Hz or kHz), hearing threshold level (dB), or both frequency and hearing threshold level (CDC, 2004).

In addition, there are different degrees of PTS: ranging from slight/mild to moderate and from severe to profound (Clark, 1981). Profound PTS or the complete loss of the ability to hear in one or both ears is commonly referred to as deafness (CDC, 2004; WHO, 2006). High-frequency PTS, presumably as a normal process of aging that occurs in humans and other terrestrial mammals, has also been demonstrated in captive cetaceans (Ridgway and Carder, 1997; Yuen *et al.* 2005; Finneran *et al.*, 2005; Houser and Finneran, 2006; Finneran *et al.* 2007; Schlundt *et al.*, 2011) and in stranded individuals (Mann *et al.*, 2010).

In terms of what is analyzed for the potential PTS (Level A harassment) in marine mammals as a result of Eglin AFB's Maritime WSEP operations, if it occurs, NMFS has determined that the levels would be slight/mild because research shows that most cetaceans show relatively high levels of avoidance. Further, it is uncommon to sight marine mammals within the target area, especially for prolonged durations. Results from monitoring programs associated other Eglin AFB activities and for Eglin AFB's 2015 Maritime WSEP activities have shown the absence of marine mammals within the EGTTR during and after maritime operations. Avoidance varies among individuals and depends on their activities or reasons for being in the area.

NMFS' predicted estimates for Level A harassment take are likely overestimates of the likely injury that will occur. NMFS expects that successful implementation of the required vessel-based and video-based mitigation measures would avoid Level A take in some instances. Also, NMFS expects that some individuals would avoid the source at levels expected to result in injury. Nonetheless, although NMFS expects that Level A harassment is unlikely to occur at the numbers proposed to be authorized, because it is difficult to quantify the degree to which the mitigation and avoidance will

reduce the number of animals that might incur PTS, we are proposing to authorize (and analyze) the modeled number of Level A takes (14), which does not take the mitigation or avoidance into consideration. However, we anticipate that any PTS incurred because of mitigation and the likely short duration of exposures, would be in the form of only a small degree of permanent threshold shift and not total deafness.

While animals may be impacted in the immediate vicinity of the activity, because of the short duration of the actual individual explosions themselves (versus continual sound source operation) combined with the short duration of the Maritime WSEP operations, NMFS has determined that there will not be a substantial impact on marine mammals or on the normal functioning of the nearshore or offshore Gulf of Mexico ecosystems. We do not expect that the proposed activity would impact rates of recruitment or survival of marine mammals since we do not expect mortality (which would remove individuals from the population) or serious injury to occur. In addition, the proposed activity would not occur in areas (and/or times) of significance for the marine mammal populations potentially affected by the exercises (*e.g.*, feeding or resting areas, reproductive areas), and the activities would only occur in a small part of their overall range, so the impact of any potential temporary displacement would be negligible and animals would be expected to return to the area after the cessations of activities. Although the proposed activity could result in Level A (PTS only, not slight lung injury or gastrointestinal tract injury) and Level B (behavioral disturbance and TTS) harassment of marine mammals, the level of harassment is not anticipated to impact rates of recruitment or survival of marine mammals because the number of exposed animals is expected to be low due to the short-term (*i.e.*, four hours a day or less) and site-specific nature of the activity. We do not anticipate that the effects would be detrimental to rates of recruitment and survival because we do not expect serious of extended behavioral responses that would result in energetic effects at the level to impact fitness.

Moreover, the mitigation and monitoring measures proposed for the Authorization (described earlier in this document) are expected to further minimize the potential for harassment. The protected species surveys would require Eglin AFB to search the area for marine mammals, and if any are found in the live fire area, then the exercise

would be suspended until the animal(s) has left the area or relocated. Moreover, marine species observers located in the Eglin control tower would monitor the high-definition video feed from cameras located on the instrument barge anchored on-site for the presence of protected species. Furthermore, Maritime WSEP missions would be delayed or rescheduled if the sea state is greater than a 4 on the Beaufort Scale at the time of the test. In addition, Maritime WSEP missions would occur no earlier than two hours after sunrise and no later than two hours prior to sunset to ensure adequate daylight for pre- and post-mission monitoring.

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 mitigation and monitoring measures, NMFS finds that Eglin AFB's Maritime WSEP operations will result in the incidental take of marine mammals, by Level A and Level B harassment only, and that the taking from the Maritime WSEP exercises will have a negligible impact on the affected species or stocks.

#### **Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

#### **Endangered Species Act (ESA)**

Due to the location of the activity, no ESA-listed marine mammal species are likely to be affected; therefore, NMFS has determined that this proposed Authorization would have no effect on ESA-listed species. Therefore, NMFS has determined that a section 7 consultation under the ESA is not required for the issuance of an MMPA Authorization to Eglin AFB.

#### **National Environmental Policy Act (NEPA)**

In 2015, Eglin AFB provided NMFS with an EA titled, Maritime Weapon Systems Evaluation Program (WSEP) Operational Testing in the Eglin Gulf Testing and Training Range (EGTTR), Florida. The EA analyzed the direct, indirect, and cumulative environmental impacts of the specified activities on marine mammals. NMFS, after review and evaluation of the Eglin AFB EA for consistency with the regulations published by the Council of

Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing the National Environmental Policy Act, adopted the EA. After considering the EA, the information in the 2014 IHA application, and the **Federal Register** notice, as well as public comments, NMFS has determined that the issuance of the 2015 Authorization was not likely to result in significant impacts on the human environment; adopted Eglin AFB's EA under 40 CFR 1506.3; and issued a FONSI statement on issuance of an Authorization under section 101(a)(5) of the MMPA.

In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS will again review the information contained in Eglin AFB's EA and determine whether the EA accurately and completely describes the preferred action alternative and the potential impacts on marine mammals. Based on this review and analysis, NMFS has reaffirmed the 2015 FONSI statement on issuance of an annual authorization under section 101(a)(5) of the MMPA or supplement the EA if necessary.

#### Authorization

As a result of these determinations, NMFS has issued an Incidental Harassment Authorization to Eglin AFB for conducting Maritime WSEP activities, for a period of one year from the date of issuance, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: February 8, 2016.

**Perry F. Gayaldo,**

*Deputy Director, Office of Protected Resources, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648–XE282

#### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys Along the Oregon and California Coasts

**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 we have issued an incidental harassment authorization (IHA) to the Partnership for Interdisciplinary Study of Coastal Oceans (PISCO) at the University of California (UC) Santa Cruz for an Incidental Harassment Authorization (IHA) to take three species of marine mammals, by harassment, incidental to rocky intertidal monitoring surveys.

**DATES:** This authorization is effective from February 3, 2016, through February 2, 2017.

**FOR FURTHER INFORMATION CONTACT:** Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

#### SUPPLEMENTARY INFORMATION:

##### Availability

An electronic copy of PISCO's application and supporting documents, as well as a list of the references cited in this document, may be obtained by visiting the Internet at: [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm). In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

##### 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.

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.”

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. 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].”

#### Summary of Request

On August 10, 2015 NMFS received an application from PISCO for the taking of marine mammals incidental to rocky intertidal monitoring surveys along the Oregon and California coasts. NMFS determined that the application was adequate and complete on October 9, 2015. In December 2012, NMFS issued a 1-year IHA to PISCO to take marine mammals incidental to these same proposed activities (77 FR 72327, December 5, 2012). In December 2013, NMFS issued a second 1-year IHA to PISCO to take marine mammals incidental to these same proposed activities (78 FR 79403, December 30, 2013). The 2013 IHA expired on December 16, 2014. A third IHA was issued to PISCO with an effective date of December 17, 2014 (79 FR 73048, December 9, 2014) to take animals for these identical activities and expires on December 16, 2015. The IHA announced in this notice is valid from February 3, 2016 through February 2, 2017.

The research group at UC Santa Cruz operates in collaboration with two large-scale marine research programs: PISCO and the Multi-agency Rocky Intertidal Network (MARINE). The research group at UC Santa Cruz (PISCO) is responsible for many of the ongoing rocky intertidal monitoring programs along the Pacific coast. Monitoring occurs at rocky intertidal sites, often large bedrock benches, from the high intertidal to the water's edge. Long-term monitoring

projects include Community Structure Monitoring, Intertidal Biodiversity Surveys, Marine Protected Area Baseline Monitoring, Intertidal Recruitment Monitoring, and Ocean Acidification. Research is conducted throughout the year along the California and Oregon coasts and will continue indefinitely. Most sites are sampled one to two times per year over a 4–6 hour period during a negative low tide series. The following specific aspects of the proposed activities are likely to result in the take of marine mammals: Presence of survey personnel near pinniped haulout sites and unintentional approach of survey personnel towards hauled out pinnipeds. Take, by Level B harassment only, of individuals of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina richardii*) and northern elephant seals (*Mirounga angustirostris*) is anticipated to result from the specified activity.

### Description of the Specified Activity

#### Overview

PISCO requested an IHA for work to continue a rocky intertidal monitoring project that has been ongoing for 20 years. Research activities would include the presence of survey personnel near pinniped haulout sites as well as the unintentional approach of survey personnel towards hauled out pinnipeds. PISCO focuses on understanding the nearshore ecosystems of the U.S. west coast through a number of interdisciplinary collaborations. The program integrates long-term monitoring of ecological and oceanographic processes at dozens of sites with experimental work in the lab and field.

#### Dates and Duration

PISCO's research is conducted throughout the year but will begin no sooner than February 3, 2016 and end on February 2, 2017. Most sites are sampled one to two times per year over a 1-day period (4–6 hours per site) during a negative low tide series. Due to the large number of research sites, scheduling constraints, and the necessity for negative low tides and favorable weather/ocean conditions, exact survey dates are variable and difficult to predict. Some sampling is anticipated to occur in all months.

#### Specific Geographic Region

Sampling sites occur along the California and Oregon coasts. Community Structure Monitoring sites range from Ecola State Park near Cannon Beach, Oregon to Government Point located northwest of Santa

Barbara, California. Biodiversity Survey sites extend from Ecola State Park south to Cabrillo National Monument in San Diego County, California. Exact locations of sampling sites can be found in Tables 1 and 2 of PISCO's application (see **ADDRESSES**).

#### Detailed Description of Activities

We provided a description of the proposed action in our **Federal Register** notice announcing the proposed authorization (80 FR 76448; December 9, 2015). Please refer to that document; we provide only summary information here.

Researchers will utilize a Community Structure Monitoring approach which is based largely on surveys that quantify the percent cover and distribution of algae and invertebrates that constitute these communities. This approach allows researchers to quantify both the patterns of abundance of targeted species, as well as characterize changes in the communities in which they reside. Such information provides managers with insight into the causes and consequences of changes in species abundance. There are 47 Community Structure sites, each of which is surveyed over a 1-day period during a low tide series one to two times per year.

Biodiversity surveys are also part of a long-term monitoring project and are conducted every 3–5 years across 140 established sites. These surveys involve point contact identification along permanent transects, mobile invertebrate quadrat counts, sea star band counts, and tidal height topographic measurements. Additionally, California has established a network of Marine Protected Areas along the California coast which will require sampling at both new and established sites within and outside of marine protected areas. These sites were sampled using existing Community Structure and Biodiversity protocols for consistency. Resampling of these sites may take place as part of future marine protected area evaluation.

The intertidal zones where PISCO conducts intertidal monitoring are also areas where pinnipeds can be found hauled out on the shore at or adjacent to some research sites. Accessing portions of the intertidal habitat may cause incidental Level B (behavioral) harassment of pinnipeds through some unavoidable approaches if pinnipeds are hauled out directly in the study plots or while biologists walk from one location to another. No motorized equipment is involved in conducting these surveys.

### Comments and Responses

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on December 9, 2015 (80 FR 76448). During the 30-day public comment period, the Marine Mammal Commission (Commission) submitted a letter on December 15, 2015. The letter is available on the Internet at [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm). The Commission had no formal comments and concurred with NMFS's preliminary finding that recommended that NMFS issue an IHA to PISCO, subject to the inclusion of the mitigation, monitoring, and reporting measures.

### Description of Marine Mammals in the Area of the Specified Activity

There are three marine mammal species known to occur in the vicinity of the project areas which may be subjected to Level B harassment. These are the California sea lion, harbor seal and northern elephant seal. Steller sea lions are also observed rarely but take for this animal is not requested.

We have reviewed PISCO's detailed species descriptions, including life history information, for accuracy and completeness and refer the reader to POA's application as well as the proposed incidental harassment authorization published in the **Federal Register** (80 FR 76448) instead of reprinting the information here. We have also provided information for the potentially affected stocks, including details of stock-wide status, trends, and threats, in our **Federal Register**. Please refer to NMFS' Web site ([www.nmfs.noaa.gov/pr/species/mammals](http://www.nmfs.noaa.gov/pr/species/mammals)) for generalized species accounts which provide information regarding the biology and behavior of the marine resources that occur in the vicinity of the project area.

#### Potential Effects of the Specified Activity on Marine Mammals

The **Federal Register** notice of proposed authorization (80 FR 76448) provides a general background on sound relevant to the specified activity as well as a detailed description of marine mammal hearing and of the potential effects of these construction activities on marine mammals, and is not repeated here.

#### Anticipated Effects on Habitat

We described potential impacts to marine mammal habitat in detail in our **Federal Register** notice of proposed authorization. In summary, the project activities would not modify existing marine mammal habitat. Because of the

short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences for individual marine mammals or their populations

### 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 such activity, “and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking” for certain subsistence uses.

PISCO shall implement several mitigation measures to reduce potential take by Level B (behavioral disturbance) harassment. Measures include: (1) Conducting slow movements and staying close to the ground to prevent or minimize stampeding; (2) avoiding loud noises (*i.e.*, using hushed voices); (3) avoiding pinnipeds along access ways to sites by locating and taking a different access way and vacating the area as soon as sampling of the site is completed; (4) monitoring the offshore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters; (5) using binoculars to detect pinnipeds before close approach to avoid being seen by animals; and (6) only approaching pinnipeds when are located in the sampling plots if there are no other means to accomplish the survey.

The methodologies and actions noted in this section shall be utilized and included as mitigation measures in the IHA to ensure that impacts to marine mammals are mitigated to the lowest level practicable. The primary method of mitigating the risk of disturbance to pinnipeds, which will be in use at all times, is the selection of judicious routes of approach to study sites, avoiding close contact with pinnipeds hauled out on shore, and the use of extreme caution upon approach. In no case will marine mammals be deliberately approached by survey personnel, unless they are located in sampling plots and there is no other method available and in all cases every possible measure will be taken to select a pathway of approach to study sites that minimizes the number of marine mammals potentially harassed. In general, researchers will stay inshore of pinnipeds whenever possible to allow maximum escape to the ocean. Each visit to a given study site will last for

approximately 4–6 hours, after which the site is vacated and can be re-occupied by any marine mammals that may have been disturbed by the presence of researchers. By arriving before low tide, worker presence will tend to encourage pinnipeds to move to other areas for the day before they haul out and settle onto rocks at low tide.

### Mitigation Conclusions

We have carefully evaluated PISCO’s mitigation measures and considered their effectiveness in past implementation to determine whether they are likely to effect the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals, (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation.

Any mitigation measure(s) we prescribe should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

(2) A reduction in the number (total number or number at biologically important time or location) of individual marine mammals exposed to stimuli expected to result in incidental take (this goal may contribute to 1 above).

(3) A reduction in the number (total number or number at biologically important time or location) of times any individual marine mammal would be exposed to stimuli expected to result in incidental take (this goal may contribute to 1 above).

(4) A reduction in the intensity of exposure to stimuli expected to result in incidental take (this goal may contribute to 1 above).

(5) Avoidance or minimization of adverse effects to marine mammal habitat, paying particular attention to the prey base, blockage or limitation of passage to or from biologically important areas, permanent destruction of habitat, or temporary disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation, an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of PISCO’s proposed measures, including information from monitoring of implementation of mitigation measures very similar to those described here under previous IHAs from other research projects, we have determined that the mitigation measures provide the means of effecting the least practicable impact on marine mammal 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 incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

PISCO can add to the knowledge of pinnipeds in California and Oregon by noting observations of: (1) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Monitoring requirements in relation to PISCO’s rocky intertidal monitoring will include observations made by project field biologists who will function as marine mammal observers (MMOs). Minimum qualifications for MMOs include an undergraduate degree in biology. Information recorded will include species counts (with numbers of pups/juveniles when possible) of animals present before approaching, numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event. Disturbances will be recorded according to a three-point scale of intensity including: (1) Head orientation in response to disturbance,

which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, or changing from a lying to a sitting position and/or slight movement of less than 1 m; “alert”; (2) Movements in response to or away from disturbance, over short distances (typically two times its body length) and including dramatic changes in direction or speed of locomotion for animals already in motion; “movement”; and (3) All flushes to the water as well as lengthier retreats (>3 m); “flight”. However, only observations fitting the descriptions of # 2 and # 3 on the three-point scale need to be recorded as authorized takes. Observations regarding the number and species of any marine mammals observed, either in the water or hauled out, at or adjacent to the site, will be recorded as part of field observations during research activities. Observations of unusual behaviors, numbers, or distributions of pinnipeds will be reported to NMFS so that any potential follow-up observations can be conducted by the appropriate personnel. In addition, observations of tag-bearing pinniped carcasses as well as any rare or unusual species of marine mammals will be reported to NMFS. Information regarding physical and biological conditions pertaining to a site, as well as the date and time that research was conducted will also be noted.

If at any time injury, serious injury, or mortality of the species for which take is authorized should occur, or if take of any kind of any other marine mammal occurs, and such action may be a result of the research, PISCO will suspend research activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

#### *Summary of Previous Monitoring*

PISCO complied with the mitigation and monitoring required under the previous authorization (2014–2015). However, in compliance with that Authorization, PISCO submitted a report on activities covering the period of December 17, 2014 through September 30, 2015. PISCO was authorized to take 60 California sea lions, 183 Pacific harbor seals and 30 Northern elephant seals and actual recorded takes were documented at 19, 37 and 4 respectively.

#### *Reporting*

PISCO must submit a draft final report to NMFS Office of Protected Resources within 60 days after the conclusion of the 2016–2017 field season or 60 days

prior to the start of the next field season if a new IHA will be requested. The report will include a summary of the information gathered pursuant to the monitoring requirements set forth in the IHA. A final report must be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS West Coast Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

#### **Estimated Take by Incidental Harassment**

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].

All anticipated takes would be by Level B harassment, involving temporary changes in behavior. The mitigation and monitoring measures are expected to minimize the possibility of injurious or lethal takes such that take by injury, serious injury, or mortality is considered remote. Animals hauled out close to the actual survey sites may be disturbed by the presence of biologists and may alter their behavior or attempt to move away from the researchers.

NMFS considers an animal to have been harassed if it moved greater than 2 times its body length in response to the researcher’s presence or if the animal was already moving and changed direction and/or speed, or if the animal flushed into the water. Animals that became alert without such movements were not considered harassed.

For the purpose of this IHA, only Oregon and California sites that are frequently sampled and have a marine mammal presence during sampling were included in generating take estimates. Sites where only Biodiversity Surveys are conducted did not provide enough data to confidently estimate takes since they are sampled infrequently (once every 3–5 years). A small number of harbor seal, northern elephant seal and California sea lion pup takes are anticipated as pups may be present at several sites during spring and summer sampling.

Take estimates are based on marine mammal observations from each site. Marine mammal observations are done as part of PISCO site observations, which include notes on physical and biological conditions at the site. The maximum number of marine mammals, by species, seen at any given time throughout the sampling day is recorded at the conclusion of sampling. A marine mammal is counted if it is seen on access ways to the site, at the site, or immediately up-coast or down-coast of the site. Marine mammals in the water immediately offshore are also recorded. Any other relevant information, including the location of a marine mammal relevant to the site, any unusual behavior, and the presence of pups is also noted.

These observations formed the basis from which researchers with extensive knowledge and experience at each site estimated the actual number of marine mammals that may be subject to take. In most cases the number of takes is based on the maximum number of marine mammals that have been observed at a site throughout the history of the site (1–3 observation per year for 5–10 years or more). Section 6 in PISCO’s application outlines the number of visits per year for each sampling site and the potential number of pinnipeds anticipated to be encountered at each site. Tables 3, 4, 5 in PISCO’s application outlines the number of potential takes per site (see **ADDRESSES**).

Harbor seals are expected to occur at 15 locations in numbers ranging from 30 per visit (25 adults and 5 pups) at the Pebble Beach site to 5 per visit (all adults) at the Shelter Cove, Kibesillah Hill, Sea Ranch and Franklin Point sites (Table 3 in Application). These numbers are based on past observations at each site as well as input from researchers with extensive knowledge of individual sites. NMFS took the number of takes estimated at each site, based on past observations as well as input from researchers with extensive site knowledge, and multiplied by the number of site visits scheduled during the authorization period. Nine sites were scheduled for one visit while six sites were projected to have 2 sites. A total of 190 adults and 13 pups were anticipated for take and, therefore, NMFS has permitted the take of 203 harbor seals.

Due to the potentially significant effect of El Niño on California sea lions NMFS will increase the number of California sea lion takes beyond what PISCO requested. Changes in sea surface temperature associated with El Niño can have significant impacts throughout the food web. Historically, El Niño years

have resulted in high numbers of marine mammal strandings, likely due to changes in prey availability and increased physiologic stress on the animals. NOAA fisheries west coast region office has reported elevated strandings at locations in central and southern California. For a five-month period from January to May 2015, strandings were over ten times higher than the average stranding level for the same 5 month period during 2004–2012. PISCO plans to conduct 8 visits under this authorization at 5 different sites during the one-year authorization period (see Table 2 in Application). PISCO had requested 90 takes for these 8 visits at five sites. However, given the increased numbers of California sea lions recorded earlier in 2015 during the current El Niño event, NMFS authorized 8 times that number for a total of 720 authorized takes. While all of the five sites may not experience numbers that are ten times greater than is typical, as was reported from January through May 2015, it is likely that observations will be significantly elevated. As such, NMFS has elected to increase the total number of takes originally anticipated by PISCO to 720 California sea lions.

Northern elephant seals are only expected to occur at one site this year, Piedras Blancs, which will experience two separate visits. Up to twenty takes are expected during each visit for a total of 40 authorized takes.

PISCO researchers report that they have very rarely observed Steller sea lions at any of their research sites and none have been seen the last several years. Given that the likelihood of taking Steller sea lions is extremely low, NMFS has not authorized take of Steller sea lions and PISCO has agreed to re-schedule surveys if when Steller sea lions are present to avoid take of this species.

NMFS has authorized the take, by Level B harassment only, of 720 California sea lions, 203 harbor seals and 40 northern elephant seals. These numbers are considered to be maximum take estimates; therefore, actual take may be less if animals decide to haul out at a different location for the day or animals are out foraging at the time of the survey activities.

### Analyses and Determinations

#### *Negligible Impact Analysis*

Negligible impact is “an impact resulting from the specified activity that cannot be reasonably expected to, and is

not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival” (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 Level B harassment 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 behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, feeding, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

No injuries or mortalities are anticipated to occur as a result of PISCO’s rocky intertidal monitoring, and none are authorized. The risk of marine mammal injury, serious injury, or mortality associated with rocky intertidal monitoring increases somewhat if disturbances occur during breeding season. These situations present increased potential for mothers and dependent pups to become separated and, if separated pairs do not quickly reunite, the risk of mortality to pups (through starvation) may increase. Separately, adult male elephant seals may trample elephant seal pups if disturbed, which could potentially result in the injury, serious injury, or mortality of the pups. The risk of either of these situations is greater in the event of a stampede.

Very few pups are anticipated to be encountered during the monitoring surveys. However, a small number of harbor seal, northern elephant seal and California sea lion pups have been observed at several of the monitoring sites during past years. Harbor seals are very precocious with only a short period of time in which separation of a mother from a pup could occur. Though elephant seal pups are occasionally present when researchers visit survey sites, risk of pup mortalities is very low because elephant seals are far less reactive to researcher presence than the other two species. Furthermore, pups are typically found on sand beaches, while study sites are located in the rocky intertidal zone, meaning that

there is typically a buffer between researchers and pups. Finally, the caution used by researchers in approaching sites generally precludes the possibility of behavior, such as stampeding, that could result in extended separation of mothers and dependent pups or trampling of pups. No research would occur where separation of mother and her nursing pup or crushing of pups can become a concern.

Typically, even those reactions constituting Level B harassment would result at most in temporary, short-term disturbance. In any given study season, researchers will visit sites one to two times per year for a total of 4–6 hours per visit. Therefore, disturbance of pinnipeds resulting from the presence of researchers lasts only for short periods of time and is separated by significant amounts of time in which no disturbance occurs.

Some of the pinniped species may use some of the sites during certain times of year to conduct pupping and/or breeding. However, some of these species prefer to use the offshore islands for these activities. At the sites where pups may be present, PISCO has shall implement certain mitigation measures, such as no intentional flushing if dependent pups are present, which will avoid mother/pup separation and trampling of pups.

Of the three marine mammal species most likely to occur in the activity areas, none are listed under the ESA. Taking into account the mitigation measures that are planned, effects to marine mammals are generally expected to be restricted to short-term changes in behavior or temporary abandonment of haulout sites. Pinnipeds are not expected to permanently abandon any area that is surveyed by researchers, as is evidenced by continued presence of pinnipeds at the sites during annual monitoring counts. 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 mitigation and monitoring measures, NMFS finds that the total marine mammal take from PISCO’s rocky intertidal monitoring program will not adversely affect annual rates of recruitment or survival and therefore will have a negligible impact on the affected species or stocks.

TABLE 1—POPULATION ABUNDANCE ESTIMATES, TOTAL LEVEL B TAKE, AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES DURING THE ROCKY INTERTIDAL MONITORING PROGRAM

Species	Abundance *	Total Level B take	Percentage of stock or population
Harbor seal .....	<sup>1</sup> 30,968, <sup>2</sup> 24,732	203	0.6–0.8
California sea lion .....	296,750	720	0.2
Northern elephant seal .....	179,000	40	<0.01

\* Abundance estimates are taken from the 2014 U.S. Pacific Marine Mammal Stock Assessments (Carretta *et al.*, 2014).

<sup>1</sup> California stock abundance estimate;

<sup>2</sup> Oregon/Washington stock abundance estimate from 1999—Most recent surveys.

### Small Numbers Analysis

Table 1 in this document presents the abundance of each species or stock, the authorized take estimates, the percentage of the affected populations or stocks that may be taken by harassment, and the species or stock trends. According to these estimates, PISCO would take less than 0.8% of each species or stock. Because these are maximum estimates, actual take numbers are likely to be lower, as some animals may select other haulout sites the day the researchers are present.

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 mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the action, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

### Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

### Endangered Species Act (ESA)

None of the marine mammals for which incidental take is authorized are listed as threatened or endangered under the ESA. Therefore, NMFS has determined that issuance of the IHA to PISCO under section 101(a)(5)(D) of the MMPA will have no effect on species listed as threatened or endangered under the ESA.

### National Environmental Policy Act (NEPA)

In 2012, NMFS prepared an EA analyzing the potential effects to the human environment from conducting

rocky intertidal surveys along the California and Oregon coasts and issued a Finding of No Significant Impact (FONSI) on November 26, 2012 on the issuance of an IHA for PISCO's rocky intertidal surveys in accordance with section 6.01 of the NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999). We have reviewed the application for a renewed IHA for ongoing monitoring activities for 2016–17 as well as results from the 2014–15 monitoring report. Based on that review, we have determined that the action is very similar to that considered in the previous IHA. In addition, no significant new circumstances or information relevant to environmental concerns have been identified. Thus, we have determined that the preparation of a new or supplemental NEPA document is not necessary, and will, after review of public comments determine whether or not to reaffirm our 2012 FONSI. The 2012 NEPA documents are available for review at [www.nmfs.noaa.gov/pr/permits/incidental/research.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm).

### Authorization

As a result of these determinations, we have issued an IHA to PISCO for conducting the described activities related to rocky intertidal monitoring surveys along the Oregon and Washington coasts from February 3, 2016 and end on February 2, 2017 provided the previously described mitigation, monitoring, and reporting requirements are incorporated.

Dated: February 3, 2016.

### Perry Gayaldo,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–02802 Filed 2–10–16; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648–XE434

### 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 Shrimp Optimum Yield (OY) and Maximum Sustainable Yield (MSY) Working Group.

**DATES:** The meeting will convene on Wednesday, March 2, 2016, from 9 a.m. to 5 p.m.

**ADDRESSES:** The meeting will take place at the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

**FOR FURTHER INFORMATION CONTACT:** Dr. Morgan Kilgour, Fishery Biologist, Gulf of Mexico Fishery Management Council; [morgan.kilgour@gulfcouncil.org](mailto:morgan.kilgour@gulfcouncil.org), telephone: (813) 348–1630.

### SUPPLEMENTARY INFORMATION:

#### Agenda

The Working Group will discuss appropriate methodology and data needs for evaluating aggregate Maximum Sustainable Yield (MSY) and Optimum Yield (OY) for all shrimp species; and identify next steps, timeline, and assign responsibilities.

—Meeting Adjourns—

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is <https://public.gulfcouncil.org:5001/webman/index.cgi>, or go to the Council's Web site and click on the FTP link in the lower left of the Council Web site

(<http://www.gulfcouncil.org>). The username and password are both “gulf guest.” Click on the “Library Folder,” then scroll down to “Shrimp MSY OY Working Group.”

The meeting will be webcast over the internet. A link to the webcast will be available on the Council’s Web site, <http://www.gulfcouncil.org>.

Although other non-emergency issues not on the agenda may come before the Shrimp Working 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 of the Shrimp Working Group 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.

#### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: February 8, 2016.

**Tracey L. Thompson,**

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

[FR Doc. 2016-02783 Filed 2-10-16; 8:45 am]

**BILLING CODE 3510-22-P**

## COMMISSION OF FINE ARTS

### Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 18 February 2016, at 9:00 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street NW., Washington, DC 20001-2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: [www.cfa.gov](http://www.cfa.gov). Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing [cfastaff@cfa.gov](mailto:cfastaff@cfa.gov); or by calling 202-504-2200. Individuals requiring sign language interpretation for the hearing impaired should contact

the Secretary at least 10 days before the meeting date.

Dated: February 3, 2016 in Washington, DC.

**Thomas Luebke,**  
*Secretary.*

[FR Doc. 2016-02541 Filed 2-10-16; 8:45 am]

**BILLING CODE 6330-01-M**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID: DOD-2016-OS-0010]

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Secretary of Defense, DoD.

**ACTION:** Notice to alter a System of Records.

**SUMMARY:** The Office of the Secretary of Defense proposes to alter a system of records notice DPFPA 02, entitled “Pentagon Reservation Vehicle Parking Program” to manage the Pentagon Facilities Parking Program for DoD civilian, military, and contractor personnel applying for and in receipt of Pentagon parking permits. Records are also used to ensure DoD military personnel and civilians are not in receipt of both an issued parking pass and mass transit benefits.

**DATES:** Comments will be accepted on or before March 14, 2016. This proposed action will be effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>.

Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301-9010.

*Instructions:* All submissions received must include the agency name and docket number 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:** Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301-1155, or by phone at (571) 372-0461.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in the **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Division Web site at <http://dpcl.d.defense.gov/>.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, were submitted on February 4, 2016, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, “Federal Agency Responsibilities for Maintaining Records About Individuals,” dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: February 8, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

### DPFPA 02

#### SYSTEM NAME:

Pentagon Reservation Vehicle Parking Program (October 20, 2010, 75 FR 64713).

#### CHANGES:

#### SYSTEM ID:

Delete entry and replace with “DWHS D04”.

#### SYSTEM NAME:

Delete entry and replace with “Pentagon Facilities Parking Program.”

\* \* \* \* \*

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with “All DoD civilians, military, and contractors holding DoD parking permits, participating in DoD carpools, or are otherwise authorized to park at the Pentagon Reservation (to include the Pentagon, Mark Center, and Suffolk Building). This includes concessionaires and custodial workers who are authorized to park at Pentagon Facilities.”

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Delete entry and replace with “Full name, Social Security Numbers (SSN), work email address, rank/grade, work location, work telephone number, home zip code, organizational affiliation, vehicle license plate number, state, and parking permit number.”

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Delete entry and replace with “10 U.S.C. 2674, Operation and Control of Pentagon Reservation and Defense Facilities in National Capital Region; and Administrative Instruction 88, Pentagon Reservation Vehicle Parking Program, and E.O. 9397 (SSN), as amended.”

**PURPOSE(S):**

Delete entry and replace with “To manage the Pentagon Facilities Parking Program for DoD civilian, military, and contractor personnel applying for and in receipt of Pentagon parking permits. Records are also used to ensure DoD military personnel and civilians are not in receipt of both an issued parking pass and mass transit benefits.”

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Delete entry and replace with “In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

**LAW ENFORCEMENT ROUTINE USE:**

If a system of records maintained by a DoD Component to carry out its functions indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or by regulation, rule, or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the agency concerned, whether federal, state, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

**CONGRESSIONAL INQUIRIES DISCLOSURE ROUTINE USE:**

Disclosure from a system of records maintained by a DoD Component may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

**DISCLOSURE TO THE DEPARTMENT OF JUSTICE FOR LITIGATION ROUTINE USE:**

A record from a system of records maintained by a DoD Component may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department in pending or potential litigation to which the record is pertinent.

**DISCLOSURE OF INFORMATION TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION ROUTINE USE:**

A record from a system of records maintained by a DoD Component may be disclosed as a routine use to the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

**DATA BREACH REMEDIATION PURPOSES ROUTINE USE:**

A record from a system of records maintained by a Component may be disclosed to appropriate agencies, entities, and persons when (1) The Component suspects or has confirmed that the security or confidentiality of the information in the system of records has been compromised; (2) the Component has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Component or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Components efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices apply to this system. The complete list of DoD Blanket Routine Uses can be found Online at: <http://dpcl.d.defense.gov/Privacy/SORNs/Index/BlanketRoutineUses.aspx>.”

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

\* \* \* \* \*

**RETRIEVABILITY:**

Delete entry and replace with “Full name, SSN, parking permit number, and vehicle tag number.”

**SAFEGUARDS:**

Delete entry and replace with “Records are maintained in controlled areas accessible only to authorized DoD personnel, including system users, system administrators, and authorized contractors who have a need-to-know in the performance of official duties and who are properly screened and cleared. Physical entry is restricted by the use of locks, guards, identification badges, key cards and closed circuit TV. Paper records are stored in locked cabinets in secured offices. Access to personal information is further restricted by the use of Common Access Card and user ID/passwords, intrusion detection system, encryption, and firewalls. Administrative procedures include periodic security audits, regular monitoring of users’ security practices, methods to ensure only authorized personnel access to Personally Identifiable Information (PII) and encryption of back-up and recovery Standard Operating Procedures.”

**RETENTION AND DISPOSAL:**

Delete entry and replace with “Destroy credentials three months after return to issuing office.”

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with “Chief, Parking Management Branch, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.”

**NOTIFICATION PROCEDURE:**

Delete entry and replace with “Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Chief, Parking Management Branch, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

Signed, written requests for information should contain the full name, SSN, and current address.”

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with “Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Signed, written requests for information should contain the full name, SSN, current address and number of this system of records notice.”

\* \* \* \* \*

**DEPARTMENT OF DEFENSE****Office of the Secretary****[Docket ID: DOD–2016–OS–0009]****Privacy Act of 1974; System of Records****AGENCY:** Office of the Secretary of Defense, DoD.**ACTION:** Notice to alter a System of Records.

**SUMMARY:** The Office of the Secretary of Defense proposes to alter a system of records notice DA&M 01, entitled “Civil Liberties Program Case Management System” to receive, log and track the processing of allegations of civil liberties violations by the DoD, its civilian employees, members of the Military Services, DoD contractors, or others acting under the authority of the DoD and document the review, investigation, and redress provided. Records may also be used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

**DATES:** Comments will be accepted on or before March 14, 2016. This proposed action will be effective on the date following the end of the comment period unless comments are received which result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods:

\* *Federal Rulemaking Portal:* <http://www.regulations.gov>.

Follow the instructions for submitting comments.

\* *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301–9010.

*Instructions:* All submissions received must include the agency name and docket number 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:** Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571)372–0461.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in the **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Division Web site at <http://dpcl.d.defense.gov/>.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, were submitted on February 4, 2016, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, “Federal Agency Responsibilities for Maintaining Records About Individuals,” dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 8, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**DA&M 01****SYSTEM NAME:**

Civil Liberties Program Case Management System (October 3, 2013, 78 FR 61345)

**CHANGES:**

\* \* \* \* \*

**SYSTEM IDENTIFIER:**

Delete entry and replace with “DCMO 02.”

\* \* \* \* \*

**SYSTEM LOCATION:**

Delete entry and replace with “Defense Privacy and Civil Liberties Office, Office of the Deputy Chief Management Officer, Department of Defense, 9010 Defense Pentagon, Washington, DC 20301–9010. Records are maintained by offices within the Office of the Secretary of Defense (OSD) and Joint Staff (JS). For a complete list of these offices contact the system manager.”

\* \* \* \* \*

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Delete entry and replace with “In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Disclosure to the Office of Personnel Management Routine Use. A record from a system of records subject to the Privacy Act and maintained by a DoD Component may be disclosed to the Office of Personnel Management (OPM) concerning information on pay and leave, benefits, retirement deduction, and any other information necessary for the OPM to carry out its legally authorized government-wide personnel management functions and studies.

Disclosure to the Department of Justice for Litigation Routine Use. A record from a system of records maintained by a DoD Component may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department in pending or potential litigation to which the record is pertinent.

Disclosure of Information to the National Archives and Records Administration Routine Use. A record from a system of records maintained by a DoD Component may be disclosed as a routine use to the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

Data Breach Remediation Purposes Routine Use. A record from a system of records maintained by a Component may be disclosed to appropriate agencies, entities, and persons when (1) The Component suspects or has confirmed that the security or confidentiality of the information in the system of records has been compromised; (2) the Component has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Component or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Components efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices may apply to this system. The complete list of DoD Blanket Routine Uses can be found Online at: <http://>

*dpcl.d.defense.gov/Privacy/SORNs  
Index/BlanketRoutineUses.aspx.”*

\* \* \* \* \*

**STORAGE:**

Delete entry and replace with “Data will be stored on paper and on electronic storage media.”

\* \* \* \* \*

**SYSTEM MANAGER(S) AND ADDRESS:**

Delete entry and replace with “Chief, Defense Privacy and Civil Liberties Division, Office of the Deputy Chief Management Officer, Department of Defense, 9010 Defense Pentagon, Washington, DC 20301–9010.”

**NOTIFICATION PROCEDURES:**

Delete entry and replace with “Individuals seeking to determine if information about themselves is contained in this system should address written inquiries to the Chief, Defense Privacy and Civil Liberties Division, Office of the Deputy Chief Management Officer, Department of Defense, 9010 Defense Pentagon, Washington, DC 20301–9010.

For verification purposes, the requestor should provide his/her full name, home or work address, home or work telephone number, email addresses, Military Service or DoD component involved, and case number.”

**RECORD ACCESS PROCEDURES:**

Delete entry and replace with “Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Signed, written requests should include full names, home or work addresses, home or work telephone number, email address, Military Service or DoD component involved and case number, and the name and number of this system of records.”

\* \* \* \* \*

[FR Doc. 2016–02770 Filed 2–10–16; 8:45 am]

**BILLING CODE 5001–06–P**

**DEPARTMENT OF EDUCATION**

[Docket No.: ED–2016–ICCD–0016]

**Agency Information Collection Activities; Comment Request; Fiscal Operations Report for 2014–2015 and Application To Participate 2016–2017 (FISAP) and Reallocation Form**

**AGENCY:** Federal Student Aid (FSA), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

**DATES:** Interested persons are invited to submit comments on or before April 11, 2016.

**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–2016–ICCD–0016. 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. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–103, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public’s reporting burden. It also helps the public understand the Department’s information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the

respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* Fiscal Operations Report for 2014–2015 and Application to Participate 2016–2017 (FISAP) and Reallocation Form.

*OMB Control Number:* 1845–0030.

*Type of Review:* An extension of an existing information collection.

*Respondents/Affected Public:* State, Local, and Tribal Governments; Private Sector.

*Total Estimated Number of Annual Responses:* 4,223.

*Total Estimated Number of Annual Burden Hours:* 86,022.

*Abstract:* The data submitted electronically in the Fiscal Operations Report and Application to Participate (FISAP) through FISAP on the Web is used by the Department of Education to determine the institution’s funding need for the award year and monitor program effectiveness and accountability of fund expenditures. The Reallocation form is part of FISAP on the Web. The Higher Education Amendments (HEA) requires that if an institution anticipates not using all of its allocated funds for the Perkins, Federal Work Study (FWS), and Federal Supplemental Education Opportunity Grant (FSEOG) programs by the end of an award year, it must specify the anticipated remaining unused amount to the Secretary. In addition to renewing the expiration date, references to dates and award years dates have been updated on the forms and in the instructions for both documents. The FISAP form has been revised: (1) To use technology to gather existing data electronically from other sources requiring less data entry concerning Additional Institutions in Part I; (2) per discussions with OMB staff on 11/26/12 with concurrence on 11/30/12 to allow applicable aggregate level data entry concerning graduate and professional students for schools with non-traditional academic calendars; and (3) per OMB staff request and discussions on 8/21/12 with concurrence on 8/24/12, to expand the income grid in the Part VI summary to collect a more concise breakdown of student data at the aggregate level.

Dated: February 8, 2016.

**Kate Mullan,**

*Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.*

[FR Doc. 2016–02811 Filed 2–10–16; 8:45 am]

**BILLING CODE 4000–01–P**

**DEPARTMENT OF EDUCATION****Applications for New Awards;  
American Indian Vocational  
Rehabilitation Services**

**AGENCY:** Office of Special Education and Rehabilitative Services, Department of Education.

**ACTION:** Notice.

*Overview Information:* American Indian Vocational Rehabilitation Services Notice inviting applications for new awards for fiscal year (FY) 2016.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.250L.

*Dates: Applications Available:* February 11, 2016.

*Deadline for Transmittal of Applications:* April 26, 2016.

**Full Text of Announcement****I. Funding Opportunity Description**

*Purpose of Program:* The purpose of this program is to provide vocational rehabilitation (VR) services to American Indians with disabilities who reside on or near Federal or State reservations, consistent with their individual strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice, so that they may prepare for, and engage in, high-quality employment that will increase opportunities for economic self-sufficiency.

*Priority:* This competition has one competitive preference priority. In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 121(b)(4) of the Rehabilitation Act of 1973, as amended (29 U.S.C. 741(b)(4)).

*Competitive Preference Priority:* For FY 2016 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award an additional five points to an application that meets this priority.

This priority is:

*Continuation of Previously Funded Tribal Programs.* In making new awards under this program, we give priority to applications for the continuation of programs that have been funded under the American Indian Vocational Rehabilitation Services program.

*Program Authority:* 29 U.S.C. 741.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 81, 82, and 84. (b) The Office of Management and Budget (OMB) Guidelines to Agencies on

Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for this program in 34 CFR parts 369 and 371.

**II. Award Information**

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* \$7,800,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2017 from the list of unfunded applications from this competition.

*Estimated Range of Awards:* \$365,000–\$800,000.

*Estimated Average Size of Awards:* \$550,000.

*Estimated Number of Awards:* 11.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

**III. Eligibility Information**

1. *Eligible Applicants:* The governing bodies of Indian tribes (and consortia of those governing bodies) located on Federal and State reservations. The definition of “Indian tribe” was amended by the Workforce Innovation and Opportunity Act enacted on July 22, 2014, to include “a tribal organization (as defined in section 4(l) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(b)(1)).”

In addition, the Department published final regulations in the **Federal Register** on February 5, 2015 (80 FR 6452), amending the definition of “reservation” in 34 CFR 369.4 and 371.4. Under the amended definition, “reservation” means a Federal or State Indian reservation; public domain Indian allotment; former Indian reservation in Oklahoma; land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act; or a defined area of land recognized by a State or the Federal Government where there is a concentration of tribal members and on which the tribal government is providing structured activities and services.

2. *Cost Sharing or Matching:* Cost sharing is required by 34 CFR 371.40.

**IV. Application and Submission Information**

1. *Address To Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: [www.ed.gov/fund/grant/apply/grantapps/index.html](http://www.ed.gov/fund/grant/apply/grantapps/index.html). To obtain a copy from ED Pubs, write, fax, or call: ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: [www.EDPubs.gov](http://www.EDPubs.gov) or at its email address: [edpubs@inet.ed.gov](mailto:edpubs@inet.ed.gov).

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.250L.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotope, or compact disc) by contacting the person listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. These include a requirement that the applicant submit documentation demonstrating that it is a federally or State recognized tribe or a tribal organization and is located on a Federal or State reservation, as defined by the Department in the final regulations published in the **Federal Register** on February 5, 2015 (80 FR 6452). See 34 CFR 369.4 and 371.4.

**Note:** Each application must describe how the special application requirements stated at 34 CFR 371.21 will be met, including evidence that the applicant has or will obtain a formal cooperative agreement with the appropriate State VR agency, or agencies, that includes strategies for collaboration and coordination of service provision.

3. *Submission Dates and Times:*

*Applications Available:* February 11, 2016.

*Deadline for Transmittal of Applications:* April 26, 2016.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for

an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review*: This competition is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions*: We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management*: To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: <http://fedgov.dnb.com/webform>. A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and

accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

**Note:** Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, Grants.gov.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at [www.SAM.gov](http://www.SAM.gov). To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a SAM.gov Tip Sheet, which you can find at: <http://www2.ed.gov/fund/grant/apply/sam-faqs.html>.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: [www.grants.gov/web/grants/register.html](http://www.grants.gov/web/grants/register.html).

7. *Other Submission Requirements*: Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications*.

Applications for grants under the American Indian Vocational Rehabilitation Services program, CFDA number 84.250L, must be submitted electronically using the Governmentwide Grants.gov Apply site at [www.Grants.gov](http://www.Grants.gov). Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written

statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement*.

You may access the electronic grant application for the American Indian Vocational Rehabilitation Services program at [www.Grants.gov](http://www.Grants.gov). You must search for the downloadable application package for this competition by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.250, not 84.250L).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date.

Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.

- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at [www.G5.gov](http://www.G5.gov). In addition, for specific guidance and procedures for submitting an

application through Grants.gov, please refer to the Grants.gov Web site at: [www.grants.gov/web/grants/applicants/apply-for-grants.html](http://www.grants.gov/web/grants/applicants/apply-for-grants.html).

- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

- You must upload any narrative sections and all other attachments to your application as files in a read-only, non-modifiable Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (e.g., Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the project narrative—is critical to a meaningful review of your proposal. For that reason, it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF.

- Your electronic application must comply with any page-limit requirements described in this notice.

- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. This notification indicates receipt by Grants.gov only, not receipt by the Department. Grants.gov will also notify you automatically by email if your application met all the Grants.gov validation requirements or if there were any errors (such as submission of your application by someone other than a registered Authorized Organization Representative or inclusion of an attachment with a file name that contains special characters). You will be given an opportunity to correct any errors and resubmit, but you must still meet the deadline for submission of applications.

Once your application is successfully validated by Grants.gov, the Department will retrieve your application from Grants.gov and send you an email with

a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by Grants.gov, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only, non-modifiable PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

- We may request that you provide us original signatures on forms at a later date.

*Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System:* If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1-800-518-4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

**Note:** The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the

application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or

- You do not have the capacity to upload large documents to the Grants.gov system;

and

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: August Martin, U.S. Department of Education, 400 Maryland Avenue SW., Room 5049, Potomac Center Plaza, Washington, DC 20202-2800. FAX: (202) 245-7592.

Your paper application must be submitted in accordance with the mail or hand-delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.250L), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202-4260.

You must show proof of mailing consisting of one of the following:

- (1) A legibly dated U.S. Postal Service postmark.

- (2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

#### c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.250L), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202-4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

*Note for Mail or Hand Delivery of Paper Applications:* If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245-6288.

#### V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 of EDGAR and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the

Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition, the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

#### VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN), or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

#### 2. *Administrative and National Policy Requirements:*

We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to

comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to [www.ed.gov/fund/grant/apply/appforms/appforms.html](http://www.ed.gov/fund/grant/apply/appforms/appforms.html).

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case, the Secretary establishes a data collection period.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has established three performance measures for the American Indian Vocational Rehabilitation Services program. The measures are:

(1) The percentage of individuals who leave the program with an employment outcome after receiving services under an individualized plan for employment;

(2) The percentage of projects that demonstrate an average annual cost per employment outcome of no more than \$35,000; and

(3) The percentage of projects that demonstrate an average annual cost per participant of no more than \$10,000.

However, the Department is considering revising these measures in order to assess the program's performance in areas that are aligned with the primary indicators of performance under section 116 of the Workforce Innovation and Opportunity Act, where appropriate.

Each grantee must annually report the data needed to measure its performance on the GPRA measures through the Annual Progress Reporting Form (APR Form) for the American Indian Vocational Rehabilitation Services program, including data needed to report on revised measures once they are implemented.

**Note:** For purposes of this section, the term "employment outcome" means, with respect to an individual: (a) Entering or retaining full-time or, if appropriate, part-time competitive employment in the integrated labor market; (b) satisfying the vocational outcome of supported employment; or (c)

satisfying any other vocational outcome the Secretary may determine to be appropriate (including satisfying the vocational outcome of customized employment, self-employment, telecommuting, or business ownership) (Section 7(11) of the Rehabilitation Act of 1973, as amended (29 U.S.C. 705(11)).

5. *Continuation Awards*: In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** August Martin, U.S. Department of Education, 400 Maryland Avenue SW., Room 5049, Potomac Center Plaza, Washington, DC 20202-2800. Telephone: (202) 245-7410 or by email: [august.martin@ed.gov](mailto:august.martin@ed.gov).

If you use a TDD or a TTY, call the Federal Relay Service, toll free, at 1-800-877-8339.

## VIII. Other Information

*Accessible Format*: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotope, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

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

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

Dated: February 5, 2016.

**Michael K. Yudin,**

*Assistant Secretary for Special Education and Rehabilitative Services.*

[FR Doc. 2016-02808 Filed 2-10-16; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF ENERGY

### Hydrogen and Fuel Cell Technical Advisory Committee (HTAC)

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

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Hydrogen and Fuel Cell Technical Advisory Committee (HTAC). The Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770, requires notice of the meeting be announced in the **Federal Register**.

**DATES:**

Wednesday, April 6, 2016, 8:30 a.m.–5:00 p.m.

Thursday, April 7, 2016, 8:00 a.m.–12:00 p.m.

**ADDRESSES:** Hilton Garden Inn Livermore, 2801 Constitution Drive, Livermore, CA 94550

**FOR FURTHER INFORMATION CONTACT:**

Email: [HTAC@nrel.gov](mailto:HTAC@nrel.gov) or at the mailing address: James Alkire, Deputy Designated Federal Officer, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, 15013 Denver West Parkway, Golden, CO 80401

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Committee:* The Hydrogen and Fuel Cell Technical Advisory Committee (HTAC) was established under section 807 of the Energy Policy Act of 2005 (EPACT), Pub. L. 109-58; 119 Stat. 849.

*Purpose of the Meeting:* To provide advice and recommendations to the Secretary of Energy on the program authorized by Title VIII of EPACT.

*Tentative Agenda:* (updates will be posted on the web at: [http://hydrogen.energy.gov/advisory\\_htac.html](http://hydrogen.energy.gov/advisory_htac.html)).

- HTAC Business (including public comment period)
- DOE Leadership Updates
- Program and Budget Updates

- Updates from Federal/State Governments and Industry
- HTAC Subcommittee Updates
- Open Discussion Period

*Public Participation:* The meeting is open to the public. Individuals who would like to attend and/or to make oral statements during the public comment period must register no later than 5:00 p.m. on Wednesday, March 30, 2016 by email at [HTAC@nrel.gov](mailto:HTAC@nrel.gov). Entry to the meeting room will be restricted to those who have confirmed their attendance in advance. Please provide your name, organization, citizenship, and contact information. Anyone attending the meeting will be required to present government-issued identification. Those wishing to make a public comment are required to register. The public comment period will take place between 8:30 a.m. and 9:00 a.m. on April 6, 2016. Time allotted per speaker will depend on the number who wish to speak but will not exceed five minutes. Those not able to attend the meeting or have insufficient time to address the committee are invited to send a written statement to [HTAC@nrel.gov](mailto:HTAC@nrel.gov).

*Minutes:* The minutes of the meeting will be available for public review at [http://hydrogen.energy.gov/advisory\\_htac.html](http://hydrogen.energy.gov/advisory_htac.html).

Issued in Washington, DC in February 5, 2016.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2016-02791 Filed 2-10-16; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Portsmouth

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Thursday, March 3, 2016, 6:00 p.m.

**ADDRESSES:** Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

**FOR FURTHER INFORMATION CONTACT:** Greg Simonton, Alternate Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661,

(740) 897-3737, *Greg.Simonton@lex.doe.gov*.

#### SUPPLEMENTARY INFORMATION:

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE-EM and site management in the areas of environmental restoration, waste management and related activities.

#### *Tentative Agenda:*

- Call to Order, Introductions, Review of Agenda
- Approval of January Minutes
- Deputy Designated Federal Officer's Comments
- Federal Coordinator's Comments
- Liaison's Comments
- Presentation
- Administrative Issues
- Subcommittee Updates
- Public Comments
- Final Comments from the Board
- Adjourn

*Public Participation:* The meeting is open to the public. The EM SSAB, Portsmouth, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Greg Simonton at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Greg Simonton at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Greg Simonton at the address and phone number listed above. Minutes will also be available at the following Web site: <http://www.ports-sab.energy.gov/>.

Issued at Washington, DC, on February 3, 2016.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2016-02790 Filed 2-10-16; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Secretary of Energy Advisory Board

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open meeting of the Secretary of Energy Advisory Board (SEAB). The SEAB was reestablished pursuant to the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) (the Act). This notice is provided in accordance with the Act.

**DATES:** Wednesday, March 23, 2016, 8:30 a.m.–12:30 p.m.

**ADDRESSES:** Department of Energy, 1000 Independence Avenue SW., Room 8E-089, Washington, DC 20585

#### **FOR FURTHER INFORMATION CONTACT:**

Karen Gibson, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; email: [seab@hq.doe.gov](mailto:seab@hq.doe.gov).

#### **SUPPLEMENTARY INFORMATION:**

*Background:* The Board was established to provide advice and recommendations to the Secretary on the Department's basic and applied research, economic and national security policy, educational issues, operational issues, and other activities as directed by the Secretary.

*Purpose of the Meeting:* This meeting is the quarterly meeting of the Board.

*Tentative Agenda:* The meeting will start at 8:30 a.m. on March 23rd. The tentative meeting agenda includes: Updates from SEAB's task forces, informational briefings, and an opportunity for comments from the public. The meeting will conclude at 12:30 p.m. Agenda updates will be posted on the SEAB Web site prior to the meeting: [www.energy.gov/seab](http://www.energy.gov/seab).

*Public Participation:* The meeting is open to the public. Individuals who would like to attend must RSVP to Karen Gibson no later than 5:00 p.m. on Friday, March 18, 2016, by email at: [seab@hq.doe.gov](mailto:seab@hq.doe.gov). Please provide your name, organization, citizenship, and contact information. Anyone attending the meeting will be required to present government issued identification. Please note that the Department of Homeland Security (DHS) has determined that regular driver's licenses (and ID cards) from the following jurisdictions are not acceptable: Alaska, American Samoa, Arizona, Louisiana, Maine, Massachusetts, Minnesota, New York, Oklahoma, and Washington. Acceptable alternate forms of Photo-ID include:

- U. S. Passport or Passport Card
- An Enhanced Driver's License or Enhanced ID-Card issued by the states

of Minnesota, New York or Washington (Enhanced licenses issued by these states are clearly marked Enhanced or Enhanced Driver's License)

- A military ID or other government issued Photo-ID card

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 30 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed five minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 8:30 a.m. on March 23rd.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to Karen Gibson, U.S. Department of Energy, 1000 Independence Avenue SW., Washington DC 20585, email to: [seab@hq.doe.gov](mailto:seab@hq.doe.gov).

*Minutes:* The minutes of the meeting will be available on the SEAB Web site or by contacting Ms. Gibson. She may be reached at the postal address or email address above, or by visiting SEAB's Web site at [www.energy.gov/seab](http://www.energy.gov/seab).

Issued in Washington, DC, on February 5, 2016.

**LaTanya R. Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2016-02792 Filed 2-10-16; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #2

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

*Docket Numbers:* EG16-51-000.

*Applicants:* Ringer Hill Wind, LLC.

*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Ringer Hill Wind, LLC.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205-5166.

*Comments Due:* 5 p.m. ET 2/26/16.

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

*Docket Numbers:* ER15-746-003.

*Applicants:* RC Cape May Holdings, LLC.

*Description:* Compliance filing: Third Revised Rate Schedule Ferc No. 2 to be effective 10/1/2015.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5172.

*Comments Due:* 5 p.m. ET 2/26/16.

*Docket Numbers:* ER16–581–001.

*Applicants:* ENGIE Portfolio Management, LLC.

*Description:* Tariff Amendment: Supplement to MBR Application & Request for Shortened Comment Period to be effective 2/17/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5202.

*Comments Due:* 5 p.m. ET 2/26/16.

*Docket Numbers:* ER16–582–001

*Applicants:* ENGIE Retail, LLC.

*Description:* Tariff Amendment: Supplement to MBR Application & Request for Shortened Comment Period to be effective 2/17/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5204.

*Comments Due:* 5 p.m. ET 2/26/16.

*Docket Numbers:* ER16–583–001.

*Applicants:* GDF SUEZ Energy Resources NA, Inc.

*Description:* Tariff Amendment: Supplement to MBR Application & Request for Shortened Comment Period to be effective 2/17/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5205.

*Comments Due:* 5 p.m. ET 2/26/16.

*Docket Numbers:* ER16–901–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Section 205(d) Rate Filing: Revisions to Update Attachment AF—Frequently Constrained Areas to be effective 4/5/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5153.

*Comments Due:* 5 p.m. ET 2/26/16.

*Docket Numbers:* ER16–902–000.

*Applicants:* Voyager Wind I, LLC.

*Description:* Baseline eTariff Filing: MBR Application to be effective 4/6/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5182.

*Comments Due:* 5 p.m. ET 2/26/16.

Take notice that the Commission received the following public utility holding company filings:

*Docket Numbers:* PH16–4–000.

*Applicants:* New Jersey Resources Corporation.

*Description:* New Jersey Resources Corporation submits FERC 65–A Material Change in Facts of Exemption Notification.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5174.

*Comments Due:* 5 p.m. ET 2/26/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 5, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–02758 Filed 2–10–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP15–148–000]

#### Tennessee Gas Pipeline Company, L.L.C.; Notice of Revised Schedule for Environmental Review of the Susquehanna West Project

This notice identifies the Federal Energy Regulatory Commission staff's revised schedule for the completion of the environmental assessment (EA) for Tennessee Gas Pipeline Company, L.L.C.'s (TGP) proposed Susquehanna West Project. The first notice of schedule, issued on November 24, 2015, identified February 23, 2016 as the EA issuance date. However, TGP has recently filed supplemental information that warrants further review. As a result, staff has revised the schedule for issuance of the EA.

#### Schedule for Environmental Review

Issuance of Notice of Availability of the EA, March 17, 2016.

90-day Federal Authorization Decision Deadline, June 15, 2016.

If a schedule change becomes necessary, an additional notice will be provided so that the relevant agencies are kept informed of the project's progress.

#### Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription

(<http://www.ferc.gov/docs-filing/esubscription.asp>).

Dated: February 5, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016–02757 Filed 2–10–16; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Combined Notice of Filings #1

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

*Docket Numbers:* ER15–1825–000.

*Applicants:* California Independent System Operator Corporation.

*Description:* Petition for Limited Waiver to Modify Effective Date and Request for Shortened Comment Period of California Independent System Operator Corporation.

*Filed Date:* 2/4/16.

*Accession Numbers:* 20160204–5236, 20160205–5049.

*Comments Due:* 5 p.m. ET 2/11/16.

*Docket Numbers:* ER16–898–000.

*Applicants:* Northern States Power Company, a Minnesota corporation.

*Description:* Tariff Cancellation: 20160204\_Rate Schedule 601\_Cancellation to be effective 4/30/2015.

*Filed Date:* 2/4/16.

*Accession Number:* 20160204–5212.

*Comments Due:* 5 p.m. ET 2/25/16.

*Docket Numbers:* ER16–899–000.

*Applicants:* Orange and Rockland Utilities, Inc.

*Description:* Notice of Cancellation of Power Supply Agreement, Rate Schedule FERC No. 60, and Request for Waivers of Orange and Rockland Utilities, Inc.

*Filed Date:* 2/4/16.

*Accession Number:* 20160204–5225.

*Comments Due:* 5 p.m. ET 2/25/16.

*Docket Numbers:* ER16–900–000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* Section 205(d) Rate Filing: 2016–02–05\_SA 2893 Black Hawk MPPCA (J233, J274, J278, J279) to be effective 2/6/2016.

*Filed Date:* 2/5/16.

*Accession Number:* 20160205–5083.

*Comments Due:* 5 p.m. ET 2/26/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211

and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: February 5, 2016.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2016-02755 Filed 2-10-16; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. CP14-103-000; CP14-115-000]

#### **Elba Liquefaction Company, LLC, Southern LNG Company, LLC, Elba Express Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed Elba Liquefaction Project**

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the natural gas facilities proposed by Elba Liquefaction Company, LLC (ELC), Southern LNG Company, LLC (SLNG), and Elba Express Company, LLC (EEC) (collectively referred to as "Companies") in the above-referenced dockets. The proposed Elba Liquefaction Project and EEC Modification Project are collectively referred to as the Elba Liquefaction Project, or Project. The Companies request authorization to add natural gas liquefaction and exporting capabilities to SLNG's existing Elba Island liquefied natural gas (LNG) terminal (LNG Terminal) and abandon SLNG's existing LNG truck loading facilities at the LNG Terminal in Chatham County, Georgia. In addition, the Companies propose to construct and operate new and modified compression and metering facilities in Hart, Jefferson, and Effingham Counties, Georgia, and in Jasper County, South Carolina. The Project would enable SLNG to export approximately 2.5 million tons per annum of LNG via the existing LNG Terminal in Chatham County, Georgia.

The EA assesses the potential environmental effects of the construction and operation of the Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed Project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The U.S. Department of Energy—Office of Fossil Energy (DOE-FE), U.S. Department of Transportation (DOT), and U.S. Coast Guard (USCG) participated as cooperating agencies in the preparation of the EA. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis, and will adopt and use the EA to support their respective approvals for the Project.

ELC and SLNG propose to construct and operate liquefaction and export facilities in two phases at the LNG Terminal. Phase I of the proposed facilities associated with the LNG Terminal includes installation of three liquefaction system units; installation of a flare system and a marine flare; modifications to the LNG Terminal; and ancillary facilities and support system modifications. Project facilities associated with Phase II include installation of seven additional liquefaction system units, ancillary support systems, and potential additions or upgrades to systems installed as part of Phase I.

ECC proposes to construct and operate facilities on its existing pipeline system in three phases. The Phase I would include the addition of approximately 31,800 horsepower (hp) of compression and metering modifications to the existing Hartwell Compressor Station; construction of a new 15,900 hp compressor station in Jefferson County, Georgia; construction of a new 15,900 hp compressor station in Effingham County, Georgia; installation of new metering facilities at existing sites in Chatham and Effingham County, Georgia and Jasper County, South Carolina; and modifications to segregate the two pipelines that currently extend from Elba Island to Port Wentworth, Georgia.

Phase II would include the addition of approximately 15,900 hp of compression at the existing Hartwell Compressor Station. Phase III would include the addition of approximately 15,900 hp at each of the Hartwell, Jefferson, and Rincon Compressor Stations.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; newspapers and libraries in the Project area; and parties to this proceeding. In addition, the EA is available for public viewing on the FERC's Web site ([www.ferc.gov](http://www.ferc.gov)) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502-8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on the proposal, it is important that we receive your comments in Washington, DC on or before March 7, 2016.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket numbers (CP14-103-000 and CP14-115-000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502-8258 or [efiling@ferc.gov](mailto:efiling@ferc.gov).

(1) You can file your comments electronically using the eComment feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "eRegister." You must select the type of filing you are making. If you are filing a comment on a particular project, please select "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory

Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).<sup>1</sup> Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding that no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the Project is available from the Commission's Office of External Affairs, at (866) 208-FERC, or on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)) using the eLibrary link. Click on the eLibrary link, click on "General Search," and enter the docket number excluding the last three digits in the Docket Number field (*i.e.*, CP14-103 and/or CP14-115). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription, which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/docs-filing/esubscription.asp](http://www.ferc.gov/docs-filing/esubscription.asp).

Dated: February 5, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-02756 Filed 2-10-16; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL16-32-000]

#### Talen Energy Marketing, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On February 5, 2016, the Commission issued an order in Docket No. EL16-32-000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2012), instituting an investigation into the justness and reasonableness of Talen Energy Marketing, LLC's informational filing pursuant to Schedule 2 to the PJM Interconnection, LLC's Open Access Transmission Tariff supporting the revenue requirement for reactive supply and voltage control service (Reactive Service) of Talen Ironwood, LLC. *Talen Energy Marketing, LLC*, 154 FERC ¶ 61,087 (2016).

The refund effective date in Docket No. EL16-32-000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Dated: February 5, 2016.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2016-02759 Filed 2-10-16; 8:45 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP-2015-0393; FRL-9941-55]

### Registration Review Interim Decisions; Notice of Availability; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice; correction.

**SUMMARY:** EPA issued a notice in the **Federal Register** of October 15, 2015, concerning Registration Review Interim Decisions, Notice of Availability. This document corrects a typographical error.

**FOR FURTHER INFORMATION CONTACT:** Richard Dumas, Pesticide Re-Evaluation Division, (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (703) 308-8015; email address: [dumas.richard@epa.gov](mailto:dumas.richard@epa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### A. Does this action apply to me?

The Agency included in the October 15, 2015 notice a list of those who may be potentially affected by this action.

### B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2015-0393, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

## II. What does this correction do?

FR Doc. 2015-26299 published in the **Federal Register** of October 15, 2015 (80 FR 62069) (FRL-9934-06) is corrected as follows:

1. On page 62071, in the second column, at the end of the document, the signature is corrected to read Richard P. Keigwin, Jr.

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: January 27, 2016.

**Michael Goodis,**

*Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2016-02820 Filed 2-10-16; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2015-0507; FRL-9942-09]

### Certain New Chemicals; Receipt and Status Information for December 2015

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA is required under the Toxic Substances Control Act (TSCA) to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN); an application for a test marketing exemption (TME), both pending and/or expired; and a periodic status report on any new chemicals under EPA review and the receipt of

<sup>1</sup> See the previous discussion on the methods for filing comments.

notices of commencement (NOC) to manufacture those chemicals. This document covers the period from December 1, 2015 to December 31, 2015.

**DATES:** Comments identified by the specific case number provided in this document, must be received on or before March 14, 2016.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPPT-2015-0507, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

#### FOR FURTHER INFORMATION CONTACT:

*For technical information contact:* Jim Rahai, IMD 7407M, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 564-8593; email address: [rahai.jim@epa.gov](mailto:rahai.jim@epa.gov).

*For general information contact:* The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: [TSCA-Hotline@epa.gov](mailto:TSCA-Hotline@epa.gov).

#### SUPPLEMENTARY INFORMATION:

### I. General Information

#### A. Does this action apply to me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitters of the actions addressed in this document.

#### B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

### II. What action is the Agency taking?

This document provides receipt and status reports, which cover the period from December 1, 2015 to December 31, 2015, and consists of the PMNs and TMEs both pending and/or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

### III. What is the Agency's authority for taking this action?

Under TSCA, 15 U.S.C. 2601 *et seq.*, EPA classifies a chemical substance as either an "existing" chemical or a "new" chemical. Any chemical substance that is not on EPA's TSCA

Inventory is classified as a "new chemical," while those that are on the TSCA Inventory are classified as an "existing chemical." For more information about the TSCA Inventory go to: <http://www.epa.gov/opptintr/newchems/pubs/inventory.htm>.

Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for "test marketing" purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: <http://www.epa.gov/oppt/newchems>.

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic reports on the status of new chemicals under review and the receipt of NOCs to manufacture those chemicals.

### IV. Receipt and Status Reports

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that the information in the table is generic information because the specific information provided by the submitter was claimed as CBI.

For the 46 PMNs received by EPA during this period, Table 1 provides the following information (to the extent that such information is not claimed as CBI): The EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer/importer; the potential uses identified by the manufacturer/importer in the PMN; and the chemical identity.

TABLE 1—PMNS RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015

Case No.	Date received	Projected end date for EPA review	Manufacturer/importer	Use(s)	Chemical identity
P-16-0015 .....	12/15/2015	3/14/2016	CBI .....	(S) New substance is a polymer used as a hydrophobic coating for metal oxide particular in industrial formulations used a functional surface treatment on metal oxide which is used in cosmetic and sun-screen formulations.	(G) Dimethicone crosspolymer and Silica.

TABLE 1—PMNS RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015—Continued

Case No.	Date received	Projected end date for EPA review	Manufacturer/importer	Use(s)	Chemical identity
P-16-0054 .....	12/10/2015	3/9/2016	Blaser Swisslube, Inc	(S) Metal working fluid component .....	(S) Phosphoric acid, mixed 2-hexyldodecyl and 2-hexyldodecyl and 2-octyldodecyl and 2-octyldodecyl mono- and diesters.
P-16-0108 .....	12/2/2015	3/1/2016	CBI .....	(G) Use in uv/eb adhesives and coatings .....	(G) Dimethyl ester, polymer with 1,6-hexanediol, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane and 2-oxepanone, 2-hydroxyethyl acrylate-blocked.
P-16-0109 .....	12/2/2015	3/1/2016	CBI .....	(G) Raw material of polyurethane .....	(G) Heteropolycycle hydrogen carbonate, polycondensate with alkyl hydrogen carbonate.
P-16-0110 .....	12/2/2015	3/1/2016	CBI .....	(G) Raw material of polyurethane .....	(G) Heteropolycycle hydrogen carbonate, polycondensate with alkyl hydrogen carbonate.
P-16-0111 .....	12/3/2015	3/2/2016	Allnex USA, Inc .....	(S) Electro-deposition primer .....	(G) Fatty acids, reaction products with alkylamine, polymers with substituted carbomonocycle, substituted alkylamines, heteromonocycle and substituted alkanolate, acetates (salts).
P-16-0112 .....	12/3/2015	3/2/2016	Allnex USA, Inc .....	(S) Isolated intermediate for electro deposition primer.	(G) Substituted heteromonocycle, polymer with substituted carbomonocycle and alkyl (hydroxyalkyl)alkanediol, alkoxyalkanol-blocked.
P-16-0115 .....	12/4/2015	3/3/2016	CBI .....	(S) Component of flexible foam .....	(G) 2-Propanediol, polymer with 2-ethyloxirane, oxirane and cycloaliphatic anhydride, polymer with 2,2'-[(1-methylethylidene)bis(4,1-phenyleneoxymethylene)]bis[oxirane].
P-16-0117 .....	12/5/2015	3/4/2016	CBI .....	(S) Bleach for whitening, deodorizing and/or cleaning.	(S) Magnesium hydroxide hypochlorite oxide.
P-16-0118 .....	12/8/2015	3/7/2016	CBI .....	(G) Additives for lubricating oil .....	(G) Alkyl methacrylates copolymer.
P-16-0119 .....	12/14/2015	3/13/2016	CBI .....	(G) Intermediate .....	(G) Chlorofluorocarbon.
P-16-0120 .....	12/8/2015	3/7/2016	The Shepherd Color Company.	(G) Pigment for anti-corrosive paints .....	(S) Aluminum vanadium zinc hydroxide oxide.
P-16-0121 .....	12/8/2015	3/7/2016	CBI .....	(S) Water reducing agent for use in concrete	(G) Acrylic acid polymer with polyethylene glycol.
P-16-0122 .....	12/8/2015	3/7/2016	CBI .....	(G) Intermediate .....	(G) Chlorofluorocarbon.
P-16-0123 .....	12/8/2015	3/7/2016	Infineum USA, L.P .....	(G) Oil additive .....	(G) Formaldehyde polymers with substituted-carbomonocycle, (tetraalkenyl) derivs.
P-16-0124 .....	12/9/2015	3/8/2016	CBI .....	(G) Resin for coatings .....	(G) Substituted alkanolic acid-, salts with substituted alkanol-blocked haloalkyl heteromonocycle substituted carbomonocycle polymer alkyl alkanolate-substituted carbomonocycle-trialkylcarbomonocycle-alkyl imine reaction products.
P-16-0125 .....	12/9/2015	3/8/2016	CBI .....	(G) Resin for coatings .....	(G) Alkoxy alkyl substituted alkanolic acid, ion(1-), salts with substituted carbomonocycle substituted heteromonocyclic polymer ester with substituted carbomonocycle alkyl ester-alkyl substituted alkanol reaction products.
P-16-0126 .....	12/9/2015	3/8/2016	CBI .....	(G) Resin for coatings .....	(G) Substituted carbomonocycle, polymer with substituted heteromonocycle, reaction products with substituted amine, substituted amine and substituted alkanol, alkylalkanoates substituted carbomonocycle.
P-16-0127 .....	12/10/2015	3/9/2016	CBI .....	(S) Flotation of silica from iron ore and selected nonferrous minerals.	(G) dialkyl ether ammonium salts.
P-16-0128 .....	12/10/2015	3/9/2016	Cardolite Corporation	(S) Epoxy curing agent for light colored coatings.	(G) Fatty acids, c18-unsatd., dimers, polymers with cashew nutshell liq., glycidyl ethers and polyethylenepolyamines.
P-16-0129 .....	12/10/2015	3/9/2016	Zeon Chemicals, L.P	(S) Resin for hot melt adhesives .....	(G) Hydrocarbon Resin, Hydrogenated.
P-16-0131 .....	12/14/2015	3/13/2016	CBI .....	(G) Dye .....	(G) Polyethoxylated monoazo.
P-16-0132 .....	12/14/2015	3/13/2016	CBI .....	(S) Emulsifier and lubricant for use in metal working fluids.	(G) Alkyoxylated fatty alcohol phosphate ester.
P-16-0133 .....	12/14/2015	3/13/2016	CBI .....	(S) Raw material used to impart high heat resistance to heat resistant plastics used in the manufacture of LED reflectors used in reflective plates.	(S) 1,4-Benzenedicarboxylic acid, polymer with 2-methyl-1,8-octanediamine and 1,9-nonanediamine, reaction products with benzoic acid.
P-16-0134 .....	12/15/2015	3/14/2016	CBI .....	(G) Cured coatings and inks .....	(G) Acrylic oligomer.
P-16-0135 .....	12/16/2015	3/15/2016	CBI .....	(G) Pigment wetting and dispersing additive	(G) Polyesters, fatty alkyl amides terminated.
P-16-0136 .....	12/15/2015	3/14/2016	CBI .....	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt.
P-16-0139 .....	12/15/2015	3/14/2016	CBI .....	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt, salts.
P-16-0140 .....	12/15/2015	3/14/2016	CBI .....	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt, salts.
P-16-0141 .....	12/22/2015	3/21/2016	CBI .....	(G) Lubricant additive .....	(G) Polyalkyl methacrylate copolymer.
P-16-0142 .....	12/16/2015	3/15/2016	CBI .....	(G) Polymer for coatings .....	(G) Amine salted polyacrylate.
P-16-0143 .....	12/16/2015	3/15/2016	CBI .....	(G) Chemical intermediate .....	(G) Haloalkylfuranocarboxaldehyde.

TABLE 1—PMNS RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015—Continued

Case No.	Date received	Projected end date for EPA review	Manufacturer/importer	Use(s)	Chemical identity
P-16-0144 .....	12/16/2015	3/15/2016	H. B. Fuller Company	(G) Industrial adhesive .....	(G) Urethane acrylate.
P-16-0145 .....	12/16/2015	3/15/2016	H. B. Fuller Company	(G) Urethane acrylate .....	(G) Urethane acrylate.
P-16-0146 .....	12/16/2015	3/15/2016	H. B. Fuller Company	(G) Industrial adhesive .....	(G) Urethane acrylate.
P-16-0147 .....	12/16/2015	3/15/2016	H. B. Fuller Company	(G) Industrial adhesive .....	(G) Urethane acrylate.
P-16-0148 .....	12/16/2015	3/15/2016	CBI .....	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt.
P-16-0149 .....	12/17/2015	3/16/2016	Cadence Chemical Corporation.	(S) Paints for wood, metal and plastic .....	(G) 2-alkenoic acid, alkyl ester, polymer with ethenyl benzene, alkyl 2-alky alkenoate and alkene carboxylic acid.
P-16-0150 .....	12/18/2015	3/17/2016	CBI .....	(G) Intermediate .....	(G) Chlorofluorocarbon.
P-16-0151 .....	12/18/2015	3/17/2016	CBI .....	(G) Intermediate .....	(G) Perfluoropolyether halide.
P-16-0152 .....	12/18/2015	3/17/2016	CBI .....	(G) Intermediate .....	(G) Perfluoropolyether aryl.
P-16-0153 .....	12/18/2015	3/17/2016	CBI .....	(G) Lubricant additive .....	(G) Substituted aryl perfluoropolyether.
P-16-0154 .....	12/18/2015	3/17/2016	CBI .....	(G) Lubricant additive .....	(G) Sulfonated perfluoropolyether aromatic transition metal salt.
P-16-0155 .....	12/18/2015	3/17/2016	CBI .....	(G) Lubricant additive .....	(G) Sulfonated perfluoropolyether aryl alkali metal salt.
P-16-0156 .....	12/18/2015	3/17/2016	CBI .....	(G) Lubricant additive .....	(G) Sulfonated perfluoropolyether aryl alkali metal salt.
P-16-0160 .....	12/30/2015	3/29/2016	CBI .....	(G) Curing agent and curing agent precursor, adhesion promoter and adhesion promoter precursor.	(G) Polyethylenepolyamines.

For the 4 TMEs received by EPA during this period, Table 2 provides the following information (to the extent that such information is not claimed as CBI):

The EPA case number assigned to the TME, the date the TME was received by EPA, the projected end date for EPA's review of the TME, the submitting

manufacturer/importer, the potential uses identified by the manufacturer/importer in the TME, and the chemical identity.

TABLE 2—TMEs RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015

Case No.	Date received	Projected end date for EPA review	Manufacturer/Importer	Use(s)	Chemical identity
T-16-0013 .....	12/15/2015	1/29/2016	CBI	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt.
T-16-0014 .....	12/15/2015	1/29/2016	CBI	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt, salts.
T-16-0015 .....	12/15/2015	1/29/2016	CBI	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt, salts.
T-16-0016 .....	12/16/2015	1/30/2016	CBI	(G) Oil production .....	(G) Dialkylamino alkylamide inner salt.

For the 38 NOCs received by EPA during this period, Table 3 provides the following information (to the extent that such information is not claimed as CBI):

The EPA case number assigned to the NOC; the date the NOC was received by EPA; the projected date of commencement provided by the

submitter in the NOC; and the chemical identity.

TABLE 3—NOCs RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015

Case No.	Date received	Projected date of commencement	Chemical identity
J-15-0034 .....	12/21/2015	12/18/2015	(G) Saccharomyces cerevisiae modified.
P-11-0543 .....	12/1/2015	11/3/2015	(G) Polyfluorinated alkyl quaternary ammonium chloride.
P-12-0118 .....	12/16/2015	12/2/2015	(G) Substituted pyridinium salt.
P-12-0549 .....	12/10/2015	11/11/2015	(G) Modified polyester.
P-13-0558 .....	12/3/2015	11/28/2015	(G) Alkylene imine homopolymer, alkyl derivatives.
P-13-0853 .....	12/15/2015	10/28/2015	(G) Inorganic acid, triphenyl ester, polymer with mixed diols and alcohols.
P-14-0492 .....	12/1/2015	10/18/2015	(S) Ethanol, 2,2',2''-nitrotris-, compd. with alpha, alpha'-[[[4-[2-(4-sulfo-1-naphthalenyl) diazenyl] phenyl] imino] di-2,1-ethanedyl]bis[omega-hydroxypoly(oxy-1,2-ethanedyl)] (1:1).
P-14-0643 .....	12/16/2015	11/16/2015	(G) Titanium oxide derivative.
P-14-0838 .....	12/10/2015	12/7/2015	(G) Modified copolymer of buta-1,3-diene and styrene.
P-15-0065 .....	12/9/2015	12/5/2015	(G) Mixture of aminopropyl-terminated N-methylated polyalkylenepolyamines.
P-15-0177 .....	12/16/2015	12/4/2015	(G) Phenol, 2,2'-[1,2-disubstituted-1,2-ethanedyl]bis(iminomethylene)bis[substituted].
P-15-0326 .....	12/21/2015	10/19/2015	(G) Polyfluorohydrocarbon.
P-15-0341 .....	12/22/2015	12/15/2015	(G) Propenoic acid alkyl ester(s), telomer with alkanethiol, 2-methyl-2-propenoic acid and 2-hydroxyethyl 2-propenoate.
P-15-0349 .....	12/3/2015	11/23/2015	(G) Carbonic acid, diethyl ester, polymer with 1,6-hexanediol, 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane 2-hydroxyethyl acrylate-blocked.
P-15-0355 .....	12/8/2015	11/21/2015	(S) Hexane, 1,6-diisocyanato-, homopolymer, di-et malonate-blocked.

TABLE 3—NOCs RECEIVED FROM DECEMBER 1, 2015 TO DECEMBER 31, 2015—Continued

Case No.	Date received	Projected date of commencement	Chemical identity
P-15-0455 .....	12/15/2015	12/4/2015	(S) 1,4-Cyclohexanedicarboxylic acid, 1,4-dimethyl ester, polymer with 1,4-cyclohexanedimethanol.
P-15-0468 .....	12/16/2015	12/15/2015	(G) Polycyclohexanedicarboxylic acid, hydroxy-(substituted phenyl)diazenyl, metal salt.
P-15-0544 .....	12/1/2015	11/25/2015	(G) Trialkyl cycloalkylammonium hydroxide.
P-15-0581 .....	12/10/2015	11/23/2015	(G) L-amino acid, homopolymer, carboxylate.
P-15-0587 .....	12/14/2015	12/2/2015	(G) vegetable oil polymer with 1,1'-methylenebis[isocyanatobenzene], oxepanone and trimethylolpropane.
P-15-0596 .....	12/3/2015	11/16/2015	(G) Methyl alkaryl methyl hydrogen cyclosiloxanes.
P-15-0602 .....	12/9/2015	11/12/2015	(G) Copolymer of tetrafluoroethene and perfluorosulfonylvinylolether.
P-15-0606 .....	12/2/2015	11/24/2015	(S) Alkenes, C18-22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues, from C20-22 alcs. manufacturer.
P-15-0608 .....	12/2/2015	11/26/2015	(G) Modified rosin polyol ester.
P-15-0612 .....	12/23/2015	12/22/2015	(S) Sulfur thulium ytterbium yttrium oxide.
P-15-0613 .....	12/23/2015	12/22/2015	(S) Gadolinium sulfur ytterbium yttrium oxide, erbium- and thulium-doped.
P-15-0614 .....	12/23/2015	12/22/2015	(S) Neodymium sulfur yttrium oxide.
P-15-0615 .....	12/23/2015	12/22/2015	(S) Erbium gadolinium neodymium sulfur ytterbium yttrium oxide.
P-15-0616 .....	12/23/2015	12/22/2015	(S) Erbium gadolinium sulfur ytterbium yttrium oxide.
P-15-0618 .....	12/23/2015	12/22/2015	(S) Erbium gadolinium sulfur ytterbium oxide.
P-15-0624 .....	12/2/2015	11/22/2015	(G) Modified urethane polymer.
P-15-0635 .....	12/29/2015	12/13/2015	(G) Polymer of an aromatic olefin and one or more substituted aromatic olefins.
P-15-0648 .....	12/11/2015	12/10/2015	(G) Alkylamino alcohol.
P-15-0657 .....	12/9/2015	11/22/2015	(G) Allyl triazine oligomer.
P-15-0684 .....	12/7/2015	12/3/2015	(G) Substituted alkenoic acid, alkyl ester, telomer with alkanethiol and oxiranylalkyl alkyl-alkenoate.
P-15-0687 .....	12/10/2015	12/8/2015	(G) Polyester adduct.
P-15-0696 .....	12/14/2015	12/7/2015	(G) Urethane acrylate.
P-15-0712 .....	12/14/2015	12/11/2015	(S) Cyclopropanemethanol, 2-(1,4-dimethyl-3-penten-1-yl)-1-methyl-

**Authority:** 15 U.S.C. 2601 *et seq.*

Dated: February 5, 2016.

**Pamela Myrick,**

*Acting, Information Management Division,  
Office of Pollution Prevention and Toxics.*

[FR Doc. 2016-02830 Filed 2-10-16; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for

inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the notices must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 26, 2016.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045-0001. Comments can also be sent electronically to

*Comments.applications@ny.frb.org:*

1. *Sumitomo Mitsui Trust Holdings, Inc., and Sumitomo Mitsui Trust Bank, Limited*, both in Tokyo, Japan; to acquire 50 percent of the voting shares of Marubeni Rail Transport, Inc., Wilmington, Delaware, and indirectly acquire voting shares of Midwest Railcar Corporation, Maryville, Illinois, and thereby engage in personal property leasing, incidental fleet management, and consulting activities, pursuant to sections 225.28(b)(3) and 225.28(b)(9).

Board of Governors of the Federal Reserve System, February 8, 2016.

**Michael J. Lewandowski,**

*Associate Secretary of the Board.*

[FR Doc. 2016-02781 Filed 2-10-16; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise

noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 7, 2016.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045-0001. Comments can also be sent electronically to

[Comments.applications@ny.frb.org](mailto:Comments.applications@ny.frb.org):

1. *Mizuho Financial Group, Inc., Tokyo, Japan* (“MHFG”), and *Mizuho Bank, Ltd., Tokyo, Japan* (“MHBK”), seeks approval to form Mizuho Americas LLC (“MHA”), as a bank holding company that will be a wholly-owned subsidiary of MHBK, and to transfer the ownership interests of MHFG’s banking subsidiaries, Mizuho Bank (USA), New York, New York, and Mizuho Trust & Banking Co. (USA), New York, New York, to MHA.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *First Wyoming Bancorporation*, Laramie, Wyoming; to merge with First Express of Nebraska, Inc., Gering, Nebraska, and thereby indirectly acquire voting shares of Valley Bank and Trust Co., Scottsbluff, Nebraska.

Board of Governors of the Federal Reserve System, February 8, 2016.

**Michael J. Lewandowski,**

*Associate Secretary of the Board.*

[FR Doc. 2016-02780 Filed 2-10-16; 8:45 am]

BILLING CODE 6210-01-P

## FEDERAL TRADE COMMISSION

[File No. 152 3159]

### General Workings Inc. (Also Doing Business as Vulcun); Analysis of Proposed Consent Order To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before March 8, 2016.

**ADDRESSES:** Interested parties may file a comment at <https://>

[ftcpublic.commentworks.com/ftc/vulcunconsent](https://ftcpublic.commentworks.com/ftc/vulcunconsent) online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “General Workings Inc. also doing business as Vulcun—Consent Agreement; File No. 152–3159” on your comment and file your comment online at <https://ftcpublic.commentworks.com/ftc/vulcunconsent> by following the instructions on the web-based form. If you prefer to file your comment on paper, write “General Workings Inc. also doing business as Vulcun—Consent Agreement; File No. 152–3159” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

Jacob Snow (415) 848-5175 or Alexander Reicher (415) 848-5198, FTC Western Region, San Francisco, 901 Market Street, Suite 570, San Francisco, CA 94103.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 5, 2016), on the World Wide Web at: <http://www.ftc.gov/os/actions.shtm>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 8, 2016. Write “General Workings Inc. also doing business as Vulcun—Consent Agreement; File No. 152–3159” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals’

home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone’s Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential,” as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).<sup>1</sup> Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpublic.commentworks.com/ftc/vulcunconsent> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that Web site.

If you file your comment on paper, write “General Workings Inc. also doing business as Vulcun—Consent Agreement; File No. 152–3159” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue

<sup>1</sup> In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c), 16 CFR 4.9(c).

NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 8, 2016. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

#### Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing consent order from General Workings Inc., Ali Moiz, and Murtaza Hussain (collectively "Respondents").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Respondent General Workings Inc., also doing business as Vulcun, is a Delaware corporation with its principal office or place of business in San Francisco, California. Respondents Ali Moiz and Murtaza Hussain are founders and officers of Vulcun. The Commission's complaint alleges that Respondents installed software, including Chrome browser extensions and mobile apps, onto users' desktops and mobile devices without adequately disclosing to users that the software would be installed. Google offers a web browser, Chrome, as a free download for desktop computer and mobile operating systems. The desktop-computer version of Chrome allows users to install "browser extensions," which are software programs that can modify and extend Chrome's functionality. Respondents' conduct had two parts. First, Respondents acquired a popular

browser-based game called *Running Fred* and replaced it entirely with their own software program, called *Weekly Android Apps*, on users' desktops. Users of *Running Fred* were not informed that the game had been replaced. Second, *Weekly Android Apps* contained code that would install, again without adequate disclosure to users, apps on user's mobile devices.

The proposed consent order contains provisions designed to prevent Respondents from engaging in similar acts or practices in the future.

Part I of the proposed order prohibits Respondents from misrepresenting certain aspects of any browser extension, Web site, web service, mobile app, or any other product or service they offer or operate. Specifically, Respondents are prohibited from misrepresenting: The existence of certain endorsements; the nature of their products and services; the installation, download, usage, review, or endorsement statistics associated with their products and services; the press coverage of their products and services; their information collection, usage, disclosure, and sharing practices; the extent of user control over information about individual consumers; the purpose of collecting, using, disclosing, or sharing information about individual consumers; and the extent to which Respondents protect the privacy, confidentiality, security, and integrity of information collected from or about consumers.

Part II of the proposed order requires Respondents to clearly and conspicuously disclose the types of information their products and services will access, how that information will be used, and the nature of any changes to Respondents' products and services. The order also requires Respondents to display built-in permission notices or approvals, and to obtain consumer's express affirmative consent prior to installation or material changes of any product or service.

Part III of the proposed order requires Respondents to delete certain information collected about individual consumers within ten days of entry of the order.

Part IV of the proposed order contains recordkeeping requirements for advertisements and substantiation relevant to representations covered by Parts I through III of the order.

Parts V, VI, VII, and VIII of the proposed order require Respondents to: Deliver a copy of the order to certain personnel who have responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure that might affect

compliance obligations under the order; notify the Commission of changes in the employment of Respondents Moiz and Hussain; and file compliance reports with the Commission.

Part IX of the proposed order provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the complaint or proposed order, or to modify the proposed order's terms in any way.

By direction of the Commission.

**Donald S. Clark,**

Secretary.

[FR Doc. 2016-02769 Filed 2-10-16; 8:45 am]

**BILLING CODE 6750-01-P**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000-0129; Docket 2016-0053; Sequence 8]

#### Information Collection; Cost Accounting Standards Administration

**AGENCY:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for comments regarding an extension to an existing OMB clearance.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning cost accounting standards administration.

**DATES:** Submit comments on or before April 11, 2016.

**ADDRESSES:** Submit comments identified by Information Collection 9000-0129, Cost Accounting Standards Administration by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link "Submit a Comment" that corresponds with "Information Collection 9000-0129, Cost Accounting Standards Administration". Follow the

instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “Information Collection 9000–0129, Cost Accounting Standards Administration” on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0129, Cost Accounting Standards Administration.

*Instructions:* Please submit comments only and cite Information Collection 9000–0129, Cost Accounting Standards Administration, in all correspondence related to this collection. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Kathlyn Hopkins, Procurement Analyst, Office of Acquisition Policy, GSA, 202–969–7226, or email [kathlyn.hopkins@gsa.gov](mailto:kathlyn.hopkins@gsa.gov).

#### SUPPLEMENTARY INFORMATION:

##### A. Purpose

FAR Subpart 30.6 and the provision at 52.230–6 include pertinent rules and regulations related to the Cost Accounting Standards (CAS) along with necessary administrative policies and procedures. These require companies performing CAS-covered contracts to submit notifications and descriptions of certain cost accounting practice changes, including revisions to their Disclosure Statements, if applicable.

Specifically, FAR 52.230–6 requires contractors to submit to the cognizant Contracting Officer a description of any cost accounting practice change, the total potential impact of the change on contracts containing a CAS provision, a general dollar magnitude or detailed cost-impact proposal of the change which identifies the potential shift of costs among CAS-covered contracts by contract type (*i.e.*, firm fixed-price, incentive cost-plus-fixed-fee, etc.) and other contractor business activity.

##### B. Annual Reporting Burden

*Number of Respondents:* 840.  
*Responses per Respondent:* 2.27.  
*Total Responses:* 1907.  
*Average Burden Hours per Response:* 175.

*Total Burden Hours:* 333,690.

##### C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulation (FAR), and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755.

Please cite OMB Control Number 9000–0129, Cost Accounting Standards Administration, in all correspondence.

Dated: February 8, 2016.

**Lorin S. Curit,**

*Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2016–02812 Filed 2–10–16; 8:45 am]

**BILLING CODE 6820–EP–P**

#### GOVERNMENT ACCOUNTABILITY OFFICE

##### Request for Medicare Payment Advisory Commission Nominations

In notice document 2016–01264 beginning on page 4911 in the issue of Thursday, January 28, 2016, make the following correction:

1. On page 4911, in the third column, in the **ADDRESSES** section, “*MedPACappointments@qao.gov.*” should read “*MedPACappointments@gao.gov.*”

[FR Doc. C1–2016–01264 Filed 2–10–16; 8:45 am]

**BILLING CODE 1501–01–D**

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Centers for Disease Control and Prevention

##### 30-Day–16–15BHD]

##### Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted 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. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) 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; (b) Evaluate the accuracy of the agencies 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; (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; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to [omb@cdc.gov](mailto:omb@cdc.gov). Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments received within 30 days of this notice.

##### Proposed Project

Congenital Heart Survey To Recognize Outcomes, Needs, and Well-being (CHSTRONG)—New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Congenital heart defects (CHDs) are the most common type of structural birth defects, affecting approximately 1 in 110 live-born children. According to previously published data, prior to the 1970s, many CHDs were considered fatal during infancy or childhood, but with tremendous advances in pediatric cardiology and cardiac surgery, at least 85% of patients now survive to adulthood. There are approximately 1.5 million adults with CHD in the United States today, and adults with CHD now outnumber children. With vast declines in mortality from pediatric heart disease over the past 30 years, it is vital to

assess long term outcomes and quality of life issues.

For this one-year project, we will use data from U.S. state birth defect surveillance systems to identify a population-based sample of individuals 18 to 45 years of age born with CHD. We will then use state databases and online search engines to find current addresses for those individuals and mail surveys to them inquiring about their barriers to health care, quality of life, social and educational outcomes, and transition of care from childhood to adulthood. The information collected from this population-based survey will be used to inform current knowledge, allocate

resources, develop services, and, ultimately, improve long-term health of adults born with CHD.

We estimate sending an introductory letter and survey to 6,675 individuals with CHD in the birth defects surveillance systems, and receiving completed surveys from 4,672 individuals (70%). The survey takes approximately 20 minutes to complete. The Contact Information Form will be provided in English and Spanish and should take approximately 2 minutes to read and complete. It is estimated that the total burden hours are 2,254.

There are no costs to participants other than their time.

**ESTIMATED ANNUALIZED BURDEN HOURS**

Type of respondents	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)
Individuals aged 18–45 years who were born with a congenital heart defect.	Survey questionnaire .....	6,675	1	20/60
English-speaking mothers of respondents .....	Contact Information Form—English .....	757	1	2/60
Spanish-speaking mothers of respondents .....	Contact Information Form—Spanish .....	133	1	2/60

**Leroy A. Richardson,**

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–02765 Filed 2–10–16; 8:45 am]

**BILLING CODE 4163–18–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

[CMS–1660–N]

**Medicare Program: Notice of Seven Membership Appointments to the Advisory Panel on Hospital Outpatient Payment**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** This notice announces seven new membership appointments to the Advisory Panel on Hospital Outpatient Payment (the Panel). The seven new appointments to the Panel will each serve a 4-year period. The new members have terms that begin in Calendar Year (CY) 2016 and end in CY 2020. The purpose of the Panel is to advise the Secretary of the Department of Health and Human Services and the Administrator of the Centers for

Medicare & Medicaid Services concerning the clinical integrity of the Ambulatory Payment Classification groups and their relative payment weights. The Panel also addresses and makes recommendations regarding supervision of hospital outpatient therapeutic services. The advice provided by the Panel will be considered as we prepare the annual updates for the hospital outpatient prospective payment system.

The Secretary rechartered the Panel in 2014 for a 2-year period effective through November 6, 2016.

**DATES:** March 14, 2016.

**ADDRESSES:** *Web site:* For additional information on the Panel meeting dates, agenda topics, copy of the charter, and updates to the Panel’s activities, we refer readers to our Web site at the following address: <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonAmbulatoryPaymentClassificationGroups.html>.

**FOR FURTHER INFORMATION CONTACT:** Designated Federal Official (DFO): Carol Schwartz, DFO, 7500 Security Boulevard, Mail Stop: C4–04–25, Woodlawn, MD 21244–1850. Phone: (410) 786–3985. Email: [APCPanel@cms.hhs.gov](mailto:APCPanel@cms.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Secretary of the Department of Health and Human Services (the

Secretary) is required by section 1833(t)(9)(A) of the Social Security Act (the Act) (42 U.S.C. 1395l(t)(9)(A)) and section 222 of the Public Health Service Act (PHS Act) (42 U.S.C. 217a) to consult with an expert outside advisory panel on the clinical integrity of the Ambulatory Payment Classification groups and relative payment weights, which are major elements of the Medicare Hospital Outpatient Prospective Payment System (OPPS), and the appropriate supervision level for hospital outpatient therapeutic services. The Panel is governed by the provisions of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory panels. The Panel Charter provides that the Panel shall meet up to 3 times annually. We consider the technical advice provided by the Panel as we prepare the proposed and final rules to update the OPPS for the following calendar year (CY).

The Panel shall consist of a chair and up to 15 members who are full-time employees of hospitals, hospital systems, or other Medicare providers that are subject to the OPPS. The Secretary or a designee selects the Panel membership based upon either self-nominations or nominations submitted by Medicare providers and other interested organizations of candidates determined to have the required

expertise. For supervision deliberations, the Panel shall also include members that represent the interests of Critical Access Hospitals (CAHs), who advice Centers for Medicare & Medicaid Services (CMS) only regarding the level of supervision for hospital outpatient therapeutic services.

New appointments are made in a manner that ensures a balanced membership under the FACA guidelines.

The Panel presently consists of the following members and a Chair.

(**Note:** The asterisk [\*] indicates the Panel members whose terms end during CY 2016, along with the month that the term ends.)

- E. L. Hambrick, M.D., J.D., Chair, a CMS Medical Officer.
- Karen Borman, M.D., F.A.C.S.\*(January 2016)
- Dawn L. Francis, M.D., M.H.S.
- Ruth Lande
- Jim Nelson, M.B.A., C.P.A., F.H.F.M.A.\*(January 2016)
- Leah Osbahr, M.A., M.P.H.\*(January 2016)
- Jacqueline Phillips\*(February 2016)
- Johnathan Pregler, M.D.
- Traci Rabine\*(January 2016)
- Michael Rabovsky, M.D.
- Wendy Resnick, F.H.F.M.A.
- Michael K. Schroyer, R.N.
- Marianna V. Spanki-Varelas M.D., Ph.D., M.B.A.\*(February 2016)
- Norman Thomson, III, M.D.
- Gale Walker\*(January 2016)
- Kris Zimmer

## II. Provisions of the Notice

We published a notice in the **Federal Register** on August 28, 2015, entitled "Medicare Program; Solicitation of Nominations to the Advisory Panel on Hospital Outpatient Payment (80 FR 52294). The notice solicited nominations for up to seven new members to fill the vacancies on the Panel beginning in CY 2016. As a result of that notice, we are announcing seven new members to the Panel. The Panel consists of a Chair and 15 members. The seven new Panel member appointments are for 4-year terms beginning March 1, 2016 and will assure that we continue to have a Chair and 15 members available to attend our scheduled meeting.

### *New Appointments to the Panel*

New members of the Panel will have terms beginning on March 1, 2016 and continuing through February 28, 2020 as follows:

- Shelly Dunham, R.N.
- Kenneth Michael Flowe, M.D., M.B.A.
- Erika Hardy, R.H.I.A.

- Karen A. Lambert
- Scott Manaker, M.D., Ph.D.
- Agatha L. Nolen, Ph.D., D.Ph.
- Richard Nordahl, M.B.A.

## III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: *February 2, 2016.*

**Andrew M. Slavitt,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2016-02798 Filed 2-10-16; 8:45 am]

**BILLING CODE 4120-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

#### Office of the Assistant Secretary, Office of the Deputy Assistant Secretary for Early Childhood Development, Office of Head Start, Office of Child Care; Statement of Organization, Functions, and Delegations of Authority

**AGENCY:** Administration for Children and Families, HHS.

**ACTION:** Notice.

**SUMMARY:** Statement of organization, functions, and delegations of authority. The Administration for Children and Families (ACF) has reorganized the Office of the Deputy Assistant Secretary for Early Childhood Development (ODAS-ECD) within the Office of the Assistant Secretary (OAS), the Office of Head Start (OHS), and the Office of Child Care (OCC). This reorganization will transfer reporting authority of OCC and OHS in their entirety from OAS to the ODAS-ECD. This reorganization creates within ODAS-ECD the Division of Policy and Budget; the Division of Comprehensive Services and Training and Technical Assistance; the Division of Research, Analysis, and Communications; and the Division of Interagency and Special Initiatives. Additionally, this reorganization will realign and combine several functions currently separately managed within OHS, OCC, and ODAS-ECD.

The ODAS-ECD reviewed the programmatic and administrative similarities and differences between

OHS and OCC and is proposing a new organizational structure that will not only retain the autonomy of the Head Start and Child Care programs and retain the best parts of how they provide services, but will also demonstrate a clear message to the field about the alignment of the Head Start and Child Care program offices, the unified focus of ensuring children receive quality services regardless of their program option, and a common message about the quality and expectations for services to children and families.

Internally, the proposed reorganization will generate a more integrated alignment of standards through Head Start and Child Care programs, the development of a unified training and technical assistance system, consistent access to resources at the ACF level for both programs, and a shared use of research resources and agenda. Additionally, the proposed reorganization will result in greater collaborative efforts among both offices thereby leveraging best practices across both offices (monitoring, program outreach, content development, etc.). Moreover, both staffs will gain a broader understanding of the early childhood field and the inter-dependencies between programs.

Within OHS, this reorganization eliminates the Education and Comprehensive Services Division and moves some of the functions to the newly created Division of Comprehensive Services and Training and Technical Assistance and the Division of Research, Analysis, and Communications within ODAS-ECD. It eliminates the Policy and Planning Division in OHS and moves some of those functions to the newly created Division of Policy and Budget within ODAS-ECD and to a new OHS Division of Planning, Oversight, and Policy. It eliminates the State Initiatives Division in OHS and moves some of those functions to each of the newly created Division of Interagency and Special Initiatives and the Division of Comprehensive Services and Training and Technical Assistance within ODAS-ECD. It also deletes the Grants and Contracts Division in OHS and moves the functions to two newly created and separate Divisions within OHS—the Division of Contracts and the Division of Grants. It combines the previous OHS Quality Assurance Division and OHS Policy and Planning Division to create the OHS Division of Planning, Oversight, and Policy. The OHS Program Operations Division remains the OHS Division of Program Operations.

Within OCC, this reorganization eliminates the Division of Technical Assistance and moves most of its functions to the newly created Division of Comprehensive Services and Training and Technical Assistance within ODAS–ECD. It also eliminates the Division of Policy in OCC and moves some of those functions to the newly created Division of Policy and Budget within ODAS–ECD and to the new OCC Division of Planning, Data, and Policy. Within OCC, it creates a new Division—the Division of Oversight and Accountability. The OCC Division of Program Operations remains the Division of Program Operations.

The goal of this reorganization is to more closely align early childhood programs, policies, and support functions in order to improve collaboration between OHS, OCC, and other federal agencies as appropriate. This will leverage best practices, generating more integrated and aligned standards through Head Start and Child Care, and improving access to ACF resources for OHS and OCC grantees while fully supporting the fundamental responsibility of operating Head Start and the Child Care and Development Fund to ensure the authorized purposes of each program and its funding are fully realized.

This notice amends Part K of the Statement of Organization Functions, and Delegations of Authority of the Department of Health and Human Services, Administration for Children and Families: Chapter K, Administration for Children and Families, as last amended 77 FR 23250–23260, April 18, 2012; Chapter KA, Office of the Assistant Secretary, as last amended 80 FR 33269–33270, June 11, 2015, and 75 FR 60471–60473, September 30, 2010; Chapter KU, Office of Head Start (OHS), as last amended 75 FR 81280–81282, December 27, 2010; Chapter KV, Office of Child Care (OCC) as last amended 75 FR 60471–60473, September 30, 2010.

I. Amend Chapter K, Administration for Children and Families, as follows:

A. Delete Section K.10, Administration for Children and Families, in its entirety and replace with the following:

K.10 Organization. The Administration for Children and Families (ACF) is a principal operating division of the Department of Health and Human Services (HHS). The Administration is headed by the Assistant Secretary for Children and Families, who reports directly to the Secretary. The Assistant Secretary also serves as the Director of Child Support

Enforcement. In addition to the Assistant Secretary, the Administration consists of the Principal Deputy Assistant Secretary, the Deputy Assistant Secretary for Administration, the Deputy Assistant Secretary for Policy, the Deputy Assistant Secretary for External Affairs, the Deputy Assistant Secretary for Early Childhood Development, and Staff and Program Offices. ACF is organized as follows:

Office of the Assistant Secretary for Children and Families (KA)  
Administration on Children, Youth and Families (KB)  
Administration for Native Americans (KE)  
Office of Child Support Enforcement (KF)  
Office of Community Services (KG)  
Office of Family Assistance (KH)  
Office of Regional Operations (KJ)  
Office of Planning, Research and Evaluation (KM)  
Office of Public Affairs (KN)  
Office of the Deputy Assistant Secretary for Administration (KP)  
Office of Refugee Resettlement (KR)  
Office of Legislative Affairs and Budget (KT)

Office of Head Start (KU)  
Office of Child Care (KV)  
II. Delete KA.20 Functions, Office of the Deputy Assistant Secretary for Early Childhood Development, paragraph E, in its entirety and replace with the following:

KAH.00 Mission. The Office of the Deputy Assistant Secretary for Early Childhood Development (ODAS–ECD) advises the Secretary, through the Assistant Secretary for Children and Families, in the formulation of policy positions, budget, and implementation strategies on matters related to early childhood programs and services under the purview of ACF. Additionally, ECD serves as the representative on behalf of the Assistant Secretary to the Department and on behalf of the Department to other agencies across the government on matters involving early childhood development.

KAH.10 Organization. ODAS–ECD is headed by the Deputy Assistant Secretary who reports directly to the Assistant Secretary for Children and Families. ODAS–ECD is organized as follows:

Office of the Deputy Assistant Secretary for Early Childhood Development (KAH)  
Division of Policy and Budget (KAH1)  
Division of Comprehensive Services and Training and Technical Assistance (KAH2)  
Division of Research, Analysis, and Communications (KAH3)

Division of Interagency and Special Initiatives (KAH4)

KAH.20 Functions. A. Office of the Deputy Assistant Secretary (KAH): The Office of the Deputy Assistant Secretary is responsible for: (1) Providing leadership, coordination, planning, and oversight of early childhood systems across Head Start, child care, and other relevant child- and family-serving governmental and non-governmental organizations at all levels; (2) promoting high-quality and accountable early childhood programs for all children; (3) coordinating the development of policy, legislative, regulatory, and budgetary proposals across the Office of Child Care (OCC) and the Office of Head Start (OHS); and (4) conducting outreach and maintaining relationships with and responding to inquiries from governmental and non-governmental organizations.

The Associate Deputy Assistant Secretary for Early Childhood Development (ADAS) reports to and assists the Deputy Assistant Secretary in carrying out the responsibilities of ECD and serves as a liaison to the Directors of OCC and OHS. The ADAS performs the duties of the Deputy Assistant Secretary when absent. The ADAS also supervises all Division Directors (KAH1–KAH4).

B. Division of Policy and Budget (KAH1): The Division of Policy and Budget is responsible for: (1) Advising the Deputy Assistant Secretary and the Directors of OCC and OHS on matters relating to policy, regulation development, legislative issues, and budget formulation to better align early childhood programs; (2) coordination and oversight of policies, regulations, program instructions, information memoranda, and other policy documents governing early childhood programs; (3) coordination of strategic plans and long-term goals to more effectively and efficiently protect and promote early childhood development; (4) overall budget coordination, development, presentation, and activities consistent with ACF and HHS vision and goals; (5) development of cross-cutting policy and strategic problem solving in early childhood settings; (6) reviewing, analyzing, and providing recommendations on budgetary and policy impacts of congressional or administrative proposals.

C. Division of Comprehensive Services and Training and Technical Assistance (KAH2): The Division of Comprehensive Services and Training and Technical Assistance is responsible for: (1) Supporting local, state, territory, and tribal grantees, and Regional Offices

in providing or promoting the coordination of high-quality, comprehensive, early childhood programs that are responsive to and supportive of early childhood development; and promoting family engagement and facilitating linkages to health, nutrition, dental, and mental health services, as well as promoting strong program management and fiscal systems, to build a diversified system across all early childhood settings that promotes school readiness and school-age success; (2) providing technical assistance to local agencies (in particular Head Start and Early Head Start grantees), states, territories, tribes, and Regional Offices concerning the administration of early childhood programs and school-age care programs (in conformance with applicable requirements); (3) supporting the implementation of training and technical assistance strategies to build capacity for program leaders, teachers, and other staff to implement evidence-based practices designed to increase the knowledge, skills, and competencies of the early childhood workforce, as well as their professional recognition and compensation; (4) providing leadership, coordination, and oversight of technical assistance grants, cooperative agreements and contracts, and publications to identify and promote replication of effective practices with children and families; (5) working with local, state, territorial, and tribal agencies, and Regional Offices to assess technical assistance needs and forging partnerships with public and private organizations to develop tailored approaches to address needs; (6) providing content expertise and leadership to the field in all comprehensive service areas, including, but not limited to, early childhood education; disability services; dual language learners; school age services; family and community engagement; management and fiscal operations; and health, wellness, safety and licensing; (7) supporting all content areas with a focus on relevant and necessary professional development; and (8) coordinating with the other divisions in ECD, OHS, and OCC on content related to monitoring, interagency agreements, policy, the Web site, and departmental responses to departmental inquiries.

D. Division of Research, Analysis, and Communications (KAH3): The Division of Research, Analysis, and Communications is responsible for: (1) Identifying and developing areas for research, demonstration, or developmental activities designed to improve the quality and level of services

provided to and by early childhood in conjunction with the Offices of Child Care and Head Start and the Office of Planning, Research and Evaluation; (2) conducting analyses and special studies of early childhood reports and documentation, and identifying future implications; (3) developing, directing, and coordinating communication and engagement with internal and external stakeholders; and (4) coordinating efforts to plan, evaluate, and improve external and internal communication and messaging in response to or anticipation of programmatic, policy, or research developments with implications affecting the early childhood landscape.

E. Division of Interagency and Special Initiatives (KAH4): The Division of Interagency and Special Initiatives is responsible for: (1) Fostering coordination at the federal, regional, state, and local levels to develop a continuum of comprehensive early childhood services, promoting family engagement and facilitating linkages to health, nutrition, dental, and mental health services from birth to age 8, and promoting connections and transitions with services for expectant families and school-age care programs serving children up to age 13; (2) formulating strategic plans and long-term goals to encourage development of this continuum of services and innovative programming; (3) ensuring coordination of policy and budget activities between federal agencies and within ACF as appropriate; (4) designing, developing, and planning with internal and external organizations regarding early childhood programs; (5) serving as the focal point to provide direction, coordination, and oversight of special initiatives; (6) developing and managing projects, and tracking internal and external agency initiatives; (7) serving as the liaison with other government agencies for policy and procedure development, coordination, and execution of jointly administered programs and initiatives involving early childhood, afterschool, and summer programs.

III. Delete Chapter KU, Office of Head Start, in its entirety and replace with the following:

KU.00 Mission. The Office of Head Start (OHS) has primary responsibility for the overall direction, policy and budget development and management, and oversight of Head Start operations authorized under the Head Start Act. OHS advises the Deputy Assistant Secretary for Early Childhood Development on issues regarding the Head Start program (including Early Head Start). OHS identifies legislative and budgetary requirements; identifies

areas for research, demonstration, and developmental activities; presents operational planning objectives and initiatives relating to Head Start and Early Head Start to the Deputy Assistant Secretary for Early Childhood Development; and oversees the progress of approved activities. OHS provides leadership and coordination for the activities of the Head Start program in the ACF Central Office, including the Head Start Regional Program Units. OHS represents Head Start in inter-agency activities with other federal and non-federal organizations.

KU.10 Organization. OHS is headed by a Director who reports directly to the Deputy Assistant Secretary for Early Childhood Development. OHS is organized as follows:

Office of the Director (KUA)  
 Division of Program Operations (KUB)  
 Head Start Regional Program Units (KUBDI–XII)  
 Division of Planning, Oversight, and Policy (KUE)  
 Division of Grants (KUF)  
 Division of Contracts (KUG)  
 Division of Budget Execution (KUH)

KU.20 Functions. A. Office of the Director (KUA): The Office of the Director (OD) serves as the principal advisor to the Deputy Assistant Secretary for Early Childhood Development on the administration of discretionary grant programs providing Head Start and Early Head Start services. The OD has overall responsibility for policy and budget development specific to Head Start, as well as for the management and oversight of the Head Start program and supervision of OHS Division Directors. The OD is responsible for: (1) Providing public information services by responding to inquiries from the public and private sectors; (2) serving as the central point for operational and long-range planning needs for OHS; (3) conducting outreach and maintaining relationships with Department officials; other federal departments; state, tribal, and local officials; and private organizations and individuals; (4) coordinating and planning Head Start and Early Head Start activities to maximize program effectiveness; and (5) managing large-scale or high-profile activities involving multiple OHS areas of responsibility. The Deputy Director reports to and assists the Director in carrying out the responsibilities of OHS and performs the duties of the Director when absent.

The Administration Team is responsible for providing administrative and human resource support to OHS in: (1) Planning and coordinating the

provision of new employee orientation, staff development, and training; (2) personnel administration, including position descriptions, job analysis, recruitment and selection, employee and labor relations, work force analysis, and PMAP coordination; (3) timekeeping, oversight of travel, transhare, and credit card accounts/profiles; (4) managing controlled space, facilities, and equipment; and (5) liaison for work/life balance, staff wellness, and employee recognition.

B. Division of Program Operations (KUB): The Division of Program Operations is responsible for: (1) Advising the Director on all strategic and operational activities related to the design and implementation of Head Start and Early Head Start programs in the 12 regions; (2) providing oversight, direction, and guidance to the Head Start Regional Program Units; (3) providing ongoing management of national Head Start program operations inclusive of grantee-level Designation Renewal System determinations, funding, ongoing oversight and monitoring, and training and technical assistance; (4) managing Head Start program-level data systems; and (5) serving as OHS liaison to the Offices of Grants Management and Information Systems.

C. Division of Planning, Oversight, and Policy (KUE): The Division of Planning, Oversight, and Policy is responsible for: (1) Overseeing the development and issuance of policy, regulations, program instructions, information memoranda, and other policy documents governing Head Start and Early Head Start; and legislative issues and budget formulation in coordination with ODAS–ECD and consistent with ACF early childhood priorities; (2) overseeing all major planning and implementation activities to determine Head Start and Early Head Start programs' compliance, quality, and performance with all applicable requirements and regulations; (3) conducting data analyses on monitoring outcomes to inform training and technical assistance efforts, and policy guidance and development; (4) serving as the liaison to the Office of Inspector General (OIG) for targeted OIG audits; (5) managing the OHS Complaint Line; and (6) assisting in the preparation of Congressional reports and briefing materials for hearings and testimony.

D. Division of Grants (KUF): The Division of Grants is responsible for: (1) Overseeing matters related to competitive discretionary and cooperative agreement funding opportunities; (2) managing discretionary grant competition,

including Designation Renewal, paneling, and awarding; (3) serving as the liaison to the Office of Administration, Divisions of Grants Management, and Division of Grants Policy for all matters related to competitive funding; and (4) oversight and management of interim grantees.

E. Division of Contracts (KUG): The Division of Contracts is responsible for: (1) Providing ongoing oversight of national Head Start and Early Head Start contracts; (2) providing expert technical assistance and guidance to OHS contract officer representatives on all matters related to procurement and acquisition; (3) providing ongoing monitoring of all OHS contracts ensuring internal controls are adequate; and (4) serving as liaison to the Contracts Offices.

F. Division of Budget Execution (KUH): The Division of Budget Execution is responsible for: (1) Identifying budgetary needs and working with divisions within ECD to ensure adequate funding; (2) providing oversight, execution, and ongoing management of all federal Head Start program and administrative funds; (3) providing guidance and advice on the execution of the Head Start and Early Head Start budgets; (4) establishing and implementing procedures for all phases of budget execution; (5) completing detailed reviews and analyses of grantees financial operating plans ensuring budgetary resources are used in a manner consistent with the OHS mission and are not over spent or obligated beyond appropriate limits; (6) apportioning funds appropriated by Congress; (7) preparing all required financial reports necessary and entry of all past-year data requirements; and (8) preparation of historical budget-related data, congressional inquiries, and data for budget formulation and hearings.

G. Head Start Regional Program Units (KUBDI–XII): The Head Start Regional Program Units are each headed by a Regional Program Manager (RPM) who report to the Director of the Division of Program Operations. Head Start Regional Program Units are responsible for: (1) Administering funding, ongoing oversight and monitoring, and training and technical assistance to the grantee agencies that provide services to Head Start and Early Head Start children and families; (2) providing ongoing management of Regional Head Start program operations, including State Collaboration grants; (3) serving as OHS Liaison within the Region to the Regional Office of Child Care and the Office of Grants Management; and (4) advising the Director on Regional issues impacting the Head Start program.

Regions I through X are located in the ACF geographical regions. Region XI, American Indian/Alaska Native Head Start, located at the OHS central office, administers grants for Indian Head Start grantees. Region XII, Migrant and Seasonal Head Start, located at the OHS central office, administers grants for agencies that serve the children and families of migrant and seasonal farm workers.

IV. Delete Chapter KV, Office of Child Care, in its entirety and replace with the following:

KV.00 Mission. The Office of Child Care (OCC) advises the Deputy Assistant Secretary for Early Childhood Development on matters relating to services provided in child care centers, homes, and school-age care programs, focusing on the twin goals of supporting family success and child development by improving access to high-quality child care to promote healthy development, school readiness, and school success for children. OCC identifies legislative and budgetary requirements; identifies areas for research, demonstration, and developmental activities; presents operational planning objectives and initiatives relating to child care to the Deputy Assistant Secretary for Early Childhood Development; and oversees the progress of approved activities. OCC has primary responsibility for the overall direction, policy and budget development and management, and oversight of Child Care program operations authorized under the Child Care and Development Block Grant (CCDBG) and section 418 of the Social Security Act. OCC supports state, tribal, and territorial grantees' efforts to provide financial assistance to low-income families so children can have access to high-quality child care so parents can engage in work, education, and other activities to support their families and be successful. OCC develops comprehensive, cross-sector systems of quality improvement so Child Care programs can achieve higher levels of quality training and education for the child care work force and programs. OCC provides leadership and coordination for child care issues within ACF, HHS, and with relevant federal, state, local, and tribal governmental and non-governmental organizations.

KV.10 Organization. OCC is headed by a Director who reports to the Deputy Assistant Secretary for Early Childhood Development. OCC is organized as follows:

Office of the Director (KVA)  
Division of Program Operations (KVA2)  
Division of Oversight and  
Accountability (KVA3)

Division of Planning, Data, and Policy (KVA4)

Child Care Regional Program Units (KVADI-X)

KV.20 Functions. A. Office of the Director (KVA): The Office of the Director (OD) serves as the principal advisor to the Deputy Assistant Secretary for Early Childhood Development on the administration of Child Care programs. The OD is responsible for the overall management, oversight, and policy and budget development specific to the Child Care program, and for supervision of the OCC Division Directors. The OD is also responsible for: (1) Providing public information services by responding to inquiries from the public and private sectors; (2) serving as the central point for operational and long-range planning needs for OCC; (3) conducting outreach and maintaining relationships with Department officials; other federal departments; state, tribal, and local officials; and private organizations and individuals; (4) coordinating and planning Child Care activities to maximize program effectiveness; and (5) managing large-scale or high-profile activities involving multiple OCC areas of responsibility. The Deputy Director assists the Director in carrying out the duties of the Office of the Director (OD) and performs the duties of the Director when absent.

Within the Office of the Director, Management Operation Staff is responsible for: (1) Managing the execution of the budgets for OCC-operated programs and for federal administration of the OCC program; (2) serving as the central control point for operational and long-range planning of the needs of OCC; (3) planning for and coordinating the provision of staff development and training; (4) providing support for OCC's personnel administration, including staffing, employee and labor relations, performance management, and employee recognition; (5) managing procurement planning and providing technical assistance regarding procurement; (6) managing OCC-controlled space, facilities, and equipment, including providing for health and safety; (7) planning for, acquiring, distributing, and controlling OCC supplies; (8) functioning as Executive Secretariat for OCC, including managing correspondence, correspondence systems, electronic mail requests, and mail and messenger services; (9) overseeing processes related to approval and payment of travel; and (10) maintaining fax,

computer, and computer peripheral equipment.

B. Division of Program Operations (KVA2): The Division of Program Operations is responsible for: (1) Developing and managing the process to solicit, collect, and document Child Care Development Fund (CCDF) plans of states, territories, and tribes to comply with federal CCDBG law and regulation on a triennial basis; (2) regional liaison activities, including communicating on a regular basis with regional Program Unit staff; oversight of the review and approval process for the Triennial CCDF Plans of state, territories, and tribes; and responding to questions on policy and other issues by consulting or referring to other staff; (3) collecting and maintaining information related to grantee program plans and benchmarks for achieving full implementation and compliance with federal law and regulation; (4) anticipating, identifying, and providing technical assistance for grantees to support the CCDF Program; (5) analyzing and describing grantee CCDF Plans, trends, policy and program challenges, and opportunities of major significance to inform the Director, other ACF and HHS officials, grantees, and the general public; (6) tracking and supporting special initiatives; (7) establishing partnerships with public and private entities to improve access to quality child care; (8) coordinating program activities with other government and non-governmental agencies; and (9) managing and overseeing cooperative ventures with other entities.

C. Division of Oversight and Accountability (KVA3): The Division of Oversight and Accountability is responsible for: (1) Monitoring grantees for compliance in the implementation of CCDF plans, and for programmatic and fiscal compliance with policies, regulations, and other guidance authorized under the CCDBG and section 418 of the Social Security Act; (2) planning, directing, and coordinating a comprehensive fiscal monitoring program encompassing budget planning and execution, automated financial systems, fiscal accounting, internal and external audit reporting requirements, improper payment reporting methodology, and corrective actions; (3) coordinating and targeting on-site visits to grantees to provide performance oversight and promote continuous program improvement; (4) overseeing and processing grantee reports to ensure grantee accountability; (5) serving as the liaison to the Office of Inspector General for OIG audits and Government Accountability Office (GAO) studies;

and (6) identifying and developing ongoing quality improvement strategies to address challenges grantees have in the successful implementation of their programs, which includes coordinating with the Regional Program Units and the Division of Training and Technical Assistance within ODAS-ECD.

D. Division of Planning, Data, and Policy (KVA4): The Division of Planning, Data, and Policy is responsible for: (1) Advising the Office of the Director and overseeing development and issuance of policies, regulations, program instructions, information memoranda, and other policy documents; legislative issues; and budget formulation governing the CCDF program in coordination with ODAS-ECD and consistent with ACF early childhood priorities; (2) analyzing and describing grantee data trends to inform policy guidance and development, the Director, other ACF and HHS officials, grantees, and the general public; (3) overseeing procedures for and collection of state, territory, and tribal grantee administrative and expenditure data and reports as required by the CCDBG; (4) reviewing data to determine accuracy in reporting and to work with grantees to identify challenges to accurate and timely data reporting; (5) developing and tracking performance measures to ensure the program meets established goals; (6) conducting data analysis to inform training and technical assistance efforts and policy guidance and development; and (7) assisting in the preparation of Congressional reports and briefing materials for hearings and testimony.

E. Child Care Regional Program Units (KVADI-X): The OCC Regional Program Units are headed by an OCC Regional Program Manager who reports to the Deputy Director, OCC. The Regional Program Manager, through subordinate regional staff and in collaboration with program components, is responsible for: (1) Providing program and technical administration of OCC block and discretionary programs; (2) collaborating with the OCC Central Office, states, and other grantees on all significant policy matters; (3) providing technical assistance to entities responsible for administering OCC programs to resolve identified problems; (4) ensuring that appropriate procedures and practices are adopted; (5) working with appropriate state, tribal, and local officials to develop and implement outcome-based performance goals that further the OCC mission of supporting children and families by increasing access to affordable, high-quality child care; and (6) monitoring the programs to

ensure their efficiency and effectiveness, and ensuring that these entities conform to federal laws, regulations, policies, and procedures governing the programs.

V. *Continuation of Policy.* Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to organizational components affected by this notice within ACF, heretofore issued and in effect on this date of this reorganization are continued in full force and effect.

VI. *Delegation of Authority.* All delegations and re-delegations of authority made to officials and employees of affected organizational components will continue in them, or their successors, pending further re-delegations, provided they are consistent with this reorganization.

VII. *Funds, Personnel, and Equipment.* Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment, supplies, and other resources.

**FOR FURTHER INFORMATION CONTACT:** Linda K. Smith, Office of the Deputy Assistant Secretary for Early Childhood Development, 901 D Street SW., Washington, DC 20447, (202) 401-9200. This reorganization will be effective upon date of signature.

Dated: February 5, 2016.

**Sylvia M. Burwell,**  
Secretary.

[FR Doc. 2016-02784 Filed 2-10-16; 8:45 am]

**BILLING CODE 4184-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-N-0001]

#### Pharmacy Compounding Advisory Committee; Notice of Meeting

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

*Name of Committee:* Pharmacy Compounding Advisory Committee (PCAC).

*General Function of the Committee:* To provide advice on scientific, technical, and medical issues concerning drug compounding under

sections 503A and 503B (21 U.S.C. 353A and 353B) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), and, as required, any other product for which FDA has regulatory responsibility, and make appropriate recommendations to the Commissioner of Food and Drugs.

*Date and Time:* The meeting will be held on March 8, 2016, from 8:30 a.m. to 4:30 p.m., and on March 9, 2016, from 8:30 a.m. to 1 p.m.

*Location:* FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993-0002. Answers to commonly asked questions including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

**FOR FURTHER INFORMATION CONTACT:**

Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993-0002, 301-796-9001, FAX: 301-847-8533, email: [PCAC@fda.hhs.gov](mailto:PCAC@fda.hhs.gov), or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at <http://www.fda.gov/AdvisoryCommittees/default.htm> and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

**SUPPLEMENTARY INFORMATION:**

*Background:* Section 503A of the FD&C Act describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist or licensed physician to be exempt from the following three sections of the FD&C Act: (1) Section 501(a)(2)(B) (concerning current good manufacturing practice (CGMP)); (2) section 502(f)(1) (concerning the labeling of drugs with adequate directions for use); and (3) section 505 (21 U.S.C. 355) (concerning the approval of human drug products under new drug applications (NDAs) or abbreviated new drug applications (ANDAs)).

The Drug Quality and Security Act adds a new section, 503B, to the FD&C Act that creates a new category of "outsourcing facilities." Outsourcing facilities, as defined in section 503B of

the FD&C Act, are facilities that meet certain conditions described in section 503B, including registration with FDA as an outsourcing facility. If these conditions are satisfied, a drug product compounded for human use by or under the direct supervision of a licensed pharmacist in an outsourcing facility is exempt from three sections of the FD&C Act: (1) Section 502(f)(1), concerning the labeling of drugs with adequate directions for use; (2) section 505, concerning the approval of human drug products under NDAs or ANDAs; and (3) section 582, concerning the track and trace requirements in the Drug Supply Chain Security Act (Pub. L. 113-53). Outsourcing facilities are not exempt from CGMP requirements in section 501(a)(2)(B) of the FD&C Act.

One of the conditions that must be satisfied to qualify for the exemptions under section 503A of the FD&C Act is that a bulk drug substance (active pharmaceutical ingredient) used in a compounded drug product must meet one of the following criteria: (1) Complies with the standards of an applicable United States Pharmacopoeia (USP) or National Formulary monograph, if a monograph exists, and the USP chapter on pharmacy compounding; (2) if an applicable monograph does not exist, is a component of a drug approved by the Secretary of Health and Human Services (the Secretary); or (3) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, appears on a list (the "section 503A bulk drug substances list") developed by the Secretary through regulations issued by the Secretary (see section 503A(b)(1)(A)(i) of the FD&C Act).

Another condition that must be satisfied to qualify for the exemptions under section 503A of the FD&C Act is that the compounded drug product is not a drug product identified by the Secretary by regulation as a drug product that presents demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug product (see section 503A(b)(3)(A) of the FD&C Act).

A condition that must be satisfied to qualify for the exemptions in section 503B of the FD&C Act is that the compounded drug is not identified (directly or as part of a category of drugs) on a list published by the Secretary, by regulation after consulting with the Pharmacy Compounding Advisory Committee, of drugs or categories of drugs that present demonstrable difficulties for compounding that are reasonably likely

to lead to an adverse effect on the safety or effectiveness of the drug or category of drugs, taking into account the risks and benefits to patients, or the drug is compounded in accordance with all applicable conditions identified on the list as conditions that are necessary to prevent the drug or category of drugs from presenting such demonstrable difficulties (see section 503B(a)(6)(A) and (B) of the FD&C Act).

FDA will discuss with the committee drugs proposed for inclusion on the section 503A bulk drug substances list and on the demonstrably difficult to compound list under sections 503A and 503B of the FD&C Act.

*Agenda:* On March 8, 2016, the committee will discuss six bulk drug substances nominated for inclusion on the section 503A bulk drug substances list. FDA will discuss the following nominated bulk drug substances: Quinacrine hydrochloride, boswellia, aloe vera 200:1 freeze dried, D-ribose, chondroitin sulfate, and acetyl-L-carnitine. The nominators of these substances will be invited to make a short presentation supporting the nomination.

On March 9, 2016, the committee will discuss two categories of drug products nominated for the list of drug products that present demonstrable difficulties for compounding. These categories of drug products are metered dose inhalers and dry powder inhalers. The nominators who nominated the category of drugs or specific drug products in the category will be invited to make a short presentation supporting the nomination.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at <http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm>. Scroll down to the appropriate advisory committee meeting link.

*Procedure:* Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before March 1, 2016. Oral presentations from the public will be scheduled between approximately 11 a.m. to 11:15 a.m. and 3:15 p.m. to 3:30 p.m. on March 8, 2016, and between approximately 11:30 a.m. to 12 noon on March 9, 2016. Those individuals

interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 24, 2016. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 25, 2016.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Cindy Hong at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at <http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm> for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: February 8, 2016.

**Jill Hartzler Warner,**

*Associate Commissioner for Special Medical Programs.*

[FR Doc. 2016-02786 Filed 2-8-16; 4:15 pm]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose

confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; Career Award and Conference Grant Review (2016/05).

*Date:* March 18, 2016.

*Time:* 9:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, Suite 920, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Mark Martin, Ph.D., Scientific Review Officer, 6707 Democracy Boulevard, Suite 920, Bethesda, MD 20892, (240) 447-2148, [mark.martin@mail.nih.gov](mailto:mark.martin@mail.nih.gov).

*Name of Committee:* National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; P41 BTRC review (2016/05).

*Date:* March 23-25, 2016.

*Time:* 6:00 p.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Wyndham Boston Beacon Hill, 5 Blossom Street, Boston, MA 02114.

*Contact Person:* Dennis Hlasta, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, National Institutes of Health, 6707 Democracy Blvd., Bethesda, MD 20892, (301) 451-4794, [dennis.hlasta@nih.gov](mailto:dennis.hlasta@nih.gov).

Dated: February 4, 2016.

**David Clary,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02709 Filed 2-10-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Aging Special Emphasis Panel Age-Related Hearing Loss.

*Date:* March 9, 2016.

*Time:* 11:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301-402-7702, firthkm@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 5, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02708 Filed 2-10-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Notice of Kidney Interagency Coordinating Committee Meeting

**SUMMARY:** The Kidney Interagency Coordinating Committee (KICC) will hold a meeting on March 11, 2016, on the programmatic implications of the United States Renal Data System (USRDS) to federal agencies. The meeting is open to the public.

**DATES:** The meeting will be held on March 11, 2016, 9 a.m. to 12 p.m. Individuals wanting to present oral comments must notify the contact person at least 10 days before the meeting date.

**ADDRESSES:** The meeting will be held in the Natcher Conference Center on the NIH Campus at 9000 Rockville Pike, Bethesda, MD 20894.

**FOR FURTHER INFORMATION CONTACT:** For further information concerning this meeting, contact Dr. Andrew S. Narva, Executive Secretary of the Kidney Interagency Coordinating Committee, National Institute of Diabetes and Digestive and Kidney Diseases, 31 Center Drive, Building 31A, Room 9A27, MSC 2560, Bethesda, MD 20892-2560, telephone: 301-594-8864; FAX: 301-480-0243; email: [healthinfo@niddk.nih.gov](mailto:healthinfo@niddk.nih.gov).

**SUPPLEMENTARY INFORMATION:** The KICC, chaired by the National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), comprises members

of the Department of Health and Human Services and other federal agencies that support kidney-related activities, facilitates cooperation, communication, and collaboration on kidney disease among government entities. KICC meetings, held twice a year, provide an opportunity for Committee members to learn about and discuss current and future kidney programs in KICC member organizations and to identify opportunities for collaboration. The March 11, 2016 KICC meeting will focus on the programmatic implications of the USRDS for government agencies.

Any member of the public interested in presenting oral comments to the Committee should notify the contact person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives or organizations should submit a letter of intent, a brief description of the organization represented, and a written copy of their oral presentation in advance of the meeting. Only one representative of an organization will be allowed to present; oral comments and presentations will be limited to a maximum of 5 minutes. Printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the Committee by forwarding their statement to the contact person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. Because of time constraints for the meeting, oral comments will be allowed on a first-come, first-serve basis.

Members of the public who would like to receive email notification about future KICC meetings should send a request to [healthinfo@niddk.nih.gov](mailto:healthinfo@niddk.nih.gov).

Dated: February 2, 2016.

**Camille M. Hoover,**

*Executive Officer, National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health.*

[FR Doc. 2016-02809 Filed 2-10-16; 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 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 1-Basic Translational Integrated Review Group; Cancer Molecular Pathobiology Study Section.

*Date:* February 25-26, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.

*Contact Person:* Manzoar Zarger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435-2477, [zargerma@csr.nih.gov](mailto:zargerma@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Molecular Genetics.

*Date:* March 2, 2016.

*Time:* 4:00 p.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Dominique Lorang-Leins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7766, Bethesda, MD 20892, 301.326.9721, [Lorangd@mail.nih.gov](mailto:Lorangd@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cell Biology.

*Date:* March 3-4, 2016.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Wallace Ip, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, 301-435-1191, [ipws@mail.nih.gov](mailto:ipws@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR-13-231: Phenotyping Embryonic Lethal Knockout Mice.

*Date:* March 4, 2016.

*Time:* 2:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Charles Selden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 5187 MSC 7840, Bethesda, MD 20892, 301-451-3388, [seldens@mail.nih.gov](mailto:seldens@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Oncological Sciences.

*Date:* March 7–8, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ola Mae Zack Howard, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Dr., Room 4192, MSC 7806, Bethesda, MD 20892, 301-451-4467, [howardz@mail.nih.gov](mailto:howardz@mail.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Microbiome and Related Sciences.

*Date:* March 7, 2016.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

*Contact Person:* Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594-1245, [ivinsj@csr.nih.gov](mailto:ivinsj@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: Alzheimer's Disease Pilot Clinical Trials.

*Date:* March 7, 2016.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Mark Lindner, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3182, MSC 7770, Bethesda, MD 20892, 301-915-6298, [mark.lindner@csr.nih.gov](mailto:mark.lindner@csr.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 5, 2016.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02706 Filed 2-10-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Workshop on Shift Work at Night, Artificial Light at Night, and Circadian Disruption; Notice of Public Meeting; Registration Information

**SUMMARY:** The National Toxicology Program (NTP) announces the public workshop “Shift Work at Night, Artificial Light at Night, and Circadian Disruption.” The purpose of the workshop is to obtain external scientific input on topics important for informing the literature-based health hazard assessments conducted by the NTP’s Office of the Report on Carcinogens (ORoC) and Office of Health Assessment and Translation (OHAT). This workshop is open to the public to attend in-person or by webcast. Information about the meeting and registration are available at ([http://ntp.niehs.nih.gov/go/workshop\\_ALAN](http://ntp.niehs.nih.gov/go/workshop_ALAN)).

**DATES:** *Meeting:* March 10, 2016, from 2:30 p.m. to 5:30 p.m. and March 11, 2016, from 8:00 a.m. to approximately 6:00 p.m. Eastern Standard Time (EST).

*Meeting Registration:* February 1, 2016 through March 4, 2016. Registration to attend the workshop in-person is available only for March 11 and not March 10 and will close prior to March 4 if space capacity at NIEHS is reached. The webcast is available on both March 10 and 11. Registration to view the workshop via webcast is required and will remain open through March 11, 2016.

*Workshop Materials:* Workshop materials, including preliminary agenda, registration for attendance in-person and by webcast, and other materials, are available at [http://ntp.niehs.nih.gov/go/workshop\\_ALAN](http://ntp.niehs.nih.gov/go/workshop_ALAN); other materials will be posted by March 4, 2016.

**ADDRESSES:** *Meeting Location:* Rodbell Auditorium, Rall Building, National Institute of Environmental Health Sciences (NIEHS), 111 T.W. Alexander Drive, Research Triangle Park, NC 27709

*Meeting Web page:* The preliminary agenda and registration are available at [http://ntp.niehs.nih.gov/go/workshop\\_ALAN](http://ntp.niehs.nih.gov/go/workshop_ALAN).

*Webcast:* The workshop will be webcast. The URL will be provided by email in the registration confirmation.

**FOR FURTHER INFORMATION CONTACT:** Dr. Windy Boyd, OHAT-ORoC, DNTP, NIEHS, P.O. Box 12233, MD K2-04, Research Triangle Park, NC 27709. Telephone: (919) 541-9810, email: [boydw@niehs.nih.gov](mailto:boydw@niehs.nih.gov).

#### SUPPLEMENTARY INFORMATION:

Background: Many people experience interruptions in light-dark cycles due to their lifestyle choices (e.g., use of electronic devices at night), location of their residences (e.g., urban light pollution), or working at night (e.g., shift work). Exposures to ALAN or changes in the timing of exposures to natural light (such as with ‘jet lag’) may disrupt biological processes controlled by endogenous circadian rhythms, potentially resulting in adverse health outcomes. NTP is interested in understanding the health effects of circadian disruption related to ALAN and shift work. ORoC and OHAT plan to conduct health hazard assessments focusing on cancer (ORoC) and non-cancer health outcomes (OHAT).

NTP is convening a workshop on March 10–11, 2016, to obtain external scientific input on topics important for informing the literature-based health hazard assessments, including strategies for integrating data across evidence streams and exposure scenarios, and on data gaps and research needs.

The workshop includes the following sessions:

- Circadian disruption
- ALAN
- shift work and trans-meridian travel (jet lag)
- additional overlapping exposures in ALAN/shift work studies
- strategies to synthesize across different types of exposure scenarios studies
- data gaps and research needs

Each session will start with a brief presentation followed by a short question-and-answer period and/or moderator-led discussion.

*Meeting and Registration:* This workshop is open to the public, free of charge, with attendance limited only by the space available. Individuals who plan to attend in-person for March 11, 2016, should register at [http://ntp.niehs.nih.gov/go/workshop\\_ALAN](http://ntp.niehs.nih.gov/go/workshop_ALAN) by March 4, 2016, to facilitate meeting planning. Registration for in-person attendance will close before March 4 if space capacity at NIEHS is reached. Registration is required to view the webcast; the URL for the webcast will be provided in the email confirming registration. A preliminary agenda and additional information are available at [http://ntp.niehs.nih.gov/go/workshop\\_ALAN](http://ntp.niehs.nih.gov/go/workshop_ALAN). Interested individuals are encouraged to access the Web site to stay abreast of the most current information regarding the workshop.

Visitor and security information for those attending in-person is available at <https://www.niehs.nih.gov/about/>

visiting/. Individuals with disabilities who need accommodation to participate in this event should contact Dr. Boyd at telephone: (919) 541-9810 or email: [boydw@niehs.nih.gov](mailto:boydw@niehs.nih.gov). TTY users should contact the Federal TTY Relay Service at 800-877-8339. Requests should be made at least five business days in advance of the event.

Background Information on ORoC: On behalf of NTP, ORoC conducts literature-based evaluations to identify agents, substances, mixtures, or exposures (collectively called "substances") in our environment that pose a cancer hazard for people in the United States. These cancer hazards are listed in the Report on Carcinogens (RoC), a congressionally mandated, science-based, public health report that is prepared by NTP for the Secretary of Health and Human Services. Published biennially, each edition of the RoC is cumulative and consists of substances newly reviewed in addition to those listed in previous editions. Newly reviewed substances with their recommended listing are reviewed and approved by the Secretary of Health and Human Services. The 13th RoC, the latest edition, was published on October 2, 2014 (available at <http://ntp.niehs.nih.gov/go/roc13>). The 14th RoC is under development.

Background Information on OHAT: On behalf of NTP, OHAT conducts literature-based evaluations to assess the evidence that environmental chemicals, physical substances, or mixtures (collectively referred to as "substances") cause adverse non-cancer health outcomes. As part of these evaluations, NTP may also provide opinions on whether these substances might be of concern for causing adverse effects on human health given what is known about toxicity and current human exposure levels.

Dated: February 5, 2016.

**John R. Bucher,**

*Associate Director, National Toxicology Program.*

[FR Doc. 2016-02703 Filed 2-10-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel.

*Date:* February 17, 2016.

*Time:* 2:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Sherry L Dupere, Ph.D., Chief, Scientific Review Branch, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892-7510, 301-451-3415, [duperes@mail.nih.gov](mailto:duperes@mail.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel.

*Date:* February 23, 2016.

*Time:* 1:00 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Priscah Mujuru, MPH, DRPH, RN, BSN, COHNS, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Suite 5B01, Bethesda, MD 20892-7510, 301-435-6908.

*Name of Committee:* National Institute of Child Health and Human Development Initial Review Group; Reproduction, Andrology, and Gynecology Subcommittee.

*Date:* February 26, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

*Contact Person:* Dennis E. Leszczynski, Ph.D., Scientific Review Administrator, Scientific Review Branch, National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, (301) 435-2717, [leszczynski@mail.nih.gov](mailto:leszczynski@mail.nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel.

*Date:* February 29-March 1, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

*Contact Person:* Joanna Kubler-Kielb, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892-7510, 301-435-6916, [kielbj@mail.nih.gov](mailto:kielbj@mail.nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel—Reproductive Centers.

*Date:* February 29-March 2, 2016.

*Time:* 5:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Sheri Ann Hild, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892-7510, 301-435-8382, [hildsa@mail.nih.gov](mailto:hildsa@mail.nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Initial Review Group; Obstetrics and Maternal-Fetal Biology Subcommittee.

*Date:* March 1, 2016.

*Time:* 8:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person:* Peter Zelazowski, Ph.D., Scientific Review Officer, National Institutes of Health, NICHD, SRB, 6100 Executive Blvd., Bethesda, MD 20892, 301-435-6902, [peter.zelazowski@nih.gov](mailto:peter.zelazowski@nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Initial Review Group Population Sciences Subcommittee.

*Date:* March 3-4, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel Washington, 1515 Rhode Island Ave. NW., Washington, DC 20005.

*Contact Person:* Carla T. Walls, Ph.D., Scientific Review Administrator, Scientific Review Branch, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 435-6898, [wallsc@mail.nih.gov](mailto:wallsc@mail.nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Initial Review Group; Pediatrics Subcommittee.

*Date:* March 10-11, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Rita Anand, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892, (301) 496-1487, [anandr@mail.nih.gov](mailto:anandr@mail.nih.gov)

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel.

*Date:* March 10, 2016.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

*Contact Person:* Cathy J. Wedeen, Ph.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, DHHS, 6100 Executive Blvd., Room 5B01-G, Bethesda, MD 20892, 301-435-6878, [wedeenc@mail.nih.gov](mailto:wedeenc@mail.nih.gov).

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel—Pelvic Floor Disorders.

*Date:* March 14, 2016.

*Time:* 8:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Dennis E. Leszczynski, Ph.D., Scientific Review Administrator, Scientific Review Branch, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Rm. 5B01, Bethesda, MD 20892, (301) 435-6884, [leszczyd@mail.nih.gov](mailto:leszczyd@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 4, 2016.

#### Michelle Trout,

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02712 Filed 2-10-16; 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 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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:* Center for Scientific Review Special Emphasis Panel; PAR-13-009: Secondary Dataset Analyses in Heart, Lung and Blood Diseases and Sleep Disorders.

*Date:* February 26, 2016.

*Time:* 8:30 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Baltimore Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

*Contact Person:* Karin F. Helmers, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 254-9975, [helmersk@csr.nih.gov](mailto:helmersk@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Integrative Neuroscience.

*Date:* February 26, 2016.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Nicholas Gaiano, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892-7844, 301-435-1033, [gaianonr@csr.nih.gov](mailto:gaianonr@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; PAR Panel: Selected Topics in Transfusion Medicine.

*Date:* March 2-3, 2016.

*Time:* 10:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ai-Ping Zou, M.D., Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301-408-9497, [zouai@csr.nih.gov](mailto:zouai@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Neural Trauma and Stroke.

*Date:* March 2, 2016.

*Time:* 12:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Alexei Kondratyev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, 301-435-1785, [kondratyevad@csr.nih.gov](mailto:kondratyevad@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Review of Neuroscience AREA Grant Applications.

*Date:* March 3-4, 2016.

*Time:* 8:00 a.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road NW., Washington, DC 20008.

*Contact Person:* Richard D. Crosland, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7850, Bethesda, MD 20892, 301-435-1220, [crosland@nih.gov](mailto:crosland@nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Surgical Sciences and Bioengineering.

*Date:* March 3, 2016.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Chiayeng Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Room 5213, MSC 7852, Bethesda, MD 20892, 301-435-2397, [chiayeng.wang@nih.gov](mailto:chiayeng.wang@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: February 4, 2016.

#### Carolyn Baum,

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02711 Filed 2-10-16; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning

individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Integrative Nutrition and Metabolic Processes.

*Date:* February 11, 2016.

*Time:* 1:00 p.m. to 1:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Elaine Sierra-Rivera, Ph.D., Scientific Review Officer, EMNR IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182 MSC 7892, Bethesda, MD 20892, 301 435-2514, [riverase@csr.nih.gov](mailto:riverase@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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: February 4, 2016.

**Carolyn Baum,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02710 Filed 2-10-16; 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 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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; Radiation Therapeutics and Biology Study Section.

*Date:* February 15-16, 2016.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

*Contact Person:* Bo Hong, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301-996-6208, [hongb@csr.nih.gov](mailto:hongb@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Biology.

*Date:* February 18, 2016.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Charles Morrow, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, 301-451-4467, [morrowcs@csr.nih.gov](mailto:morrowcs@csr.nih.gov).

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(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: February 5, 2016.

**Anna Snouffer,**

*Deputy Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02705 Filed 2-10-16; 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 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), 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 contract proposals 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 and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Identification, Capture and Visualization, Methods in Tissue Sections.

*Date:* March 17, 2016.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, MD 20850, (Telephone Conference Call).

*Contact Person:* Nicholas J. Kenney, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246 Rockville, MD 20850, 240-276-6374, [nicholas.kenney@nih.gov](mailto:nicholas.kenney@nih.gov)

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Methods Involved in the Integration of Metabolomics Data.

*Date:* March 21, 2016.

*Time:* 11:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 5W030, Rockville, MD 20850, (Telephone Conference Call).

*Contact Person:* Nicholas J. Kenney, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division Of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W246, Rockville, MD 20850, 240-276-6374, [nicholas.kenney@nih.gov](mailto:nicholas.kenney@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Assay Validation for High Quality Markers for NCI-Supported Clinical Trials.

*Date:* March 24, 2016.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 2W904, Rockville, MD 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, 7W114, Bethesda, MD 20892-9750, 240-276-6371, [decluej@mail.nih.gov](mailto:decluej@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Disease Penetrance of Cancer Susceptibility Gene.

*Date:* April 7, 2016.

*Time:* 12:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W032, Rockville, MD 20850 (Telephone Conference Call).

*Contact Person:* Zhiqiang Zou, MD, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, MD 20850, 240-276-6372, [zouzhq@mail.nih.gov](mailto:zouzhq@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI R03 & R21 Omnibus SEP-15.

*Date:* April 11, 2016.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications

*Place:* Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

*Contact Person:* Denise L. Stredrick, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, MD 20850, 240-276-5053, [stredrid@mail.nih.gov](mailto:stredrid@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: February 5, 2016.

**Melanie J. Gray,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2016-02707 Filed 2-10-16; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Advisory Committee for Women's Services (ACWS); Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given of a meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Advisory Committee for Women's Services (ACWS) on February 24, 2016.

The meeting will include discussions on The U.S. Preventive Services Task Force (USPSTF) Fifth Annual Report to Congress on High-Priority Evidence Gaps for Clinical Preventive Services for Women, including Intimate Partner Violence, Illicit Drug Use, Major Depressive Disorder, and Suicide Risk; the Federal Legislative process and women's behavioral health; women and sexual abuse and coercion; certified community health clinics; and a conversation with the SAMHSA Acting Administrator.

The meeting is open to the public and will be held at SAMHSA, 5600 Fishers Lane, Rockville, MD 20857, in Conference Room 5E49. Attendance by the public will be limited to space available. Interested persons may present data, information, or views, orally or in writing, on issues pending

before the committee. Written submissions should be forwarded to the contact person (below) on or before February 12, 2016. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact person on or before February 12, 2016. Five minutes will be allotted for each presentation.

The meeting may be accessed via telephone. To attend on site, obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at <http://nac.samhsa.gov/Registration/meetingsRegistration.aspx>, or communicate with SAMHSA's Designated Federal Officer, Ms. Nadine Benton (see contact information below).

Substantive meeting information and a roster of Committee members may be obtained either by accessing the SAMHSA Committees' Web site <http://www.samhsa.gov/about-us/advisory-councils/advisory-committee-women%E2%80%99s-services-awcs>, or by contacting Ms. Benton.

*Committee Name:* Substance Abuse and Mental Health Services Administration Advisory Committee for Women's Services (ACWS).

*Date/Time/Type:* Wednesday, February 24, 2016, from: 9:00 a.m. to 4:45 p.m. EDT Open.

*Place:* SAMHSA, 5600 Fishers Lane, Conference Room 5E49, Rockville, Maryland 20857.

*Contact:* Nadine Benton, Designated Federal Official, SAMHSA's Advisory Committee for Women's Services, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone: (240) 276-0127, Fax: (240) 276-2252, Email: [nadine.benton@samhsa.hhs.gov](mailto:nadine.benton@samhsa.hhs.gov).

**Summer King,**

*Statistician, SAMHSA.*

[FR Doc. 2016-02774 Filed 2-10-16; 8:45 am]

**BILLING CODE 4162-20-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) National Advisory Council (NAC) on February 26, 2016.

The meeting will include a brief reflection on the February 25, 2016 Joint

National Advisory Council meeting (JNAC) and presentations related to emerging issues and increasing engagement in quality care, followed by a Council discussion.

The meeting is open to the public and will be held at the Bethesda North Marriott and Conference Center, 5701 Marinelli Road, Rockville, MD 20852. Attendance by the public will be limited to space available. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before February 16, 2016. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact person on or before February 16, 2016. Five minutes will be allotted for each presentation.

The meeting may be accessed via telephone and web conferencing will be available. To attend on site; obtain the call-in number, access code, and/or web access link; submit written or brief oral comments; or request special accommodations for persons with disabilities, please register on-line at: <http://nac.samhsa.gov/Registration/meetingsRegistration.aspx>, or communicate with SAMHSA's Committee Management Officer, CDR Carlos Castillo (see contact information below).

Substantive meeting information and a roster of Council members may be obtained either by accessing the SAMHSA Council's Web site at <http://www.samhsa.gov/about-us/advisory-councils/> or by contacting CDR Castillo. Substantive program information may be obtained after the meeting by accessing the SAMHSA Council's Web site, <http://nac.samhsa.gov/>, or by contacting CDR Castillo.

*Council Name:* Substance Abuse and Mental Health Services, Administration National Advisory Council.

*Date/Time/Type:* February 26, 2016, 8:30 a.m. to 1:00 p.m. (EDT), Open.

*Place:* Bethesda North Marriott and Conference Center, 5701 Marinelli Road, Rockville, Maryland 20852.

*Contact:* CDR Carlos Castillo, Committee Management Officer and Designated Federal Official, SAMHSA National Advisory Council, 5600 Fishers Lane, Room 18E77A, Rockville, Maryland 20857 (mail), Telephone: (240) 276-2787, Email: [carlos.castillo@samhsa.hhs.gov](mailto:carlos.castillo@samhsa.hhs.gov).

**Summer King,**

*Statistician, SAMHSA.*

[FR Doc. 2016-02775 Filed 2-10-16; 8:45 am]

**BILLING CODE 4162-20-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of the combined meeting on February 25, 2016, of the Substance Abuse and Mental Health Services Administration's (SAMHSA) four National Advisory Councils (the SAMHSA National Advisory Council [NAC], the Center for Mental Health Services NAC, the Center for Substance Abuse Prevention NAC, the Center for Substance Abuse Treatment NAC) and the two SAMHSA Advisory Committees (Advisory Committee for Women's Services [ACWS] and the Tribal Technical Advisory Committee [TTAC]). SAMHSA's National Advisory Councils were established to advise the Secretary, Department of Health and Human Services (HHS); the Administrator, SAMHSA; and SAMHSA's Center Directors concerning matters relating to the activities carried out by and through the Centers and the policies respecting such activities.

Under Section 501 of the Public Health Service Act, the ACWS is statutorily mandated to advise the SAMHSA Administrator and the Associate Administrator for Women's Services on appropriate activities to be undertaken by SAMHSA and its Centers with respect to women's substance abuse and mental health services.

Pursuant to Presidential Executive Order No. 13175, November 6, 2000, and the Presidential Memorandum of September 23, 2004, SAMHSA established the TTAC for working with Federally-recognized Tribes to enhance the government-to-government relationship, honor Federal trust responsibilities and obligations to Tribes and American Indian and Alaska Natives. The SAMHSA TTAC serves as an advisory body to SAMHSA.

The February 25, 2016 combined meeting will include a report from the Administrator on SAMHSA's priorities and updates; a presentation about the Heroin Taskforce by the CSAP Director; several breakout groups on the following topics: Protecting Access to Medicare Act Section 223; Early Serious Mental Illness; Mental Health Parity and Addiction Equity; HHS and SAMHSA's Initiatives on Opioids; and Social Determinants of Health; followed by a presentation on the Tribal Behavioral Health Agenda by the Director of the Office of Tribal Affairs and Policy (OTAP).

The meeting is open to the public and will be held at the Bethesda North Marriott and Conference Center, 5701 Marinelli Road, Rockville, MD 20852. Attendance by the public will be limited to space available. Interested persons may present data, information, or views orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before February 15, 2016. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact on or before February 15, 2016. Five minutes will be allotted for each presentation.

The meeting may be accessed via telephone and web conferencing will be available. To attend on site; obtain the call-in number, access code, and/or web access link; submit written or brief oral comments; or request special accommodations for persons with disabilities, please register on-line at: <http://nac.samhsa.gov/Registration/meetingsRegistration.aspx>, or communicate with SAMHSA's Committee Management Officer, CDR Carlos Castillo (see contact information below).

Meeting information and a roster of Council members may be obtained either by accessing the SAMHSA Council's Web site at <http://www.samhsa.gov/about-us/advisory-councils/> or by contacting CDR Castillo. Substantive program information may be obtained after the meeting by accessing the SAMHSA Council's Web site, <http://nac.samhsa.gov/>, or by contacting CDR Castillo.

**Council Names:** Substance Abuse and Mental Health Services, Administration National Advisory Council, Center for Mental Health Services National Advisory Council, Center for Substance Abuse Prevention National Advisory Council, Center for Substance Abuse Treatment National Advisory Council, Advisory Committee for Women's Services, Tribal Technical Advisory Committee.

**Date/Time/Type:** February 25, 2016, 8:30 a.m. to 5:00 p.m. EDT, Open.

**Place:** Bethesda North Marriott and Conference Center, 5701 Marinelli Road, Rockville, Maryland 20852.

**Contact:** CDR Carlos Castillo, Committee Management Officer and Designated Federal Official, SAMHSA National Advisory Council, Room 18E77A, 5600 Fishers Lane, Rockville, Maryland 20857 (mail). Telephone:

(240) 276–2787. Email: [carlos.castillo@samhsa.hhs.gov](mailto:carlos.castillo@samhsa.hhs.gov).

**Summer King,**  
Statistician, SAMHSA.

[FR Doc. 2016–02773 Filed 2–10–16; 8:45 am]

**BILLING CODE 4162–20–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

#### Center for Substance Abuse Treatment; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA's) Center for Substance Abuse Treatment (CSAT) National Advisory Council will meet on February 24, 2016, 9:00 a.m.–5:00 p.m. (EDT).

The meeting is open and will include consideration of minutes from the SAMHSA CSAT NAC meeting of August 26, 2015, the CSAT Director's report, budget update, a presentation related to the opiate use disorders among Native Americans, a presentation related to the effects of the opioid epidemic on youth and young people, a presentation related to substance use disorders and criminal justice reform, a presentation related to peer recovery support services in diverse settings, an overview of Recovery Month.

The meeting will be held at the SAMHSA, 5600 Fishers Lane, Room 5E45, Rockville, MD 20857. Attendance by the public will be limited to space available. Public comments are welcome. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Written submissions should be forwarded to the contact person on or before February 15, 2016. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations are encouraged to notify the contact on or before February 15, 2016. Five minutes will be allotted for each presentation.

The open meeting session may be accessed via telephone. To attend on site, obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at <http://nac.samhsa.gov/Registration/meetingsRegistration.aspx>, or communicate with Tracy Goss SAMHSA/CSAT NAC Designated

Federal Officer (see contact information below).

Substantive meeting information and a roster of Council members may be obtained either by accessing the SAMHSA Council Web site at: <http://www.samhsa.gov/about-us/advisory-councils/csat-national-advisory-council> or by contacting Tracy Goss.

Substantive program information may be obtained after the meeting by accessing the SAMHSA Council Web site, <http://nac.samhsa.gov/>, or by contacting Tracy Goss.

**Council Name:** SAMHSA's Center for Substance Abuse Treatment National Advisory Council.

**Date/Time/Type:** February 24, 2016, 9:00 a.m.–5:00 p.m. EDT, OPEN.

**Place:** SAMHSA, 5600 Fishers Lane, Room 5E45, Rockville, Maryland 20857.

**Contact:** Tracy Goss, Designated Federal Officer, CSAT National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail), Telephone: (240) 276-0759, Fax: (240) 276-2252, Email: [tracy.goss@samhsa.hhs.gov](mailto:tracy.goss@samhsa.hhs.gov).

**Summer King,**

*Statistician, SAMHSA.*

[FR Doc. 2016-02794 Filed 2-10-16; 8:45 am]

**BILLING CODE 4162-20-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

[Docket No. USCG-2016-0056]

### National Offshore Safety Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of Federal Advisory Committee meeting.

**SUMMARY:** The National Offshore Safety Advisory Committee and its Subcommittees will hold meetings in New Orleans, LA to discuss the safety of operations and other matters affecting the offshore oil and gas industry. These meetings are open to the public.

**DATES:** Subcommittees of the National Offshore Safety Advisory Committee will meet on Tuesday, March 29, 2016 from 1 p.m. to 4 p.m. and the full Committee will meet on Wednesday, March 30, 2016, from 8:30 a.m. to 5:30 p.m. (All times are Central Standard Time). These meetings may end early if the Committee has completed its business, or they may be extended based on the number of public comments.

**ADDRESSES:** The meetings will be held at the Omni Riverfront Hotel at 701 Convention Center Blvd., New Orleans,

LA 70130, (504) 524-8200, <http://www.omnihotels.com/hotels/new-orleans-riverfront>.

For information on facilities or services for individuals with disabilities, or to request special assistance at the meetings, contact the individuals listed in **FOR FURTHER INFORMATION CONTACT** section, as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the Committee as listed in the "Agenda" section below. Written comments for distribution to Committee members must be submitted no later than March 16, 2016, if you want the Committee members to be able to review your comments before the meeting, and must be identified by docket number USCG-2016-0056. Written comments may be submitted using the Federal e-Rulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

**Instructions:** All submissions received must include the words "Department of Homeland Security" and the docket number for this action. Comments received will be posted without alteration at <http://www.regulations.gov>, including any personal information provided. You may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

**Docket:** For access to the docket or to read documents or comments related to this notice, go to <http://www.regulations.gov>, insert USCG-2016-0056 in the Search box, press Enter, and then click on the item you wish to view.

A public oral comment period will be held during the meeting on March 30, 2016, and speakers are requested to limit their comments to 3 minutes. Contact one of the individuals listed below to register as a speaker.

**FOR FURTHER INFORMATION CONTACT:** Commander Jose Perez, Designated Federal Officer of the National Offshore Safety Advisory Committee, Commandant (CG-OES-2), U.S. Coast Guard, 2703 Martin Luther King Jr. Avenue SE, Stop 7509, Washington, DC 20593-7509; telephone (202) 372-1410, fax (202) 372-8382 or email [jose.a.perez3@uscg.mil](mailto:jose.a.perez3@uscg.mil), or Mr. Pat Clark, telephone (202) 372-1358, fax (202) 372-8382 or email [Patrick.w.clark@uscg.mil](mailto:Patrick.w.clark@uscg.mil).

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the *Federal Advisory Committee Act*, Title 5 United States Code Appendix. The National Offshore Safety Advisory Committee provides advice and recommendations to the Department of Homeland Security on matters and actions concerning activities directly involved with or in support of the exploration of offshore mineral and energy resources insofar as they relate to matters within U.S. Coast Guard jurisdiction.

A copy of all meeting documentation will be available at <https://homeport.uscg.mil/nosac> no later than March 16, 2016. Alternatively, you may contact Mr. Pat Clark as noted in the **FOR FURTHER INFORMATION CONTACT** section above.

### Agenda

#### Day 1

The National Offshore Safety Advisory Subcommittee on Cyber Security on the Outer Continental Shelf will meet on March 29, 2016 from 1 p.m. to 2 p.m. to review, discuss, and formulate recommendations. Following this Subcommittee meeting, the Towing of Mobile Offshore Drilling Unit Subcommittee will meet from 2:00 p.m. to 3:00 p.m. and then the Well Intervention Subcommittee will meet from 3:00 p.m. to 4:00 p.m.

#### Day 2

The National Offshore Safety Advisory full Committee will hold a public meeting on March 30, 2016 from 8:30 a.m. to 5:30 p.m. to review and discuss the progress of the Subcommittees and any reports and recommendations received from the above listed Subcommittees from their deliberations on March 29, 2016. The Committee will then use this information and consider public comments in formulating recommendations to the U.S. Coast Guard. Public comments or questions will be taken at the discretion of the Designated Federal Officer during the discussion and recommendation portions of the meeting and during the public comment period, see Agenda item (6).

A complete agenda for March 30, 2016 Committee meeting is as follows:

- (1) Welcoming remarks.
- (2) General Administration; swear in new members and accept minutes from November 2015 National Offshore Safety Advisory Committee public meeting.
- (3) Current Business—Presentation and discussion of updates and any final reports to include recommendations

from the Subcommittees on Cyber Security, Towing of Mobile Offshore Drilling Units and Well Intervention.

(4) New Business

(a) Discussion of any new business items.

(5) Presentations and discussions on the following matters:

(a) Actions on previous National Offshore Safety Advisory Committee recommendations to the Coast Guard;

(b) DP Assurance—vessels conducting Critical Activity Modes (CAMO) and Well Intervention Activities;

(c) Update from the International Association of Drilling Contractors; and

(d) Update on activities from the Eighth Coast Guard District's Officer in Charge of Marine Inspection for the Outer Continental Shelf.

(6) Public comment period.

The agenda, any draft final reports, new task statements and presentations will be available by March 16, 2016 at the <https://homeport.uscg.mil/nosac> Web site or by contacting Mr. Pat Clark in the **FOR FURTHER INFORMATION CONTACT**.

### Minutes

Meeting minutes from this public meeting will be available for public view and copying within 90 days following the close of the meeting at the <https://homeport.uscg.mil/nosac> Web site.

Dated: February 4, 2016.

**J. G. Lantz,**

*Director of Commercial Regulations and Standards, United States Coast Guard.*

[FR Doc. 2016-02779 Filed 2-10-16; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

[1651-0005]

#### Agency Information Collection Activities: Application-Permit-Special License Unlading-Lading-Overtime Services

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; Extension of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Application-Permit-Special License Unlading-Lading-Overtime Services (CBP Form 3171).

This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

**DATES:** Written comments should be received on or before March 14, 2016 to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) or faxed to (202) 395-5806.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177, at 202-325-0265.

**SUPPLEMENTARY INFORMATION:** This proposed information collection was previously published in the **Federal Register** (80 FR 68326) on November 4, 2015, 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 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3507). The comments should address:

(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 estimates 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, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and

included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

**Title:** Application-Permit-Special License Unlading-Lading-Overtime Services.

**OMB Number:** 1651-0005.

**Form Number:** CBP Form 3171.

**Abstract:** The Application-Permit-Special License Unlading-Lading-Overtime Services (CBP Form 3171) is used by commercial carriers and importers as a request for permission to unlade imported merchandise, baggage, or passengers. It is also used to request overtime services from CBP officers in connection with lading or unlading of merchandise, or the entry or clearance of a vessel, including the boarding of a vessel for preliminary supplies, ship's stores, sea stores, or equipment not to be reladen. CBP Form 3171 is provided for 19 CFR 4.10, 4.30, 4.37, 4.39, 4.91, 10.60, 24.16, 122.29, 122.38, 123.8, 146.32 and 146.34. This form is accessible at: <http://www.cbp.gov/newsroom/publications/forms?title=3171>.

**Action:** CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to CBP Form 3171.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Estimated Number of Respondents:** 1,500.

**Estimated Number of Annual Responses per Respondent:** 266.

**Estimated Number of Total Annual Responses:** 399,000.

**Estimated Time per Response:** 8 minutes.

**Estimated Total Annual Burden Hours:** 51,870.

Dated: February 8, 2016.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2016-02824 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-14-P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs And Border Protection

#### Accreditation and Approval of SGS North America, Inc., as a Commercial Gauger and Laboratory

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of SGS North America, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that SGS North America, Inc., has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes for the next three years as of June 17, 2015.

**DATES:** Effective dates: The accreditation and approval of SGS North America, Inc., as commercial gauger and laboratory became effective on June 17, 2015. The next triennial inspection date will be scheduled for June 2018.

**FOR FURTHER INFORMATION CONTACT:** Approved Gauger and Accredited Laboratories Manager, Laboratories and

Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202-344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that SGS North America, Inc., 151 James Drive West, St. Rose, LA 70087, has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. SGS North America, Inc., is approved for the following gauging procedures for petroleum and certain petroleum products set forth by the American Petroleum Institute (API):

API chapters	Title
3 .....	Tank gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
9 .....	Density Determination.
12 .....	Calculations.
17 .....	Maritime Measurements.

SGS North America, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-01 .....	ASTM D-287 .....	Standard test method for API Gravity of crude petroleum products and petroleum products (Hydrometer Method).
27-03 .....	ASTM D-4006 .....	Standard test method for water in crude oil by distillation.
27-04 .....	ASTM D-95 .....	Standard test method for water in petroleum products and bituminous materials by distillation.
27-05 .....	ASTM D-4928 .....	Standard Test Method for Water in Crude Oils by Coulometric Karl Fischer Titration.
27-06 .....	ASTM D-473 .....	Standard test method for sediment in crude oils and fuel oils by the extraction method.
27-08 .....	ASTM D-86 .....	Standard Test Method for Distillation of Petroleum Products.
27-13 .....	ASTM D-4294 .....	Standard test method for sulfur in petroleum and petroleum products by energy-dispersive x-ray fluorescence spectrometry.
27-14 .....	ASTM D-2622 .....	Standard test method for Sulfur in Petroleum Products (X-Ray spectrographic methods).
27-46 .....	ASTM D-5002 .....	Standard Test Method for Density and Relative Density of Crude Oils by Digital Density Analyzer.
27-48 .....	ASTM D-4052 .....	Standard test method for density and relative density of liquids by digital density meter.
27-53 .....	ASTM D-2709 .....	Standard test method for water and sediment in middle distillate by the centrifuge method.
27-58 .....	ASTM D-5191 .....	Standard Test Method For Vapor Pressure of Petroleum Products (Mini Method).

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to [cbp.labhq@dhs.gov](mailto:cbp.labhq@dhs.gov). Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: February 01, 2016.  
**Ira S. Reese,**  
*Executive Director, Laboratories and Scientific Services Directorate.*  
 [FR Doc. 2016-02827 Filed 2-10-16; 8:45 am]  
**BILLING CODE 9111-14-P**

**DEPARTMENT OF HOMELAND SECURITY**  
**U.S. Customs and Border Protection**  
**Accreditation and Approval of SGS North America, Inc., as a Commercial Gauger and Laboratory**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.  
**ACTION:** Notice of accreditation and approval of SGS North America, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that SGS North America, Inc., has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes for the next three years as of August 11, 2015.  
**DATES:** *Effective dates:* The accreditation and approval of SGS North America, Inc., as commercial gauger and laboratory became effective on August 11, 2015. The next triennial inspection date will be scheduled for August 2018.  
**FOR FURTHER INFORMATION CONTACT:** Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202-344-1060.  
**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12

and 19 CFR 151.13, that SGS North America, Inc., 300 George St., East Alton, IL 62024, has been approved to gauge and accredited to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. SGS North America, Inc., is approved for the following gauging procedures for petroleum and certain

petroleum products set forth by the American Petroleum Institute (API):

API Chapters	Title
3 .....	Tank gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
9 .....	Density Determination.
12 .....	Calculations.
17 .....	Maritime Measurements.

SGS North America, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-01 .....	ASTM D-287 .....	Standard test method for API Gravity of crude petroleum products and petroleum products (Hydrometer Method).
27-02 .....	ASTM D-1298 .....	Standard Test Method for Density, Relative Density (Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method.
27-03 .....	ASTM D-4006 .....	Standard test method for water in crude oil by distillation.
27-06 .....	ASTM D-473 .....	Standard test method for sediment in crude oils and fuel oils by the extraction method.
27-13 .....	ASTM D-4294 .....	Standard test method for sulfur in petroleum and petroleum products by energy-dispersive x-ray fluorescence spectrometry.
27-46 .....	ASTM D-5002 .....	Standard Test Method for Density and Relative Density of Crude Oils by Digital Density Analyzer.
27-50 .....	ASTM D-93 .....	Standard test methods for flash point by Pensky-Martens Closed Cup Tester.

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to [cbp.labhq@dhs.gov](mailto:cbp.labhq@dhs.gov). Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: February 1, 2016.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services Directorate.*

[FR Doc. 2016-02829 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-14-P**

**DEPARTMENT OF HOMELAND SECURITY**

**U.S. Customs and Border Protection**

[1651-0123]

**Agency Information Collection Activities: Regulations Relating to Recordation and Enforcement of Trademarks and Copyrights**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 60-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Regulations Relating to Recordation and Enforcement of Trademarks and Copyrights (Part 133 of the CBP Regulations). CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

**DATES:** Written comments should be received on or before April 11, 2016 to be assured of consideration.

**ADDRESSES:** Written comments may be mailed to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177, at 202-325-0265.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs).

The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

**Title:** Regulations Relating to Recordation and Enforcement of Trademark and Copyrights (Part 133 of the CBP Regulations)

**OMB Number:** 1651-0123.

**Abstract:** Title 19 of the United States Code section 1526(e) prohibits the importation of articles that bear a counterfeit mark of a trademark that is registered with the United States Patent and Trademark Office (USPTO) and recorded with U.S. Customs and Border Protection (CBP). Pursuant to 15 U.S.C. 1124, the importation of articles that copy or simulate the trade name of a manufacturer or trader, or copy or simulate a trademark registered with the USPTO and recorded with CBP is prohibited. Likewise, under 17 U.S.C. 602 and 17 U.S.C. 603, the importation of articles that constitute an infringement of copyright in protected copyrighted works is prohibited. Both 15 U.S.C. 1124 and 17 U.S.C. 602, authorize the Secretary of the Treasury to prescribe by regulation for the recordation of trademarks, trade names and copyrights with CBP. Additional rulemaking authority in this regard is conferred by CBP's general rulemaking authority as found in 19 U.S.C. 1624.

CBP officers enforce these intellectual property rights at the border. The information that respondents must submit in order to seek the assistance of CBP to protect against infringing imports is specified for trademarks under 19 CFR 133.2 and 133.3, and the information to be submitted for copyrights is specified under 19 CFR 133.32 and 133.33. Trademark, trade name, and copyright owners seeking border enforcement of their intellectual property rights provide information

through the recordation process in order to assist CBP officers in identifying violating articles at the border. Respondents may submit this information through the IPR e-Recordation Web site at <https://iprr.cbp.gov/>.

**Current Actions:** CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses and Individuals.

**Estimated Number of Respondents:** 2,000.

**Estimated Time per Respondent:** 2 hours.

**Estimated Total Annual Burden Hours:** 4,000.

Dated: February 8, 2016.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2016-02823 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-14-P**

**DEPARTMENT OF HOMELAND SECURITY**

**U.S. Customs and Border Protection**

**Accreditation and Approval of Pan Pacific Surveyors, Inc., as a Commercial Gauger and Laboratory**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of Pan Pacific Surveyors, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that Pan Pacific Surveyors, Inc., has been approved to gauge and accredited to test petroleum and certain petroleum

products for customs purposes for the next three years as May 12, 2015.

**DATES: Effective dates:** The accreditation and approval of Pan Pacific Surveyors, Inc., as commercial gauger and laboratory became effective on May 12, 2015. The next triennial inspection date will be scheduled for May 2018.

**FOR FURTHER INFORMATION CONTACT:**

Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202-344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Pan Pacific Surveyors, Inc., 444 Quay Avenue, Suite #7, Wilmington, CA 90744, has been approved to gauge and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Pan Pacific Surveyors, Inc., is approved for the following gauging procedures for petroleum and certain petroleum products set forth by the American Petroleum Institute (API):

API chapters	Title
3 .....	Tank gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
12 .....	Calculations.
17 .....	Maritime Measurements.

Pan Pacific Surveyors, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-02 .....	ASTM D-1298	Standard Test Method for Density, Relative Density(Specific Gravity), or API Gravity of Crude Petroleum and Liquid Petroleum Products by Hydrometer Method.
N/A .....	ASTM D-4007	Standard Test Method for Water and Sediment in Crude Oil by the Centrifuge Method (Laboratory Procedure).

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or

gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to [cbp.labhq@dhs.gov](mailto:cbp.labhq@dhs.gov). Please reference the Web site listed below for the current CBP Approved Gaugers and Accredited Laboratories List. <http://www.cbp.gov/>

*about/labs-scientific/commercial-gaugers-and-laboratories.*

Dated: February 01, 2016.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services Directorate.*

[FR Doc. 2016-02825 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-14-P**

**DEPARTMENT OF HOMELAND SECURITY**

**U.S. Customs and Border Protection**

**Accreditation and Approval of Camin Cargo Control, Inc., as a Commercial Gauger and Laboratory**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of Camin Cargo Control, Inc., as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that Camin Cargo Control, Inc., has been approved to gauge and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of March 31, 2015.

**DATES:** *Effective Dates:* The accreditation and approval of Camin

Cargo Control, Inc., as commercial gauger and laboratory became effective on March 31, 2015. The next triennial inspection date will be scheduled for March 2018.

**FOR FURTHER INFORMATION CONTACT:** Approved Gauger and Accredited Laboratories Manager, Laboratories and Scientific Services Directorate, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW., Suite 1500N, Washington, DC 20229, tel. 202-344-1060.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Camin Cargo Control, Inc., 729 West Anaheim St., Suite C, Long Beach, CA 90813, has been approved to gauge and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Camin

Cargo Control, Inc., is approved for the following gauging procedures for petroleum and certain petroleum products set forth by the American Petroleum Institute (API):

API Chapters	Title
3 .....	Tank gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
11 .....	Physical Property.
12 .....	Calculations.
17 .....	Maritime Measurements.

Camin Cargo Control, Inc., is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-05 .....	ASTM D-4928	Standard test method for water in crude oils by Coulometric Karl Fischer Titration.
27-06 .....	ASTM D-473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.
27-07 .....	ASTM D-4807	Standard Test Method for Sediment in Crude Oil by Membrane Filtration.
27-13 .....	ASTM D-4294	Standard test method for sulfur in petroleum and petroleum products by energy-dispersive x-ray fluorescence spectrometry.
27-46 .....	ASTM D-5002	Standard test method for density and relative density of crude oils by digital density analyzer.
N/A .....	ASTM D-664	Standard Test Method for Acid Number of Petroleum Products by Potentiometric Titration.
N/A .....	ASTM D-4530	Standard Test Method for Determination of Carbon Residue (Micro Method).

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to [cbp.labhq@dhs.gov](mailto:cbp.labhq@dhs.gov). Please reference the Web site listed below for the current CBP Approved Gaugers and Accredited Laboratories List. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: February 1, 2016.

**Ira S. Reese,**

*Executive Director, Laboratories and Scientific Services Directorate.*

[FR Doc. 2016-02828 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-14-P**

**DEPARTMENT OF HOMELAND SECURITY**

**U.S. Customs and Border Protection**

[1651-0061]

**Agency Information Collection Activities: Application To Establish a Centralized Examination Station**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 60-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Application to Establish a Centralized Examination Station. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

**DATES:** Written comments should be received on or before April 11, 2016 to be assured of consideration.

**ADDRESSES:** Written comments may be mailed to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10h Floor, Washington, DC 20229-1177.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229-1177, at 202-325-0265.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The comments should address: (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 estimates 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 including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

*Title:* Application to Establish a Centralized Examination Station.

*OMB Number:* 1651–0061.

*Abstract:* A Customs and Border Protection (CBP) port director decides when his or her port needs one or more Centralized Examination Stations (CES). A CES is a facility where imported merchandise is made available to CBP officers for physical examination. If it is decided that a CES is needed, the port director solicits applications to operate a CES. The information contained in the application will be used to determine the suitability of the applicant's facility; the fairness of fee structure; and the knowledge of cargo handling operations and of CBP procedures. The names of all corporate officers and all employees who will come in contact with uncleared cargo will also be provided so that CBP may perform background investigations. The CES application is provided for by 19 CFR 118.11 and is authorized by 19 U.S.C. 1499, Tariff Act of 1930.

*Current Actions:* CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

*Type of Review:* Extension (without change).

*Affected Public:* Businesses.

*Estimated Number of Respondents:* 50.

*Estimated Time per Respondent:* 2 hours.

*Estimated Total Annual Burden Hours:* 100.

Dated: February 8, 2016.

**Tracey Denning,**

*Agency Clearance Officer, U.S. Customs and Border Protection.*

[FR Doc. 2016–02826 Filed 2–10–16; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA–2016–0002; Internal Agency Docket No. FEMA–B–1550]

### Proposed Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**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). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

**DATES:** Comments are to be submitted on or before May 11, 2016.

**ADDRESSES:** The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location 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 [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

You may submit comments, identified by Docket No. FEMA–B–1550, to Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) [Luis.Rodriguez3@fema.dhs.gov](mailto:Luis.Rodriguez3@fema.dhs.gov).

**FOR FURTHER INFORMATION CONTACT:** Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) [Luis.Rodriguez3@fema.dhs.gov](mailto:Luis.Rodriguez3@fema.dhs.gov); or visit the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://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 and also are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

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 [http://floodsrp.org/pdfs/srp\\_fact\\_sheet.pdf](http://floodsrp.org/pdfs/srp_fact_sheet.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 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 [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: January 22, 2016.

**Roy E. Wright,**

*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

I. Watershed-based studies:

Community	Community map repository address
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**Quinnipiac Watershed**

Maps Available for Inspection Online at: <http://www.fema.gov/preliminaryfloodhazarddata>

**Hartford County, Connecticut (All Jurisdictions)**

City of Bristol .....	Engineering Division, 111 North Main Street, Bristol, CT 06010.
City of New Britain .....	Public Works Department, 27 West Main Street, Room 501, New Britain, CT 06051.
Town of Plainville .....	Office of Technical Services, One Central Square, Plainville, CT 06062.
Town of Southington .....	Planning Department, 196 North Main Street, Southington, CT 06489.

**New Haven County, Connecticut (All Jurisdictions)**

City of Ansonia .....	Town and City Clerk's Office, 253 Main Street, Ansonia, CT 06401.
City of Derby .....	Building Department, One Elizabeth Street, Derby, CT 06418.
City of Meriden .....	City Clerk's Office, 142 East Main Street, Meriden, CT 06450.
City of Milford .....	Parsons Government Center, 70 West River Street, Milford, CT 06460.
Town of Branford .....	Engineering Department, 1019 Main Street, Branford, CT 06405.
Town of Cheshire .....	Town Clerk's Office, 84 South Main Street, Cheshire, CT 06410.
Town of East Haven .....	Engineering Department, 461 North High Street, East Haven, CT 06512.
Town of Hamden .....	Planning and Zoning Department, 2750 Dixwell Avenue, Hamden, CT 06518.
Town of North Branford .....	Engineering Department, 909 Foxon Road, North Branford, CT 06471.
Town of North Haven .....	Town Clerk's Office, 18 Church Street, North Haven, CT 06473.
Town of Orange .....	Public Works Department, 617 Orange Center Road, Orange, CT 06477.
Town of Wallingford .....	Planning Department, 45 South Main Street, Wallingford, CT 06492.
Town of Woodbridge .....	Town Clerk's Office, 11 Meetinghouse Lane, Woodbridge, CT 06525.

**Lower Catawba Watershed**

Maps Available for Inspection Online at: <http://www.fema.gov/preliminaryfloodhazarddata>

**Chester County, South Carolina, and Incorporated Areas**

Unincorporated Areas of Chester County .....	Chester County Government Complex, 1476 J.A. Cochran Bypass, Suite 63, Chester, SC 29706.
----------------------------------------------	-------------------------------------------------------------------------------------------

**Lancaster County, South Carolina, and Incorporated Areas**

City of Lancaster .....	City Hall, 216 South Catawba Street, Lancaster, SC 29720.
Unincorporated Areas of Lancaster County .....	Lancaster County Zoning Department, 101 North Main Street, Lancaster, SC 29720.

**York County, South Carolina, and Incorporated Areas**

City of Rock Hill .....	City Hall, 155 Johnston Street, Rock Hill, SC 29731.
Town of Fort Mill .....	Engineering Department, 131 East Elliott Street, Fort Mill, SC 29715.
Unincorporated Areas of York County .....	York County Planning and Development Services Department, 1070 Heckle Boulevard, Building 107, Rock Hill, SC 29732.

II. Non-watershed-based studies:

Community	Community map repository address
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**Horry County, South Carolina, and Incorporated Areas**

Maps Available for Inspection Online at: <http://www.fema.gov/preliminaryfloodhazarddata>

Community	Community map repository address
<b>Project: MICS_18448 Preliminary Date: September 11, 2015</b>	
City of Conway .....	Building Department, 206 Laurel Street, Conway, SC 29526.
City of Loris .....	City Hall, 4101 Walnut Street, Loris, SC 29569.
City of Myrtle Beach .....	City Services Building, 921 North Oak Street, Myrtle Beach, SC 29577.
City of North Myrtle Beach .....	Planning and Development Department, 1018 Second Avenue South, North Myrtle Beach, SC 29582.
Town of Atlantic Beach .....	Town Hall, 717 30th Avenue South, Atlantic Beach, SC 29582.
Town of Briarcliffe Acres .....	Briarcliffe Acres Town Office, 121 North Gate Road, Myrtle Beach, SC 29572.
Town of Surfside Beach .....	Planning, Building and Zoning Department, 115 US Highway 17 North, Surfside Beach, SC 29575.
Unincorporated Areas of Horry County .....	Horry County Code Enforcement Office, 1301 Second Avenue, Suite 1D09, Conway, SC 29526.

[FR Doc. 2016-02747 Filed 2-10-16; 8:45 am]

BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4252-DR; Docket ID FEMA-2016-0001]

#### Idaho; 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 Idaho (FEMA-4252-DR), dated February 1, 2016, and related determinations.

**DATES:** *Effective Date:* February 1, 2016.

**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 February 1, 2016, 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 Idaho resulting from severe winter storms during the period of December 16-27, 2015, 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 Idaho.

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 Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

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, Dolph A. Diemont, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Idaho have been designated as adversely affected by this major disaster:

Benewah, Bonner, and Kootenai Counties for Public Assistance.

All areas within the State of Idaho 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.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2016-02753 Filed 2-10-16; 8:45 am]

BILLING CODE 9111-23-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Docket ID FEMA-2016-0002; Internal Agency Docket No. FEMA-B-1559]

#### Changes in Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**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 title 44, part 65 of the Code of Federal Regulations (44 CFR part 65). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes,

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 become effective 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 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 [www.msc.fema.gov](http://www.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:** Luis Rodriguez, Chief, Engineering

Management Branch, Federal Insurance and Mitigation Administration, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646-4064, or (email) [Luis.Rodriguez3@fema.dhs.gov](mailto:Luis.Rodriguez3@fema.dhs.gov); or visit the FEMA Map Information eXchange (FMIX) online at [www.floodmaps.fema.gov/fhm/fmx\\_main.html](http://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 [www.msc.fema.gov](http://www.msc.fema.gov) for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: January 22, 2016.

**Roy E. Wright,**

*Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Illinois:						
DuPage .....	City of Chicago (15-05-1012P).	The Honorable Rahm Emanuel, Mayor, City of Chicago, Chicago City Hall, Room 406, 121 North LaSalle Street, Chicago, IL 60602.	Department of Buildings, Stormwater Management, 121 N. LaSalle Street, Room 906, Chicago, IL 60602.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 5, 2016 .....	170074
DuPage .....	Village of Bensenville (15-05-1012P).	The Honorable Frank Soto, Village President, Village of Bensenville, 12 South Center Street, Bensenville, IL 60106.	Village Hall, 12 South Center Street, Bensenville, IL 60106.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 5, 2016 .....	170200
DuPage .....	Village of Elk Grove Village (15-05-1012P).	The Honorable Craig B. Johnson, Mayor, Village of Elk Grove Village, 901 Wellington Avenue, Elk Grove Village, IL 60007.	Engineering and Community Development Department, 901 Wellington Avenue, Elk Grove Village, IL 60007.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 5, 2016 .....	170088
Indiana:						
Monroe .....	City of Bloomington (15-05-2536P).	The Honorable Mark Krusan, Mayor, City of Bloomington, 401 North Morton Street, Suite 210, Bloomington, IN 47404.	401 North Morton Street, Suite 210, c/o Clerk, City of Bloomington Regina Moore, Bloomington, IN 47404.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 11, 2016 ....	180169
Monroe .....	Unincorporated areas of Monroe County (15-05-2536P).	The Honorable Julie Thomas, President, Monroe County Commissioners, 100 West Kirkwood Avenue, Courthouse, 3rd Floor, Bloomington, IN 47404.	100 West Kirkwood Avenue, County Courthouse, Room 306, Bloomington, IN 47404.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 11, 2016 ....	180444
Minnesota:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Dakota .....	City of Lakeville (15-05-2198P).	The Honorable Matt Little, Mayor, City of Lakeville, 20195 Holyoke Avenue, Lakeville, MN 55044.	City Hall, 20195 Holyoke Avenue, Lakeville, MN 55044.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 4, 2016 .....	270107
Norman .....	City of Ada (15-05-5324P).	The Honorable Jim Ellefson, Mayor, City of Ada, 15 East 4th Avenue, Ada, MN 56510.	404 West Main Street, Ada, MN 56510.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 17, 2016 ....	270323
Norman .....	Unincorporated areas of Norman County (15-05-5324P).	Ms. Lee Ann Hall, Commissioner, Norman County, 16 3rd Avenue East, Ada, MN 56510.	16 3rd Avenue East, Ada, MN 56510.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 17, 2016 ....	270322
Missouri: Cass .....	City of Belton (15-07-1479P).	The Honorable Jeff Davis, Mayor, City of Belton, 411 Westover Court, Belton, MO 64012.	Belton City Hall Annex, 520 Main Street, Belton, MO 64012.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 5, 2016 .....	290062
Howell .....	City of Willow Springs (15-07-2193P).	The Honorable Kim Wehmer, Mayor, City of Willow Springs, 900 West Main Street, P.O. Box 190, Willow Springs, MO 65793.	900 West Main Street, Willow Springs, MO 65793.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 17, 2016 ....	290167
Ohio: Franklin .....	City of Dublin (15-05-5393P).	The Honorable Michael Keenan, Mayor, City of Dublin, 5200 Emerald Parkway, Dublin, OH 43017.	Dublin Engineering Building, 5800 Shier-Rings Road, Dublin, OH 43017.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 5, 2016 .....	390673
Franklin .....	City of Grove City (15-05-7153P).	The Honorable Richard I. Stage, Mayor, City of Grove City, City Hall, 4035 Broadway, Grove City, OH 43123.	City Hall, 4035 Broadway, Grove City, OH 43123.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 23, 2016 ....	390173
Tennessee: Sevier	City of Sevierville (15-04-2363P).	The Honorable Bryan C. Atchley, Mayor, City of Sevierville, 120 Gary Wade Boulevard, P.O. Box 5500, Sevierville, TN 37864.	120 Gary Wade Boulevard, Sevierville, TN 37862.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 16, 2016 ....	475444
Wisconsin: Dane .....	City of Sun Prairie (15-05-4807P).	The Honorable Paul T. Esser, Mayor, City of Sun Prairie, 300 East Main Street, 2nd Floor, Sun Prairie, WI 53590.	300 East Main Street, Sun Prairie, WI 53590.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 12, 2016 ....	550573
Dane .....	Unincorporated areas of Dane County (15-05-4807P).	Mr. Joe Parisi, Dane County Executive, City County Building, Room 421, 210 Martin Luther King Jr. Boulevard, Madison, WI 53703.	210 Martin Luther King Jr. Boulevard, City County Building, Room 116, Madison, WI 53703.	<a href="http://www.msc.fema.gov/lomc">http://www.msc.fema.gov/lomc</a>	Feb. 12, 2016 ....	550077

[FR Doc. 2016-02746 Filed 2-10-16; 8:45 am]  
BILLING CODE 9110-12-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4247-DR; Docket ID FEMA-2016-0001]

#### 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-4247-DR),

dated December 29, 2015, and related determinations.

**DATES:** *Effective Date:* February 3, 2016.

**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 December 29, 2015.

Bryan, Garfield, and Greer 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.

**W. Craig Fugate,**  
*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2016-02752 Filed 2-10-16; 8:45 am]

BILLING CODE 9111-23-P

**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency**

[Internal Agency Docket No. FEMA-4253-DR; Docket ID FEMA-2016-0001]

**Washington; 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 Washington (FEMA-4253-DR), dated February 2, 2016, and related determinations.

**DATES:** *Effective Date:* February 2, 2016.

**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 February 2, 2016, 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 Washington resulting from a severe winter storm, straight-line winds, flooding, landslides, mudslides, and a tornado during the period of December 1-14, 2015, 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 Washington.

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 Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

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, Thomas J. Dargan, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Washington have been designated as adversely affected by this major disaster:

Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Lewis, Mason, Pacific, Skamania, and Wahkiakum Counties for Public Assistance.

All areas within the State of Washington 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.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2016-02754 Filed 2-10-16; 8:45 am]

**BILLING CODE 9111-23-P**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service**

[FWS-HQ-MB-2016-N218; 91400-5110-0000]; [91400-9410-0000]

**Multistate Conservation Grant Program; Fiscal Year 2016 Priority List and Approval for Award of the Conservation Projects**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of priority list and approval of projects.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the Fiscal Year (FY) 2016 priority list of wildlife and sport fish conservation projects from the Association of Fish and Wildlife Agencies (AFWA). As required by the Wildlife and Sport Fish Restoration Programs Improvement Act of 2000, AFWA submits a list of projects

to us each year to consider for funding under the Multistate Conservation Grant Program. We reviewed the list and have awarded all the grants from the list.

**ADDRESSES:** John C. Stremple, Multistate Conservation Grants Program Coordinator; Wildlife and Sport Fish Restoration Program; U.S. Fish and Wildlife Service; 5275 Leesburg Pike; MS: WSFR; Falls Church, VA 22041-3808.

**FOR FURTHER INFORMATION CONTACT:** John C. Stremple, (703) 358-2156 (phone) or *John\_Stremple@fws.gov* (email).

**SUPPLEMENTARY INFORMATION:** The Fish and Wildlife Programs Improvement and National Wildlife Refuge System Centennial Act of 2000 (Improvement Act, Pub. L. 106-408) amended the Pittman-Robertson Wildlife Restoration Act (16 U.S.C. 669 *et seq.*) and the Dingell-Johnson Sport Fish Restoration Act (16 U.S.C. 777 *et seq.*) and established the Multistate Conservation Grant Program. The Improvement Act authorizes us to award grants of up to \$3 million annually from funds available under each of the restoration acts, for a total of up to \$6 million annually. Projects can be funded from both funds depending on the project activities. We may award grants to projects from a list of priority projects recommended to us by the Association of Fish and Wildlife Agencies. The Service Director, exercising the authority of the Secretary of the Interior, need not fund all projects on the list, but all projects funded must be on the list.

The Improvement Act provides that funding for Multistate grants is available in the year it is appropriated and for the following year. Total funding for the FY 2016 Multistate Conservation grants is in excess of \$6 million due to funding that has been carried over from FY 2015, as well as the availability of funding that had previously been sequestered.

Grantees under this program may use funds for sport fisheries and wildlife management and research projects, boating access development, hunter safety and education, aquatic education, fish and wildlife habitat improvements, and other purposes consistent with the enabling legislation.

To be eligible for funding, a project must benefit fish and/or wildlife conservation for at least 26 States, for a majority of the States in any one Service Region, or for one of the regional associations of State fish and wildlife agencies. We may award grants to a State, a group of States, or one or more nongovernmental organizations. For the purpose of carrying out the National Survey of Fishing, Hunting, and

Wildlife-Associated Recreation, we may award grants to the Service, if requested by AFWA, or to a State or a group of States. Also, AFWA requires all project proposals to address its National Conservation Needs, which AFWA announces annually at the same time it requests proposals. Further, applicants must provide certification that no activities conducted under a Multistate Conservation Grant will promote or encourage opposition to regulated

hunting or trapping of wildlife, or to regulated angling or taking of fish. AFWA committees and interested nongovernmental organizations that represent conservation organizations, sportsmen’s and women’s organizations, and industries that support or promote fishing, hunting, trapping, recreational shooting, bowhunting, or archery review and rank eligible project proposals. AFWA’s Committee on National Grants recommends a final list of priority

projects to the directors of the State fish and wildlife agencies for their approval by majority vote. By statute, AFWA then transmits the final approved list to the Service for funding under the Multistate Conservation Grant program by October 1 of the fiscal year. This year, AFWA sent us a list of 18 projects that they recommended for funding. We awarded all of the recommended projects for FY 2016. The list follows:

MULTISTATE CONSERVATION GRANT PROGRAM  
[FY 2016 projects]

ID	Title	Submitter	PR funding <sup>1</sup>	DJ funding <sup>2</sup>	Total 2015 grant
1	State Fish & Wildlife Agency Technical Workgroup for the 2016 National Survey.	AFWA	\$3,360	\$3,360	\$6,720
2	State Fish and Wildlife Agency Administration and Coordination.	AFWA	77,386.63	77,386.63	154,773.26
3	Development of a National Outreach Strategy	AFWA	74,925	74,925	149,850
4	Increasing Effectiveness of State Wildlife Agencies Through Leadership & Professional Development.	AFWA	15,000	15,000	30,000
5	Management Assistance Team (MAT) and the National Conservation Leadership Institute.	AFWA	118,568	118,568	237,136
6	State Fish & Wildlife Agency Director Travel Administration and Coordination.	AFWA	48,056.25	48,056.25	96,112.50
7	Expansion & Implementation of the North American Conservation Education Strategy’s Outdoor Recreation Model.	AFWA	12,485	12,485	24,970
8	Preserve State Agencies’ Authority to Manage Wildlife Resources and Promote Their Interest in the Implementation of International Treaties.	AFWA	9,000	9,000	18,000
9	Diversifying Outdoor Education: Translate Explore Bowhunting into Spanish to Reveal an Untapped Market.	ATA	52,500	0	52,500
10	AFWA’s Legal Strategy: Educating Law Students, Lawyers, Judges, and the Public on State Legal Authority to Manage Fish and Wildlife Resources.	AFWA	75,000	75,000	150,000
11	Coordination of the Industry, Federal, and State Agency Coalition.	AFWA	86,640	86,640	173,280
12	Recruitment of Hispanic Hunters: Using a Case Studies approach to gain insights into Hispanic values toward wildlife and motivations and participation in hunting.	Max McGraw Wildlife Foundation	19,675	0	19,675
13	Crucial Habitat Assessment Tool (CHAT)	WAFWA	20,000	20,000	40,000
14	2016—Raising Awareness of the WSFR Program and improving industry relations to ensure the long-term stability of the program.	WMI	60,000	60,000	120,000
15	Advancing the Objectives of the National Fish Habitat Action Plan through Regional and Collaborative Science and Priority Setting.	AFWA/NFHB	0	86,000	86,000
16	Coordination of the 2016 National Survey Efforts (part A)	FWS	128,483	128,483	256,966
17	50 State Surveys Related to Fishing, Hunting, and Wildlife-Associated Recreation (part B).	Rockville Institute (Westat)	1,780,370	1,780,370	3,560,740
18	National-Level Results for the 2016 Survey of Fishing, Hunting and Wildlife-Associated Recreation (part A).	FWS/U.S. Census Bureau	1,272,167	1,272,167	2,544,334
			3,853,615.88	3,867,440.88	7,721,056.76

<sup>1</sup> PR Funding: Pitman-Robertson Wildlife Restoration funds.  
<sup>2</sup> DJ Funding: Dingell-Johnson Sport Fish Restoration funds.  
 AFWA: Association of Fish and Wildlife Agencies.  
 ATA: Archery Trade Association.  
 NFHB: National Fish Habitat Board.  
 WAFWA: Western Association of Fish and Wildlife Agencies.  
 WMI: Wildlife Management Institute.

Dated: December 7, 2015.

**Stephen Guertin,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2016-02799 Filed 2-10-16; 8:45 am]

**BILLING CODE 4333-15-P**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[LLOR936000.L1440000.ET0000.

15XL1109AF; HAG 15-0155; OR-50500]

**Public Land Order No. 7850; Extension of Public Land Order No. 7184, Elk River Wild and Scenic Corridor; Oregon**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order extends the duration of the withdrawal created by Public Land Order No. 7184 for an additional 20-year period, which would otherwise expire on February 13, 2016. This extension is necessary to continue the protection of the investment of Federal funds and recreational and visual resources of the Elk River Wild and Scenic Corridor within the Siskiyou National Forest in Oregon.

**DATES:** This withdrawal extension is effective on February 14, 2016.

**FOR FURTHER INFORMATION CONTACT:**

Robin Ligons, Bureau of Land Management Oregon/Washington State Office, 503-808-6169, or Candice Polisky, U.S. Forest Service, Region 6, Pacific Northwest Regional Office, 503-808-2479. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to reach either of the above contacts. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with either of the above individuals. You will receive a reply during normal business hours.

**SUPPLEMENTARY INFORMATION:** The purpose for which the withdrawal was first made requires this extension to continue protection of the Federal investment of approximately \$6.6 million in recreational developments and fisheries in the Elk River Wild and Scenic Corridor within the Siskiyou National Forest located in Curry County, Oregon.

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

Public Land Order No. 7184 (61 FR 5719 (1996)), as corrected (61 FR 24948 (1996)), which withdrew 4,921 acres of National Forest System lands from location and entry under the United States mining laws, but not from leasing under the mineral leasing laws, to protect the significant recreational and visual resources of the Elk River Wild and Scenic Corridor, is hereby extended for an additional 20-year period. The withdrawal extended by this order will expire on February 13, 2036, unless, as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976 43 U.S.C. 1714, the Secretary determines that the withdrawal shall be further extended.

Dated: January 31, 2016.

**Janice M. Schneider,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. 2016-02797 Filed 2-10-16; 8:45 am]

**BILLING CODE 3410-15-P**

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[LLCAD01000 L12100000.MD0000

16XL1109AF]

**Meeting of the California Desert District Advisory Council**

**AGENCY:** Bureau of Land Management.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) California Desert District Advisory Council (DAC) will meet as indicated below.

**DATES:** The DAC will participate in a field tour of BLM-administered public lands on Friday, March 4, 2016, from 8:00 a.m. to 5:00 p.m. and will meet in formal session on Saturday, March 5, 2016, from 8:00 a.m. to 5:00 p.m. in Palm Springs, California. Members of the public are welcome. They must provide their own transportation, meals and beverages. Final agendas for the Friday field trip and the Saturday public meeting, along with the Saturday meeting location, will be posted on the DAC Web page at <http://www.blm.gov/dac/st/en/info/rac/dac.html> when finalized.

**FOR FURTHER INFORMATION CONTACT:** Stephen Razo, BLM California Desert District External Affairs, 1-951-697-5217. Persons who use a

telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal hours.

**SUPPLEMENTARY INFORMATION:** All DAC meetings are open to the public. The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management on BLM-administered lands in the California desert. Public comment for items not on the agenda will be scheduled at the beginning of the meeting Saturday morning. Time for public comment is made available by the council chairman during the presentation of various agenda items, and is scheduled at the end of the meeting for topics not on the agenda. While the Saturday meeting is tentatively scheduled from 8:00 a.m. to 5:00 p.m., the meeting could conclude prior to 5:00 p.m. should the council conclude its presentations and discussions. Therefore, members of the public interested in a particular agenda item or discussion should schedule their arrival accordingly. Agenda for the Saturday meeting will include updates by council members, the BLM California Desert District Manager, five Field Managers, and council subgroups. Focus topics for the meeting will include wilderness and Paradise Valley. Written comments may be filed in advance of the meeting for the California Desert District Advisory Council, c/o Bureau of Land Management, External Affairs, 22835 Calle San Juan de Los Lagos, Moreno Valley, CA 92553. Written comments also are accepted at the time of the meeting and, if copies are provided to the recorder, will be incorporated into the minutes.

Dated: January 29, 2016.

**Teresa A. Raml,**

*California Desert District Manager.*

[FR Doc. 2016-02767 Filed 2-10-16; 8:45 am]

**BILLING CODE 4310-40-P**

**INTERNATIONAL TRADE COMMISSION**

**Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Pumping Bras DN 3118*; the Commission is soliciting comments on any public interest issues raised by the complainant or complainant's filing under section 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at EDIS,<sup>1</sup> and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at USITC.<sup>2</sup> The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at EDIS.<sup>3</sup> Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to section 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Simple Wishes, LLC on February 5, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pumping bras. The complainant names as respondents TANZKY of China; BabyPreg of China; Deal Perfect of China; and Buywish of China. The complainant requests that the Commission issue a general exclusion order, a limited exclusion order and cease and desist orders.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length,

inclusive of attachments, on any public interest issues raised by the complaint or section 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

- (i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;
- (ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;
- (iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;
- (iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and
- (v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number ("Docket No. 3118") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures<sup>4</sup>). Persons with

questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.<sup>5</sup>

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: February 5, 2016.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2016-02727 Filed 2-10-16; 8:45 am]

**BILLING CODE 7020-02-P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Explosive Materials and Blasting Units in Metal and Nonmetal Underground Gassy Mines

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, "Explosive Materials and Blasting Units in Metal and Nonmetal Underground Gassy Mines," to the Office of Management and Budget (OMB) for review and approval, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before March 14, 2016.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the

<sup>1</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

<sup>2</sup> United States International Trade Commission (USITC): <http://edis.usitc.gov>.

<sup>3</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

<sup>4</sup> Handbook for Electronic Filing Procedures: [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf).

<sup>5</sup> Electronic Document Information System (EDIS): <http://edis.usitc.gov>.

RegInfo.gov Web site at: [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201510-1219-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201510-1219-002) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-MSHA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Explosive Materials and Blasting Units in Metal and Nonmetal Underground Gassy Mines information collection. Under regulations 30 CFR parts 7 and 15, the MSHA evaluates and approves explosive materials and blasting units as permissible for use in the mining industry; however, since there are no permissible explosives or blasting units available that have adequate blasting capacity for some metal and nonmetal gassy mines, regulations 30 CFR 57.22606(a) outlines the procedures for a mine operator to follow when using non-approved explosive materials and blasting units. The standard requires the mine operator of a Class III metal or nonmetal mine (gassy mine) to notify the MSHA in writing prior to the use of any non-approved explosive materials and blasting units. The MSHA then evaluates the non-approved explosive materials and determines whether they are safe for use in a potentially gassy environment. Federal Mine Safety and Health Act of 1977 sections 101(a) and 103(h) authorize this information collection. See 30 U.S.C. 811(a), 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is

approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219-0095.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 3, 2015 (80 FR 46056).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219-0095. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL-MSHA.

*Title of Collection:* Explosive Materials and Blasting Units in Metal and Nonmetal Underground Gassy Mines.

*OMB Control Number:* 1219-0095.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 1.

*Total Estimated Number of Responses:* 1.

*Total Estimated Annual Time Burden:* 1 hour.

*Total Estimated Annual Other Costs Burden:* \$6.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: February 4, 2016.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2016-02748 Filed 2-10-16; 8:45 am]

**BILLING CODE 4510-43-P**

## DEPARTMENT OF LABOR

### Office of Labor-Management Standards

#### Extension of Information Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Labor-Management Standards (OLMS) of the Department of Labor (Department) is soliciting comments concerning the proposed extension of the collection of information requirements implementing Executive Order (E.O.) 13496: Notification of Employee Rights Under Federal Labor Laws. A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before April 11, 2016.

**ADDRESSES:** Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-5609, Washington, DC 20210,

public@dol.gov, (202) 693-0123 (this is not a toll-free number), (800) 877-8339 (TTY/TDD).

Please use only one method of transmission for comments (mail or Email).

#### **SUPPLEMENTARY INFORMATION: I.**

**Background:** President Barack Obama signed Executive Order 13496 (E.O. 13496) on January 30, 2009, requiring certain Government contractors and subcontractors to post notices informing their employees of their rights as employees under Federal labor laws. The Order also provides the text of contractual provisions that Federal Government contracting departments and agencies must include in every Government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold.

OLMS administers the enforcement provisions of Executive Order 13496, while the compliance evaluation and investigatory provisions are handled by the Department's Office of Federal Contract Compliance Programs (OFCCP), pursuant to the Order's implementing regulatory provisions (29 CFR part 471). Complaints can be filed with both agencies.

**II. Review Focus:** The Department is particularly interested in comments which:

- \* evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- \* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- \* enhance the quality, utility and clarity of the information to be collected; and

- \* minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**III. Current Actions:** The Department seeks extension of the current approval to collect this information. An extension is necessary because if this information collection is not conducted, E.O. 13496 could not be enforced through the complaint procedure.

E.O. 13496 advances the Administration's goal of promoting economy and efficiency of Federal

government procurement by ensuring that workers employed in the private sector as a result of Federal government contracts are informed of their rights to engage in union activity and collective bargaining. Knowledge of such basic statutory rights promotes stable labor-management relations, thus reducing costs to the Federal government.

The contractual provisions require contractors and subcontractors to post a notice, created by the Secretary of Labor, informing employees of their rights under the National Labor Relations Act. The notice also provides a statement of the policy of the United States to encourage collective bargaining, as well as a list of activities that are illegal under the Act. The notice concludes with a general description of the remedies to which employees may be entitled if these rights have been violated and contact information for further information about those rights and remedies, as well as enforcement procedures.

The clause also requires contractors to include the same clause in their nonexempt subcontracts and purchase orders, and describes generally the sanctions, penalties, and remedies that may be imposed if the contractor fails to satisfy its obligations under the Order and the clause.

The regulatory provisions implementing E.O. 13496 (29 CFR part 471) include the language of the required notices, and they explain posting and contractual requirements, the complaint process, the investigatory process, and sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order. Specifically, 29 CFR part 471.11(c) sets forth the procedures that the Department must use when accepting written complaints alleging that a contractor doing business with the Federal government has failed to post the notice required by the Executive Order.

*Type of Review:* Extension

*Agency:* Office of Labor-Management Standards

*OMB Number:* 1245-0004

*Affected Public:* Employees of Federal Contractors and Subcontractors

*Total Respondents:* 10.

*Total Annual responses:* 10.

*Estimated Total Burden Hours:* 12.80.

*Estimated Time Per Response:* 1.28 hours.

*Frequency:* On occasion of employee of a Federal contractor or subcontractor filing a complaint alleging a violation of proposed 29 CFR part 471.

*Total Burden Cost (capital/startup):* \$5.30 (\$0.53 per response × 10 respondents)

*Total Burden Cost (operating/maintenance):* \$0

*Employee Complaints Cost:* \$323.10 (\$32.31 per response × 10 respondents)

*Total Annual Burden Cost:* \$328.40 (\$5.30+ \$323.10)

Total respondent and responses estimates are based upon the estimate of 25 in the previous E.O. 13496 extension of information collection. See 78 FR 12799. In that submission, the Department estimated it would receive 25 employee complaints. However, since the Department received only two employee complaints since publishing the final rule in 2010, the Department has lowered its complaint estimate to 10.

The Department has not adjusted its total employee complaint hour estimate of 1.28 hours, which it estimated in the E.O. 13496 final rule. 75 FR 28368.

Based on the average seasonally-adjusted hourly earnings on private non-farm payrolls for all workers of \$25.24, we estimate that an employee will incur a cost of approximately \$32.31 for the 1.28 hours involved ( $\$25.24 \times 1.28$ ) in preparing a complaint. The total hourly cost for all employees is therefore \$323.10. Additionally, employees will incur costs of \$0.53 per complaint in capital/start-up costs (\$0.49 for postage + \$0.03 for an envelope + \$0.01 for paper) for a total cost of \$5.30. The total cost for the estimated 10 complaints is therefore \$328.40 (\$323.10 + \$5.30). There are no ongoing operation/maintenance costs associated with this information collection.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 20, 2016.

**Andrew R. Davis,**

*Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor.*

[FR Doc. 2016-02750 Filed 2-10-16; 8:45 am]

**BILLING CODE P**

## **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice: (16-013)]

### **NASA Advisory Council; Institutional Committee; Meeting.**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act (Public Law 92-463), the National Aeronautics and Space Administration announces a meeting of the Institutional Committee of the NASA Advisory Council (NAC). This committee reports to the NAC.

**DATES:** Wednesday, March 16, 2016, 9:00 a.m.–5:00 p.m., Local Time; and Thursday, March 17, 2016, 9:00 a.m.–4:30 p.m.; Local Time.

**ADDRESSES:** NASA Headquarters, Room 4L39, 300 E Street SW., Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Mr. Todd Mullins, NAC Institutional Committee Executive Secretary, NASA Headquarters, Washington, DC 20546; phone: (202) 358-3831 or [todd.mullins@nasa.gov](mailto:todd.mullins@nasa.gov).

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up to the seating capacity of the room. This meeting is also available telephonically and by WebEx. You must use a touch-tone phone to participate in this meeting. Any interested person may dial the toll free access number (844) 467-6272 or toll access number (720) 259-6462, and then the numeric participant passcode: 180093 followed by the # sign. To join via WebEx on March 16, the web link is <https://nasa.webex.com/>, the meeting number is 997 565 923 and the password is Meeting2016! (Password is case sensitive.) To join via WebEx on March 17, the link is <https://nasa.webex.com/>, the meeting number is 992 877 827 and the password is Meeting2016! (Password is case sensitive.) **Note:** If dialing in, please “mute” your telephone. The agenda for the meeting includes the following topics:

- Business Systems Assessment (BSA) Status
- Mission Support Budget
- NASA IT Security
- NAC Institutional Committee Work Plan

Attendees will be requested to sign a register and to comply with NASA Headquarters security requirements, including the presentation of a valid picture ID before receiving access to NASA Headquarters. Due to the Real ID Act, Public Law 109-13, any attendees with drivers licenses issued from non-compliant states/territories must present a second form of ID. [Federal employee badge; passport; active military identification card; enhanced driver's license; U.S. Coast Guard Merchant Mariner card; Native American tribal document; school identification accompanied by an item from LIST C

(documents that establish employment authorization) from the “List of the Acceptable Documents” on Form I-9]. Non-compliant states/territories are: American Samoa, Illinois, Minnesota, Missouri, New Mexico and Washington. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration date), employer/affiliation information (name of institution, address, country, telephone); title/ position of attendee; and home address to Ms. Mary Dunn, via email at [mdunn@nasa.gov](mailto:mdunn@nasa.gov) or by telephone at (202) 358-2789. U.S. citizens and Permanent Residents (green card holders) are requested to submit their name and affiliation 3 working days prior to the meeting to Ms. Mary Dunn via email or fax as noted above. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

**Patricia D. Rausch,**

*Advisory Committee Management Officer,  
National Aeronautics and Space Administration.*

[FR Doc. 2016-02813 Filed 2-10-16; 8:45 am]

**BILLING CODE 7510-13-P**

## NEIGHBORHOOD REINVESTMENT CORPORATION

### Regular Board of Directors Sunshine Act Meeting

**TIME AND DATE:** 3:00 p.m., Wednesday, February 17, 2016.

**PLACE:** NeighborWorks America—Gramlich Boardroom, 999 North Capitol Street NE., Washington, DC 20002.

**STATUS:** Open (with the exception of Executive Session).

**CONTACT PERSON:** Jeffrey Bryson, EVP & General Counsel/Secretary (202) 760-4101; [jbryson@nw.org](mailto:jbryson@nw.org).

#### AGENDA:

- I. Call to Order
- II. Approval of Minutes
- III. Executive Session: Audit Committee Report
- IV. Executive Session: Report from CEO
- V. Executive Session: Compensation Review
- VI. Sustainable Homeownership Project
- VII. Fresh Start Project
- VIII. Corporate Goals
- IX. Strategic Plan Perspectives
- X. Management Program Background & Updates

## XI. Adjournment

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(2) and (4) permit closure of the following portions of this meeting:

- Audit Committee Report
- Report from CEO
- Compensation Review

**Jeffrey T. Bryson,**

*EVP and General Counsel/Corporate Secretary.*

[FR Doc. 2016-02945 Filed 2-9-16; 4:15 pm]

**BILLING CODE 7570-02-P**

## NEIGHBORHOOD REINVESTMENT CORPORATION

### Audit Committee Sunshine Act Meeting

**TIME AND DATE:** 1:30 p.m., Wednesday, February 17, 2016.

**PLACE:** NeighborWorks America—Gramlich Boardroom, 999 North Capitol Street NE., Washington, DC 20002.

**STATUS:** Open (with the exception of Executive Sessions).

**CONTACT PERSON:** Jeffrey Bryson, General Counsel/Secretary, (202) 760-4101; [jbryson@nw.org](mailto:jbryson@nw.org).

#### AGENDA:

- I. Call to Order
- II. Status Update from the External Auditor
- III. Executive Session with the External Auditor
- IV. Executive Session with the Chief Audit Executive
- V. Executive Session: Pending Litigation
- VI. Internal Audit Reports with Management's Response
- VII. Internal Audit Status Reports
- VIII. Compliance Update
- IX. OHTS Watch List Review
- X. Adjournment

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4) permit closure of the following portions of this meeting:

- Executive Session with the External Auditor
- Executive Session with the Chief Audit Executive
- Executive Session—Pending Litigation

**Jeffrey T. Bryson,**

*EVP & General Counsel/Corporate Secretary.*

[FR Doc. 2016-02944 Filed 2-9-16; 4:15 pm]

**BILLING CODE 7570-02-P**

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–373 and 50–374; NRC–2014–0268]

### License Renewal Application for LaSalle County Station, Units 1 and 2

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Draft supplemental generic environmental impact statement; issuance; public meeting; and request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft plant-specific Supplement 57 to the Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants, NUREG–1437, regarding the renewal of operating licenses NPF–11 and NPF–18 for an additional 20 years of operation for LaSalle County Station (LSCS), Units 1 and 2. LSCS is located in LaSalle County, Illinois. Possible alternatives to the proposed action (licenses renewal) include no action and reasonable alternative energy sources. The NRC staff plans to hold a public meeting during the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document.

**DATES:** Submit comments by April 4, 2016. Comments received after this date will be considered, if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- Federal Rulemaking Web site: Go to <http://www.regulations.gov> and search for Docket ID NRC–2014–0268. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- Mail comments to: Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H08, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

### FOR FURTHER INFORMATION CONTACT:

David Drucker, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 1–800–368–5642, extension 6223, email: [David.Drucker@nrc.gov](mailto:David.Drucker@nrc.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Obtaining Information and Submitting Comments

##### A. Obtaining Information

Please refer to Docket ID NRC–2014–0268 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document by any of the following methods:

- Federal Rulemaking Web site: Go to <http://www.regulations.gov> and search for Docket ID NRC–2014–0268.

- NRC’s Agencywide Documents Access and Management System (ADAMS): You may obtain publicly-available documents online in the ADAMS Public Documents collection at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “ADAMS Public Documents” and then select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section. The draft plant-specific Supplement 57 to the GEIS for License Renewal of Nuclear Plants, NUREG–1437, is available in ADAMS under Accession No. ML16033A103.

- NRC’s PDR: You may examine and purchase copies of public documents at the NRC’s PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

##### B. Submitting Comments

Please include Docket ID NRC–2014–0268 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at <http://www.regulations.gov> as well as entering the comment submissions into ADAMS. The NRC does not routinely edit

comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

#### II. Discussion

The NRC is issuing for public comment a draft plant-specific Supplement 57 to the GEIS for License Renewal of Nuclear Plants, NUREG–1437, regarding the renewal of operating licenses NPF–11 and NPF–18 for an additional 20 years of operation for LSCS. Supplement 57 to the GEIS includes the preliminary analysis that evaluates the environmental impacts of the proposed action and alternatives to the proposed action. The NRC’s preliminary recommendation is that the adverse environmental impacts of license renewal for LSCS are not great enough to deny the option of license renewal for energy-planning decisionmakers.

#### III. Public Meeting

The NRC staff will hold a public meeting prior to the close of the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comment on the document. The meeting will be held at the LaSalle County, Emergency Operations Center, 711 East Etna Road, Ottawa, Illinois 61350, on Tuesday, March 22, 2016. The meeting will convene at 7:00 p.m. and will continue until 9:00 p.m., as necessary. The meeting will be transcribed and will include: (1) A presentation of the contents of the draft plant-specific supplement to the GEIS; and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. To be considered in the final supplement to the GEIS, comments must be provided either at the transcribed public meeting or submitted in writing by the comment deadline identified above. Persons may pre-register to attend or present oral comments at the meeting by contacting Mr. David Drucker, the NRC Project Manager, at 1–800–368–5642, extension 6223, or by email at [David.Drucker@nrc.gov](mailto:David.Drucker@nrc.gov) no later than Tuesday, March

15, 2016. Members of the public may also register to provide oral comments within 15 minutes before the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Mr. Drucker's attention no later than Tuesday, March 15, 2016, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

Dated at Rockville, Maryland, this 8 day of February, 2016

For The Nuclear Regulatory Commission.

**James G. Danna,**

*Chief, Environmental Review and Project Management Branch, Division of License Renewal, Office of Nuclear Reactor Regulation.*

[FR Doc. 2016-02785 Filed 2-10-16; 8:45 am]

**BILLING CODE 7590-01-P**

## **NUCLEAR REGULATORY COMMISSION**

**[NRC-2016-0001]**

### **Sunshine Act Meeting**

**DATE:** February 8, 2016.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public.

### **Week of February 8, 2016**

*Tuesday, February 9, 2016*

11:00 a.m. Affirmation Session (Public Meeting) (Tentative) Nuclear Innovation North America, LLC (South Texas Project, Units 3 and 4); Mandatory Hearing Decision (Tentative)

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301-415-0681 or via email at [Denise.McGovern@nrc.gov](mailto:Denise.McGovern@nrc.gov).

### **Additional Information**

By a vote of 4-0 on February 8, 2016, the Commission determined pursuant to U.S.C. 552b(e) and 9.107(a) of the Commission's rules that both items in the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on February 9, 2016.

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise

McGovern at 301-415-0681 or via email at [Denise.McGovern@nrc.gov](mailto:Denise.McGovern@nrc.gov).

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., Braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301-287-0739, by videophone at 240-428-3217, or by email at [Kimberly.Meyer-Chambers@nrc.gov](mailto:Kimberly.Meyer-Chambers@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301-415-1969), or email [Brenda.Akstulewicz@nrc.gov](mailto:Brenda.Akstulewicz@nrc.gov) or [Patricia.Jimenez@nrc.gov](mailto:Patricia.Jimenez@nrc.gov).

Dated: February 8, 2016.

**Glenn Ellmers,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2016-02866 Filed 2-9-16; 11:15 am]

**BILLING CODE 7590-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-77065; File No. SR-BATS-2016-15]**

### **Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.**

February 5, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 4, 2016, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("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.

<sup>1</sup> 17 CFR 200.30-3(a)(12).

<sup>2</sup> 17 CFR 240.19b-4.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange filed a proposal to amend the fee schedule applicable to Members<sup>3</sup> and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c) ("Fee Schedule"). The changes to the Fee Schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at [www.batstrading.com](http://www.batstrading.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the 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 parts 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 its Fee Schedule to: (i) Adopt a new tier under footnote 1 called the Market Depth Tier; (ii) eliminate from footnote 2 Step-Up Tiers 1, 2, and 3 and rename Step-Up Tier 4 as "Step-Up Tier"; and (iii) modify the tier-based incremental credits for Members that are Lead Market Makers ("LMMs") for their orders that provide displayed liquidity in Tape B securities described under footnote 14.

##### **Proposed Market Maker Depth Tier**

Currently, the Exchange determines the liquidity adding rebate that it will provide to Members using the Exchange's tiered pricing structure. Under such pricing structure, a Member will receive a rebate of anywhere between \$0.0020 and \$0.0034 per share executed, depending on the volume tier for which such Member qualifies. The Exchange proposes to adopt a new tier under footnote 1 titled the "Market

<sup>3</sup> The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

Depth Tier". Under the Market Depth Tier, the Exchange is proposing to provide a rebate of \$0.0032 per share to Members that add an ADV<sup>4</sup> of at least: (i) 1% of the TCV;<sup>5</sup> and (ii) 0.10% of the TCV as Non-Displayed Orders<sup>6</sup> that yield fee codes HA<sup>7</sup> or HI.<sup>8</sup> As is the case with any other rebates on the Fee Schedule, to the extent that a Member qualifies for higher rebates than those provided under the proposed Market Depth Tier, the higher rebates shall apply.

#### Amendments to Step-Up Tiers

The Exchange also maintains additional Step-Up Tiers that provide Members with additional ways to qualify for enhanced rebates where they increase their liquidity each month over a predetermined baseline. The Exchange currently offers four Step-Up Tiers under footnote 2 of its Fee Schedule. Under Tier 1, a Member receives a rebate of \$0.0025 per share when its Step-Up Add TCV from January 2014 is equal to or greater than 0.07%. Under Tier 2, a Member receives a rebate of \$0.0029 per share when its Step-Up Add TCV from January 2014 is equal to or greater than 0.10%. Under Tier 3, a Member receives a rebate of \$0.0030 per share when its Step-Up Add TCV from January 2014 is equal to or greater than 0.15%. Lastly, under Tier 4, a Member [sic] receives a rebate of \$0.0030 per share where their Step-Up Add TCV<sup>9</sup> from August 2015 is equal to or greater than 0.08%; and (2) Member's ADAV<sup>10</sup> as a percentage of TCV is equal to or greater than 0.35%.

The Exchange proposes to amend footnote 2 to eliminate Step-Up Tiers 1, 2, and 3 and rename Step-Up Tier 4 as Step-Up Tier. The Exchange believes that Step-Up Tiers 1, 2, and 3 have successfully encouraged Members to increase their liquidity on the Exchange over a January 2014 baseline and that such tiers are no longer necessary. The Exchange notes that Step-Up Tier 4, which is to be renamed Step-Up Tier, provides a contemporary baseline of August 2015 by which Members may seek to increase their liquidity and receive a rebate of \$0.0030 per share. In addition, deletion of Step-Up Tiers 1, 2, and 3 would help offset the cost

incurred by offering a rebate of \$0.0032 per share under the proposed Market Depth Tier discussed above.

#### LMM Credit Tiers for Tape B

On April 17, 2014, the Exchange filed a proposal to adopt rules to create an LMM Program (the "Program") on an immediately effective basis.<sup>11</sup> The Program is designed to strengthen market quality for BATS-listed Exchange Traded Products ("ETPs")<sup>12</sup> by offering enhanced pricing to market makers registered with the Exchange ("Market Makers")<sup>13</sup> that are also registered as an LMM in an LMM Security<sup>14</sup> and meet certain minimum quoting standards ("Minimum Performance Standards").<sup>15</sup> In October 2015, the Exchange filed a proposed rule change with the Commission to adopt such enhanced pricing for LMMs under part (A) of footnote 14 of the Fee Schedule<sup>16</sup> and to adopt additional LMM credit tiers under part (B) of footnote 14, also on an immediately effective basis.<sup>17</sup>

As described above, the Exchange offers tier-based incremental credits to Members that are LMMs for their orders that provide displayed liquidity in Tape B securities pursuant to paragraph (B) of footnote 14 of the Fee Schedule. Specifically, Members that are LMMs for LMM Securities receive an additional rebate per share (an "LMM Credit") for orders that provide displayed liquidity in Tape B securities traded on the Exchange, including non-BATS-listed securities, except that such LMM Credits are not applied to the rebates provided to LMMs pursuant to part (A) of footnote 14 of the Fee Schedule (the "LMM Rebate").

Currently, the LMM Credits and volume thresholds associated therewith are as follows: (i) An LMM Credit of \$0.0001 per share where an LMM is a Qualified LMM<sup>18</sup> in at least 50 ETPs; (ii) an LMM

Credit of \$0.0002 per share where an LMM is a Qualified LMM in at least 75 ETPs; (iii) an LMM Credit of \$0.0003 per share where an LMM is a Qualified LMM in at least 150 ETPs; and (iv) an LMM Credit of \$0.0004 per share where an LMM is a Qualified LMM in at least 250 ETPs.

The Exchange now proposes to amend the LMM Credit Tiers under part (B) of footnote 14 to reduce the minimum number of ETPs for which an LMM must be a Qualified LMM in order to qualify for each tier as follows: (i) To receive an LMM Credit of \$0.0001 per share, the number of ETPs for which the LMM is a Qualified LMM would be decreased from 50 to 25; (ii) to receive an LMM Credit of \$0.0002 per share, the number of ETPs for which the LMM is a Qualified LMM would be decreased from 75 to 50; (iii) to receive an LMM Credit of \$0.0003 per share, the number of ETPs for which the LMM is a Qualified LMM would be decreased from 150 to 75; and (iv) to receive an LMM Credit of \$0.0004 per share, the number of ETPs for which the LMM is a Qualified LMM would be decreased from 250 to 125.

For example, a Member that is a Qualified LMM in 100 ETPs is currently eligible to receive an LMM Credit of \$0.0002 per share in Tape B securities for which it is not a Qualified LMM, in addition to the rebate it would normally receive in accordance with the Exchange's Fee Schedule ("Normal Rebate"). As proposed, however, the Member would instead receive an LMM Credit of \$0.0003 per share in Tape B securities for which it is not a Qualified LMM in addition to the Normal Rebate.<sup>19</sup>

#### Implementation Date

The Exchange proposes to implement these amendments to its Fee Schedule immediately.<sup>20</sup>

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>21</sup> in general, and furthers the objectives of

<sup>11</sup> See Securities Exchange Act Release No. 72020 (April 25, 2014), 79 FR 24807 (May 1, 2014) (SR-BATS-2014-015).

<sup>12</sup> As defined in Rule 11.8(e)(1)(A), ETP means any security listed pursuant to Exchange Rule 14.11.

<sup>13</sup> See BATS Rule 11.5.

<sup>14</sup> As defined in Rule 11.8(e)(1)(C), LMM Security means an ETP that has an LMM.

<sup>15</sup> As defined in Rule 11.8(e)(1)(D), Minimum Performance Standards means a set of standards applicable to an LMM that may be determined from time to time by the Exchange.

<sup>16</sup> The Exchange does not propose to amend the enhanced pricing available to LMMs under part (A) of footnote 14 of its Fee Schedule.

<sup>17</sup> See Securities Exchange Act Release No. 76147 (October 14, 2015), 80 FR 63621 (October 20, 2015) (SR-BATS-2015-89).

<sup>18</sup> An LMM is a "Qualified LMM" in a security where it provides pricing for orders that add displayed liquidity in an LMM Security that meets

the Minimum Performance Standards during the applicable billing month.

<sup>19</sup> Where the LMM Credit plus the Normal Rebate is greater than the LMM Rebate, the Member will receive this higher rebate instead of the LMM Rebate, which is consistent with the treatment of all other fees and rebates, as provided in the General Note that states "to the extent a Member qualifies for higher rebates and/or lower fees than those provided by a tier for which such Member qualifies, the higher rebates and/or lower fees shall apply."

<sup>20</sup> The Exchange initially filed the proposed fee change on January 28, 2016 (SR-BATS-2016-11). On February 4, 2016, the Exchange withdrew SR-BATS-2016-11 and submitted this filing.

<sup>21</sup> 15 U.S.C. 78f.

<sup>4</sup> As defined in the Exchange's Fee Schedule.

<sup>5</sup> *Id.*

<sup>6</sup> See Exchange Rule 11.9(c)(11).

<sup>7</sup> As set forth in the Exchange's Fee Schedule, fee code HA is attached to Non-Displayed Orders that add liquidity.

<sup>8</sup> As set forth in the Exchange's Fee Schedule, fee code HI is attached to Non-Displayed Orders that receives price improvement and add liquidity.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Section 6(b)(4),<sup>22</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange. The Exchange believes that the proposed tier is equitable and non-discriminatory in it would apply uniformly to all Members. The Exchange believes the rates remain competitive with those charged by other venues and, therefore, reasonable and equitably allocated to Members.

Volume-based rebates such as that proposed herein have been widely adopted by equities and options exchanges and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to: (i) The value to an exchange's market quality; (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns; and (iii) introduction of higher volumes of orders into the price and volume discovery processes. The Exchange believes that the proposed tier is a reasonable, fair and equitable, and not unfairly discriminatory allocation of fees and rebates because they will provide Members with an additional incentive to reach certain thresholds on the Exchange.

In particular, the Exchange believes the addition of the Market Depth Tier is a reasonable means to encourage Members to increase their liquidity on the Exchange. The Exchange further believes that the proposed Market Depth Tier represents an equitable allocation of reasonable dues, fees, and other charges because the thresholds necessary to achieve the tier encourages Members to add displayed liquidity to the BATS Book<sup>23</sup> each month, as only the displayed liquidity in this tier is awarded the rebate of \$0.0032 per share. This tier also recognizes the contribution that non-displayed liquidity provides to the marketplace, including: (i) Adding needed depth to the Exchange market; (ii) providing price support/depth of liquidity; and (iii) increasing diversity of liquidity to the Exchange. The increased liquidity benefits all investors by deepening the

Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

#### Proposed Market Maker Depth Tier

The Exchange also notes that the criteria and rebate under the Market Depth Tier is equitable and reasonable as compared to other tiers offered by the Exchange. For example, under footnote 1 a Member may receive a rebate of \$0.0030 per share under Tier 4 where their: (i) ADAV as a percentage of TCV [sic] equal to or greater than .50%; or (ii) ADV as a percentage of TCV is equal to or greater than 1.00%. Like the proposed Market Depth Tier, Members must add as a percentage of TCV [sic] 1.00%. However, in order to receive the higher rebate of \$0.0032 per share, the Member must also add an ADV of at least 0.10% of the TCV as Non-Displayed Orders that yield fee codes HA or HL. Therefore, the Exchange believes the proposed Market Depth Tier is consistent with Section 6(b)(4)<sup>24</sup> of the Act as the more stringent criteria correlates with the tier's higher rebate.

#### Amendments to Step-Up Tiers

The Exchange believes that its proposal to amend footnote 2 to delete Step-Up Tiers 1, 2, and 3 and rename Step-Up Tier 4 as Step-Up Tier is reasonable, fair, and equitable for several of the reasons stated above. Specifically, the Exchange believes that Step-Up Tiers 1, 2, and 3 have successfully encouraged Members to increase their liquidity on the Exchange over a January 2014 baseline and that such tiers are no longer necessary. The Exchange notes that Step-Up Tier 4, which is to be renamed Step-Up Tier, provides a contemporary baseline of August 2015 by which Members may seek to increase their liquidity and receive a rebate of \$0.0030 per share. In addition, deletion of Step-Up Tiers 1, 2, and 3 would help offset the cost incurred by offering a rebate of \$0.0032 per share under the proposed Market Depth Tier discussed above. As such, the Exchange believes that removing the tier from its fee schedule is reasonable, fair, and equitable. The Exchange also believes that the proposed amendments are non-discriminatory because they apply uniformly to all Members.

#### LMM Credit Tiers for Tape B

The proposed reduction to the minimum number of ETPs for which an LMM must be a Qualified LMM in order

to qualify for each tier in the LMM Credit Tiers for Tape B is intended to encourage Members to promote price discovery and market quality across all BATS-listed securities for the benefit of all market participants. The Exchange believes that reducing the thresholds for meeting such tiers provides increased incentives to Members to become LMMs in BATS-listed ETPs, to satisfy the Minimum Performance Standards in ETPs each month, and to add liquidity in Tape B securities on the Exchange, and is therefore reasonable because the Exchange believes doing so would encourage more LMMs to register to quote and trade in as many BATS-listed ETPs as possible. In particular, reducing the ETP requirements necessary to receive enhanced rebates tiered based on the number of securities for which a Member is registered as an LMM, would provide an incentive for such Members not only to register as an LMM in more liquid securities, but also to register to quote in lower volume ETPs, which are traditionally less profitable for market makers than more liquid ETPs. Moreover, the Exchange believes that the proposed change will incentivize LMMs to register as an LMM in more ETPs, including less liquid ETPs and, thus, add more liquidity in these and other Tape B securities to the benefit of all market participants. The Exchange believes that the proposed reduction in the threshold is equitable and not unfairly discriminatory because it remains consistent with the market quality and competitiveness benefits associated with the fee program and because the magnitude of the additional rebate is not unreasonably high in comparison to the requirements associated with receiving such LMM Credit and the rebate paid with respect to other displayed liquidity-providing orders.

#### *(B) Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe its proposed amendment to its Fee Schedule would 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 change represents a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed change will impair the ability of Members or competing venues to maintain their

<sup>22</sup> 15 U.S.C. 78f(b)(4).

<sup>23</sup> See Exchange Rule 1.5(e).

<sup>24</sup> 15 U.S.C. 78f(b)(4).

competitive standing in the financial markets.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures to be unreasonable or excessive. The proposed changes are generally intended to enhance the rebates for liquidity added to the Exchange, which is intended to draw additional liquidity to the Exchange. The Exchange does not believe the proposed amendments would burden intramarket competition as they would apply to all Members uniformly.

The Exchange does not believe that the proposed new Market Depth Tier would burden competition, but instead, enhances competition, as it is intended to increase the competitiveness of and draw additional volume to the Exchange. Nor does the Exchange believe eliminating Step-Up Tiers 1, 2, and 3 would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Those tiers have successfully encouraged Members to increase their liquidity on the Exchange and their elimination would help offset the cost incurred by offering a rebate of \$0.0032 per share under the proposed Market Depth Tier.

The Exchange does not believe that the proposed reduction to the minimum number of ETPs for which an LMM must be a Qualified LMM in order to qualify for each tier in the LMM Credit Tiers for Tape B will burden competition, but instead, enhances competition, as these changes are intended to increase LMM participation in Tape B Securities, to incentivize Members to register as LMMs in BATS-listed ETPs, and to encourage Members to meet the Minimum Performance Standards in such ETPs. As such, the proposal is a competitive proposal that is intended to add additional liquidity to the Exchange, which will, in turn, benefit the Exchange and all Exchange participants.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

### 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) of the Act<sup>25</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>26</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-BATS-2016-15 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 No. SR-BATS-2016-15. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BATS-2016-15 and should be submitted on or before March 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-02730 Filed 2-10-16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77071; File No. SR-NYSEMKT-2015-89]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Provide That the Co-Location Services Offered by the Exchange Include Three Time Feeds and Four Partial Cabinet Bundle Options

February 5, 2016.

#### I. Introduction

On November 27, 2015 the NYSE MKT LLC ("the Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to provide that the co-location services offered by the Exchange include three time feeds and four bundles of co-location services ("Partial Cabinet Solution bundles"). The proposed rule change was published for comment in the **Federal Register** on December 16, 2015.<sup>3</sup> The Commission received one comment letter on the proposed rule change.<sup>4</sup> On January 28,

<sup>27</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 34-76613 (December 10, 2015), 80 FR 78262 ("Notice"). On January 28, 2016, the Exchange consented to extending the time period for the Commission to either approve or disapprove the proposed rule change, or to institute proceedings to determine whether to approve or disapprove the proposed rule change, to February 5, 2016.

<sup>4</sup> See letter from Kermit Kubitz to the Commission, dated January 6, 2016 ("Kubitz Letter").

<sup>25</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>26</sup> 17 CFR 240.19b-4(f).

2016, the Exchange filed a response letter.<sup>5</sup> On January 28, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>6</sup> The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

## II. Description of the Proposal, as Modified by Amendment No. 2

The Exchange proposes to change its rules to provide that the co-location services offered by the Exchange include three time feeds and four Partial Cabinet Solution bundles, and to establish fees for these services.

### Time Feeds

The Exchange proposes to offer Users the option to purchase connectivity to one or more of three time feeds.<sup>7</sup> Each proposed time feed provides a feed with the current time of day using one of three different time protocols: Global Positioning System (“GPS”) Time Source, the Network Time Protocol (“NTP”), and Precision Timing Protocol (“PTP”).<sup>8</sup> GPS is a time and location system maintained by the United States government.<sup>9</sup> The Exchange accesses the GPS Time Source feed through dedicated equipment and subscribing Users connect to the feed over dedicated cables.<sup>10</sup> For the NTP and PTP time

feeds, the Exchange routes the GPS data through dedicated equipment that reformats the GPS data into NTP and PTP.<sup>11</sup> Subscribing Users connect to PTP over dedicated cables and NTP over the Liquidity Center Network (“LCN”), a local area network available in the data center.<sup>12</sup> According to the Exchange, the GPS Time Source feed is a sub-microsecond time feed, providing the highest level of accuracy of the three time feeds.<sup>13</sup> PTP has an accuracy of less than 10 microseconds, while the accuracy of NTP can be greater than 10 milliseconds.<sup>14</sup> The Exchange states that a User does not require connectivity to a time feed to trade on the Exchange.<sup>15</sup> The proposed connectivity to time feeds would provide Users a convenient way to access time protocols.<sup>16</sup> According to the Exchange, Users make use of time feeds to receive time and to synchronize clocks between computer systems or throughout a computer network, and time feeds assist Users in other functions, including record keeping or measuring response times.<sup>17</sup>

Currently, Users have the option of either renting a dedicated cabinet or a partial cabinet to house their servers and other equipment in the data center.<sup>18</sup> Under the proposal, only the NTP and PTP time feeds will be available to partial cabinet Users, whereas dedicated cabinet Users will

specifying the differences in precision among the three time feeds.

<sup>7</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange, a “Hosting User” means a User that hosts a Hosted Customer in the User’s co-location space, and a “Hosted Customer” means a customer of a Hosting User that is hosted in a Hosting User’s co-location space. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMKT-2015-67). As specified in the Price List and Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange LLC and NYSE Arca, Inc. *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR-NYSEMKT-2013-67).

<sup>8</sup> *See* Notice, 80 FR at 78263.

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See* Amendment No. 2, at 4.

<sup>14</sup> *See id.*

have access to all three time feeds.<sup>19</sup> According to the Exchange, connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to interference from the cable power connections, interfering with the delivery of the GPS data.<sup>20</sup> The Exchange states that if a partial cabinet User is in need of the GPS feed, it could either purchase a dedicated cabinet or become a Hosted Customer of a Hosting User that has the GPS feed.<sup>21</sup> In addition, the Exchange states that the NTP time feed is offered only over the LCN due to a lack of demand for the NTP over the IP network, and notes that a User that requires connectivity to the NTP could connect to the LCN.<sup>22</sup>

The Exchange proposes to charge a non-recurring fee of \$300, \$1000, and \$3000 for connectivity to the NTP, PTP, and GPS time feeds, respectively.<sup>23</sup> The Exchange will also charge a monthly recurring fee of \$100, \$250, and \$400 for the NTP, PTP, and GPS time feeds, respectively.<sup>24</sup> Subscribing Users that order the proposed time feed services will be subject to a 12-month minimum commitment, after which they are subject to a 60-day rolling commitment.<sup>25</sup>

### Partial Cabinet Solution Bundles

The Exchange also proposes to offer four Partial Cabinet Solution bundles and establish fees therefor.<sup>26</sup> As more fully described in the Notice, each Partial Cabinet Solution bundle option would include network access, two fiber cross connections, and connectivity to either the NTP or PTP time feed.<sup>27</sup> Subscribing Users would be assessed a non-recurring fee and monthly charge for each bundle option as set forth below.<sup>28</sup>

<sup>15</sup> *See* Notice, 80 FR at 78263, n.6.

<sup>16</sup> *See id.* at 78263.

<sup>17</sup> *See id.* For example, a User may connect to a time feed for record keeping purposes if it uses that specific time protocol for all its activities, both inside and out of the data center. *See id.* at n.7.

<sup>18</sup> *See id.* at 78263.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at n.10.

<sup>21</sup> *See id.* at 78266.

<sup>22</sup> *See id.*

<sup>23</sup> *See id.* at 78263.

<sup>24</sup> *See id.*

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> *See* Securities Exchange Act Release No. 34-76613 (December 10, 2015), 80 FR 78262 (“Notice”). On January 28, 2016, the Exchange consented to extending the time period for the Commission to either approve or disapprove the proposed rule change, or to institute proceedings to determine whether to approve or disapprove the proposed rule change, to February 5, 2016.

<sup>4</sup> *See* letter from Kermit Kubitz to the Commission, dated January 6, 2016 (“Kubitz Letter”).

<sup>5</sup> *See* letter from Martha Redding Senior Counsel & Assistant Secretary, NYSE to Brent J. Fields, Secretary of the Commission, dated January 28, 2016 (“Exchange Response Letter”).

<sup>6</sup> On January 28, 2016, the Exchange filed Amendment No. 1 but withdrew it on the same day, replacing it with Amendment No. 2. Amendment No. 2 (i) updates the proposal to specify that Partial Cabinet Solution Bundles, originally proposed to be offered on January 1, 2016, instead will be offered on the date that is the later of February 1, 2016 and the date of any Commission approval of the proposal; and (ii) as described further below, adds clarity to the proposal by

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles. Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an aggregate cabinet footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle.	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$7,500 initial charge per bundle plus monthly charge per bundle as follows: <ul style="list-style-type: none"> <li>• For Users that order on or before December 31, 2016: \$3,000 monthly for first 12 months of service, and \$6,000 monthly thereafter.</li> <li>• For Users that order after December 31, 2016: \$6,000 monthly.</li> </ul>
	Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$7,500 initial charge per bundle plus monthly charge per bundle as follows: <ul style="list-style-type: none"> <li>• For Users that order on or before December 31, 2016: \$3,500 monthly for first 12 months of service, and \$7,000 monthly thereafter.</li> <li>• For Users that order after December 31, 2016: \$7,000 monthly.</li> </ul>
	Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$10,000 initial charge per bundle plus monthly charge per bundle as follows: <ul style="list-style-type: none"> <li>• For Users that order on or before December 31, 2016: \$7,000 monthly for first 12 months of service, and \$14,000 monthly thereafter.</li> <li>• For Users that order after December 31, 2016: \$14,000 monthly.</li> </ul>
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$10,000 initial charge per bundle plus monthly charge per bundle as follows: <ul style="list-style-type: none"> <li>• For Users that order on or before December 31, 2016: \$7,500 monthly for first 12 months of service, and \$15,000 monthly thereafter.</li> <li>• For Users that order after December 31, 2016: \$15,000 monthly.</li> </ul>

Additionally, a User purchasing a Partial Cabinet Solution bundle would be subject to a 90-day minimum commitment, after which period it would be subject to the 60-day rolling time period.<sup>29</sup>

As more fully described in the Notice, the Exchange states that the purpose of offering four Partial Cabinet Solution bundles is to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.<sup>30</sup> The Exchange proposes that the Partial Cabinet Solution bundles would be available to Users provided: (1) The subscribing User purchases only one Partial Cabinet Solution bundle; (2) the subscribing User and its Affiliates must not currently have a Partial Cabinet Solution bundle; and (3) after the purchase of the Partial Cabinet Solution bundle, the subscribing User, together with its Affiliates, has an Aggregate Cabinet Footprint of no more than 2 kW.<sup>31</sup> The Exchange proposes that for purposes of the Partial Cabinet Solution bundles, an "Affiliate" of a User would

be any other User or a Hosted Customer that is under 50% or greater common ownership or control of the first User.<sup>32</sup> Further, the term "Aggregate Cabinet Footprint" of a User or Hosted Customer is proposed to be defined as: (a) For a User, the total kW of the User's cabinets, including both partial and dedicated cabinets, and (b), for a Hosted Customer, the total kW of the portion of the Hosting User's cabinet, whether partial or dedicated, allocated to such Hosted Customer.<sup>33</sup>

A User would be required to inform the Exchange immediately of any event that causes the User or a Hosted Customer to become ineligible for a Partial Cabinet Solution bundle, including an event that causes another User or Hosted Customer to become an Affiliate as this can make the subscribing User ineligible for the bundle.<sup>34</sup> If a subscribing User ceases to

meet the conditions for access to the Partial Cabinet Solution bundle, it would be charged for each of the services individually, at the price for each such service set out in the Price List and Fee Schedule.<sup>35</sup> Such price change would be effective as of the date that the subscribing User ceased to meet the conditions.<sup>36</sup>

Further, if a subscribing User purchased each of the components of a Partial Cabinet Solution bundle, whether over several purchases or in one order, and met the conditions described above for access to the Partial Cabinet Solution bundle, the Exchange would automatically treat that User's services as a Partial Cabinet Solution bundle and, effective the date of installation of the final component, reduce the User's recurring fee to the recurring fee for the relevant bundle.<sup>37</sup> In addition, a User that changes its Partial Cabinet Solution bundle from one option to another will not be subject to a second initial charge, but will be required to pay the difference, if any, between the bundles' initial charges.<sup>38</sup>

Finally, the Exchange proposes to make non-substantive changes to the Price List and Fee Schedule to add

<sup>29</sup> See *id.* at 78265.

<sup>30</sup> See *id.* at 78265.

<sup>31</sup> See *id.* at 78265. The Exchange proposes to have a reduced minimum commitment period for

<sup>32</sup> See *id.* at n.15.

<sup>33</sup> See *id.* at 78264. For example, a User with a 4 kW dedicated cabinet would not be eligible for a Partial Cabinet Solution bundle, as its aggregate cabinet footprint would be either 5 kW or 6 kW once a Partial Cabinet Solution bundle was added.

<sup>34</sup> See *id.* The Exchange would review available information regarding the entities and may request additional information to verify the Affiliate status of a User or Hosted Customer. The Exchange would approve a request for a Partial Cabinet Solution bundle unless it determines that the certification is not accurate.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 78265.

<sup>38</sup> See *id.* at 78264, n.19.

subheadings under “Co-Location Fees” for “Definitions” and “General Notes.”<sup>39</sup>

### III. Summary of Comment Letter and Exchange Response

As noted above, the Commission received one comment letter on the proposed rule change,<sup>40</sup> and a response from the Exchange.<sup>41</sup> The commenter expressed concern about the potential for “GPS spoofing” (intentional interference with GPS feeds from a distance) if GPS data are from an unsecured source.<sup>42</sup> According to the commenter, a successful GPS spoofing attack could cause time feed data to become corrupted, which could cause Users, such as High Frequency Trading (“HFT”) firms that represent substantial market volume, to withdraw from the market and lead to market disruption.<sup>43</sup> The commenter asked particularly whether purchasers of Partial Cabinet Solution bundles that have access to the PTP and NTP feeds, but not the dedicated GPS time feed, would have any “special vulnerability to some sort of feed failure” as a result of “GPS spoofing” or otherwise.<sup>44</sup>

The Exchange responded that “[t]o the best of the Exchange’s knowledge, Users that connect to the NTP or the PTP, rather than the GPS Time Source, do not have a special vulnerability to feed failure, irrespective of whether they utilize a partial or dedicated cabinet.”<sup>45</sup> The Exchange stated that it uses the same GPS time feed equipment for its production environment and to provide time feeds to Users;<sup>46</sup> and that Users purchasing time feeds from the Exchange (whether GPS, PTP, or NTP) benefit from the same protections that the Exchange has implemented for its own GPS antennas and receivers.<sup>47</sup> The Exchange also stated that GPS is the source information for all three time feeds and that the Exchange routes the GPS data through dedicated equipment that reformats the GPS data to propagate the NTP and PTP.<sup>48</sup> The Exchange

further stated that any disruption to the GPS time feed would impact the NTP and PTP time feeds in the same way as the GPS feed; and that the Exchange has no knowledge of any other method to “spoof” the NTP or PTP feeds if the GPS feed were not compromised.<sup>49</sup>

### IV. Discussion and Commission Findings

After careful review and consideration of the Exchange’s proposal, the comment letter and the Exchange’s response, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>50</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(4) of the Act,<sup>51</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,<sup>52</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed rule change is consistent with Section 6(b)(4) of the Act. The Commission notes the Exchange’s representation that the proposed fees for the time feed connectivity and Partial Cabinet Solution bundles are reasonable because the Exchange proposes to offer the services as a convenience to Users, but in doing so will incur certain costs,

including costs related to the data center facility, hardware and equipment and costs related to personnel required for the initial installation, monitoring, support and maintenance of such services.<sup>53</sup> The Exchange states that the higher fee in connection with the GPS time feed reflects the greater costs for its equipment, installation and maintenance in comparison with the other time feeds.<sup>54</sup> In addition, all Users that voluntarily select connectivity to one or more of the proposed time feeds would be charged the same amount for the same services. With respect to the proposed Partial Cabinet Solution bundles in particular, the Commission also notes that all Users are subject to the same conditions and fees for the service selected; all Users are subject to the same limits on the number of Partial Cabinet Solution bundles and aggregate cabinet footprint; all Users that order a bundle on or before December 31, 2016 would have their monthly charges reduced by 50 percent for the first 12 months; and all Users that change their Partial Cabinet Solution bundles would not be charged a second initial charge but instead charged the difference, if any, between the initial charges.

The Commission further believes that the Exchange’s proposal to offer Users optional connectivity to the GPS, PTP, and NTP time feeds is consistent with the requirements of Section 6(b)(5) of the Act. The proposal to offer connectivity to different time feed options allows a User to select the time protocol that best suits it needs, helping to tailor its data center operations to the requirements of its business operations, and to operate more efficiently. As set forth in the Exchange Response Letter, the Exchange states that whether a User purchases access to the GPS, NTP, or PTP time feed, it benefits from the same precautions as the Exchange’s production environment, as the Exchange uses the same GPS time feed equipment, including antennas and receivers, to provide time feeds to Users.<sup>55</sup> The Commission therefore believes that the proposed time feeds, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest. The Exchange represents that connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to

<sup>39</sup> See *id.* at 78265.

<sup>40</sup> See Kubitz Letter, *supra* note 4.

<sup>41</sup> See Exchange Response Letter, *supra* note 5.

<sup>42</sup> See Kubitz Letter, *supra* note 4.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* The commenter further requested that the Commission more broadly investigate and report on any risks associated with time feeds, and measures to protect these and other data feeds. See *id.* The Commission notes that this suggestion is beyond the scope of the proposed rule change.

<sup>45</sup> See Exchange Response Letter, *supra* note 5, at 3.

<sup>46</sup> See *id.* at 4.

<sup>47</sup> See *id.* The Exchange added that that discussion of these protections in a proposed rule change would impair their effectiveness. See *id.* at 5.

<sup>48</sup> See *id.* at 3.

<sup>49</sup> See *id.* Regarding the commenter’s concern about the potential for GPS spoofing to lead to market disruption, the Exchange stated that it could not comment on the behavior of HFT Users during a “spoofing event” regardless of whether the HFT User received its time feed from the Exchange or a third party vendor. The Exchange noted, however, that the proposal was limited to time feeds provided by the Exchange and that Users purchasing time feeds from the Exchange benefit from the same protections that the Exchange has implemented for its own GPS antennas and receivers. See *id.* at 5.

<sup>50</sup> In approving this proposed rule change, as modified by Amendment No. 2, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>51</sup> 15 U.S.C. 78f(b)(4).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

<sup>53</sup> See Notice, 80 FR at 78266.

<sup>54</sup> See *id.*

<sup>55</sup> See Exchange Response Letter, *supra* note 5, at 4.

interference from the cable power connections, interfering with the delivery of the GPS data.<sup>56</sup> The Exchange also represents that connectivity to the NTP time feed is not proposed to be offered over the IP network due to lack of demand.<sup>57</sup> For these reasons, the Commission believes that providing connectivity to the GPS Time Source for dedicated cabinets but not partial cabinets, and to the NTP time feed through the LCN but not the IP network, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds the Exchange's proposal to offer Partial Cabinet Solution bundles consistent with Section 6(b)(5) of the Act. As noted, all Users seeking to purchase a Partial Cabinet Solution bundle would be subject to the same conditions. The Commission believes that the proposed Partial Cabinet Solution bundles are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services, and therefore that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

For the foregoing reasons, the Commission also finds that, the proposed rule change, as modified by Amendment No. 2, is consistent with the Act.

#### V. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether this filing, as modified by Amendment No. 2, is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEMKT-2015-89 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange

<sup>56</sup> See *supra*, notes 20 and 21 and accompanying text.

<sup>57</sup> See *supra*, note 22 and accompanying text.

Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-NYSEMKT-2015-89. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEMKT-2015-89, and should be submitted on or before March 3, 2016.

#### VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of Amendment No. 2 in the **Federal Register**. As discussed above, Amendment No. 2 updates dates in the original proposed rule change and adds clarity on the differences between the three time feeds in terms of their precision.<sup>58</sup> The Commission believes that these revisions provide clarity on when partial cabinet bundle discounts will apply along with additional information on the differences between the various time feeds. Furthermore, the Commission believes it is appropriate to have these changes incorporated into the rules of the Exchange concurrently

<sup>58</sup> See *supra*, note 6.

with those changes discussed in the original filing.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>59</sup>

#### VII. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>60</sup> that the proposed rule change, as modified by Amendment No. 2, (SR-NYSEMKT-2015-89) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>61</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-02735 Filed 2-10-16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77069; File No. SR-BATS-2016-07]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Chapter XXI of BZX Options To Further Align the Rules With Those of EDGX Options

February 5, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 27, 2016, BATS Exchange, Inc. (the "Exchange" or "BATS") 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 Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6)(iii) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>59</sup> 15 U.S.C. 78s(b)(2).

<sup>60</sup> See *id.*

<sup>61</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6)(iii).

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal for the BATS Options Market ("BATS Options" or "BZX Options") to amend various rules contained in Chapter XXI in order to further improve such rules and to align such rules with the rules applicable to the Exchange's affiliated options platform operated by EDGX Exchange, Inc. ("EDGX Options").

The text of the proposed rule change is available at the Exchange's Web site at [www.batstrading.com](http://www.batstrading.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 parts 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 various BZX Options Rules contained in Chapter XXI in order to further improve such rules and to align such rules with the rules applicable to EDGX Options, the Exchange's affiliated options platform. EDGX Options recently launched after receiving approval in August of 2015.<sup>5</sup> In connection with the creation of EDGX Options as well as in connection with rule clarifications filed by the Exchange with respect to the Exchange's equity securities trading platform ("BZX Equities"),<sup>6</sup> the Exchange has identified various BZX Options rules that could be improved or clarified. In addition, to the extent possible, the Exchange wishes to maintain identical rules with its affiliated trading platforms in order to avoid potential confusion by

<sup>5</sup> See Securities Exchange Act Release No. 75650 (August 7, 2015), 80 FR 48600 (August 13, 2015) (SR-EDGX-2015-18).

<sup>6</sup> See Securities Exchange Act Release No. 74738 (April 16, 2015), 80 FR 22600 (April 22, 2015) (SR-BATS-2015-09).

participants on the Exchange and such affiliated trading platforms. Each of the changes proposed below is consistent with these objectives and is intended to clarify and to include additional specificity regarding the current functionality of the Exchange's System,<sup>7</sup> including the descriptions of BZX Options order types and order instructions, as further described below. None of the changes proposed below represents a proposed change to the operation of BZX Options.

#### Proposed Changes to Terminology

The Exchange proposes the following terminology changes that are applicable to one or more rules within Chapter XXI applicable to BZX Options:

- The Exchange proposes to re-name "BATS Only Orders", which are not routable away from the Exchange, as "Book Only Orders."
- The Exchange proposes to re-name "BATS Post Only Orders", which do not remove liquidity from the Exchange, as "Post Only Orders."
- The Exchange proposes to refer to other "options exchanges" rather than other "trading centers."
- The Exchange proposes to refer to "contracts" rather than "shares."

#### Proposed Changes to Order Type Modifiers and Routing Instructions

Rule 21.1 sets forth numerous definitions applicable to the operation of the BZX Options System, primarily the order types and order type modifiers accepted by BZX Options. Rule 21.9 describes the process for routing orders away from BZX Options. The Exchange proposes the following changes to Rules 21.1 and 21.9:

- *Attributable and Non-Attributable Orders.* The Exchange proposes to state in Rule 21.1(a)(3) that the Exchange's data feed can be used to display orders with or without attribution. The Exchange also proposes to state in Rule 21.1(c) that the default treatment on BZX Options is that an order is a Non-Attributable Order unless the User directs otherwise. This is the opposite of EDGX Options and represents an example of a difference between the rules of BZX Options and EDGX Options that the Exchange currently intends to maintain. Finally, the Exchange proposes to make minor formatting and structural changes to conform to EDGX Options Rule 21.1(c). These changes will conform BZX Options Rules 21.1(a)(3) and 21.1(c) to EDGX Options Rules 21.1(a)(3) and 21.1(c).

<sup>7</sup> Exchange Rule 16.1(59) defines "System" as "the automated trading system used by BATS Options for the trading of options contracts."

- *Price Improving Orders.* The Exchange proposes to remove duplicative language from the definition of Price Improving Orders in Rule 21.1(d)(6). First, because all orders are displayed on BZX Options, the Exchange proposes to remove reference to orders "that are available for display." Second, because the display-price sliding process described in Rule 21.1(h) describes the process by which orders are displayed at the applicable minimum price variation and the description of Price Improving Orders cross-references Rule 21.1(h), the Exchange proposes to remove language stating that Price Improving orders are "rounded to the minimum price variation." These changes will conform BZX Options Rule 21.1(d)(6) to EDGX Options Rule 21.1(d)(6).

- *Destination Specific Orders, Directed ISOs and Parallel T.* Both Destination Specific Orders and Directed ISOs, described in Rule 21.1(d)(7) and 21.1(d)(12), respectively, are routing instructions rather than order types or order type modifiers. Accordingly, to conform BZX Options Rules to the structure of Exchange Rules 11.9 and 11.13, applicable to BZX Equities, as well as EDGX Options Rules 21.1 and 21.9, the Exchange proposes to re-locate these rules in Rules 21.9(a)(2)(C) and 21.9(a)(2)(D), applicable to routing away from BZX Options. The Exchange also proposes to re-number the remainder of Rule 21.1(d) and to modify cross-references contained in other portions of Chapter XXI in connection with this change. These changes will conform BZX Options Rule 21.1(d) to EDGX Options Rule 21.1(d).

As noted above, the Exchange proposes to re-locate the descriptions of Destination Specific Orders and Directed ISOs to Rule 21.9, which governs routing from BZX Options. The Exchange also proposes stylistic changes to conform the descriptions of these routing strategies with other routing strategies described in Rule 21.9(a)(2). Further, the Exchange proposes to eliminate reference to an obsolete routing option, Parallel T, which is set forth in Rule 21.9(a)(2)(D) and is not offered on BZX Options (or EDGX Options).<sup>8</sup> Finally, the Exchange

<sup>8</sup> The Exchange notes that it adopted rules describing the Parallel T routing strategy along with several other routing strategies based the routing rules for BZX Equities. However, the Exchange never implemented or offered the Parallel T routing strategy for BZX Options. See Securities Exchange Act Release No. 63090 (October 13, 2010), 75 FR 64387 (October 19, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change

proposes to eliminate current Rule 21.9(a)(2)(E), which is simply a cross-reference reflecting the fact that these routing strategies used to be contained within Rule 21.1; to move the Parallel D routing strategy to Rule 21.9(a)(2)(A), which is simply a paragraph that had been reserved for future use due to the prior elimination of a routing strategy; and to re-number all other routing strategies accordingly. These changes will conform BZX Options Rule 21.9(a)(2) to EDGX Options Rule 21.9(a)(2).

- *Routeable Orders With Time in Force of Immediate-or-Cancel or Fill-or-Kill.* The Exchange proposes to modify Rule 21.1(f)(2) to update the description of the Time in Force (“TIF”) of Immediate Or Cancel (“IOC”) to make clear that orders with a TIF of IOC are routeable even though such TIF indicates an instruction to execute an order immediately in whole or in part and/or cancel it back. Under current rules, the TIF of IOC indicates that an order is to be executed in whole or in part as soon as such order is received and the portion not executed is to be cancelled. The Exchange proposes to expand upon the description of IOC to specify that an order with such TIF may be routed away from the Exchange but that in no event will an order with such TIF be posted to the BATS Options Book. The Exchange notes that IOC orders routed away from the Exchange are in turn routed as IOC orders. The Exchange also notes that current Rule 21.9 already includes reference to routeable IOCs, and the proposed modifications to the rule text are intended to add further specificity that IOCs are routeable.

In addition to the change described above, the Exchange proposes to make clear in Rule 21.1(f)(5) that an order with a TIF of FOK is not eligible for routing. Although orders with a TIF of FOK are generally treated the same as IOCs, the Exchange does not permit routing of orders with a FOK because the Exchange is unable to ensure the instruction of FOK (*i.e.*, execution of an order in its entirety) through the routing process.

Finally, in connection with these changes, the Exchange also proposes to modify current Rule 21.9(a)(1) to add the cancellation of an unfilled balance of an order as one possible outcome after an order has been routed away. Rule 21.9(a)(1) currently describes other variations of how the Exchange handles an order after it has been routed away, but does not specifically state that it may be cancelled after the routing

process, which would be the case with an order submitted to the Exchange with a TIF of IOC. The Exchange also proposes to re-number the remainder of Rule 21.9(a)(1) accordingly and to eliminate current Rule 21.9(a)(1)(D), which is duplicative to Rule 21.9(a)(1)(C). Finally, the Exchange proposes to number certain un-numbered text at the end of Rule 21.9(a)(1) as Rule 21.9(a)(1)(E). These changes will conform BZX Options Rules 21.9(f) and 21.9(a)(1) to EDGX Options Rules 21.9(f) and 21.9(a)(1).

#### Proposed Changes to Priority Rule and Related Routing Rule

The Exchange proposes two changes applicable to the priority of orders on BZX Options.

- First, the Exchange proposes to adopt new paragraph (d) to Rule 21.8, which recognizes existing match trade prevention rules that optionally prevent the execution of orders from the same User (*i.e.*, based on the User’s “Unique Identifier”, as set forth in Rule 21.1(g)) by stating that in such a case the System will not permit such orders to execute against one another regardless of priority ranking. Proposed BZX Options Rule 21.8(d) is based on and identical to EDGX Options Rule 21.8(k).

- Second, the Exchange proposes to modify existing paragraph (b) of Rule 21.9 to clarify the Exchange’s rule regarding the priority of routed orders. Paragraph (b) currently sets forth the proposition that a routed order does not retain priority on the Exchange while it is being routed to other markets. The Exchange believes that its proposed clarification to paragraph (b) is appropriate because it more clearly states that a routed order is not ranked and maintained in the BATS Options Book pursuant to Rule 21.8, and therefore is not available to execute against incoming orders. These changes will conform BZX Options Rule 21.8(b) to EDGX Options Rule 21.8(b).

#### Proposed Changes to Other Rules Within Chapter XXI

In addition to the changes proposed above, the Exchange proposes to make the following changes:

- Rephrasing language within Rule 21.2 to avoid use of the phrase “BATS Options options.”
- Adding reference to the price adjust process, as defined in Rule 21.1(i), to Rule 21.6(f) and Rule 21.9(a)(1)(B) where there are currently already references to the display-price sliding process.
- Adding the term intra-day to Rule 21.10 when referring to anonymous transaction reports because participants

do learn the identity of contra-parties in connection with the clearance and settlement of transactions.

Adding a new paragraph (a) to Rule 21.15 based on EDGX Options Rule 21.15(a). The new paragraph simply reflects the regulations already applicable to the Exchange by stating that the Exchange will disseminate to quotation vendors the highest bid and the lowest offer, and the aggregate quotation size associated therewith that is available, in accordance with the requirements of Rule 602 of Regulation NMS under the Exchange Act. In accordance with this change, the Exchange proposes to re-name the rule as “Data Dissemination.” The Exchange also proposes to add a new paragraph title within the Rule, “Exchange Data Products”, to describe the existing rule text, and to re-number the existing rule text of Rule 21.15.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>10</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The proposed rule changes are generally intended to better align certain Exchange rules with the rules of EDGX Options (as well as BZX Equities) in order to provide a consistent description of functionality across the Exchange and its affiliates. Consistent descriptions of functionality between the Exchange and EDGX Options will reduce complexity and help to avoid potential confusion by Users of the Exchange that are also participants on EDGX Options. The proposed rule changes do not propose to implement new or unique functionality that has not been previously filed with the Commission or is not available on BZX Options already. The Exchange notes that the proposed rule text is based on applicable EDGX Options Rules; the proposed language of the Exchange’s Rules differs only to extent necessary to conform to existing Exchange rule text. The Exchange believes the proposed changes will increase the understanding of the Exchange’s operations for all Members of the Exchange. Where possible, the Exchange has mirrored EDGX Options rules verbatim, because consistent rules will simplify the regulatory

by BATS Exchange, Inc. To Amend BATS Rule 21.9, Entitled “Order Routing”).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

requirements and increase the understanding of the Exchange's operations for Members of the Exchange that are also participants on EDGX Options. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

*(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 notes that the proposal will provide consistent descriptions of functionality between the BZX Options and EDGX Options, thereby reducing complexity and providing improvements to rules to avoid potential confusion by Users of the Exchange that are also participants on EDGX Options. As noted elsewhere in the proposal, the Exchange is not proposing any substantive changes to the System. Thus, the Exchange does not believe the proposal creates any significant impact on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> Because the 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)

of the Act and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) 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 proposal may become operative immediately upon filing. The Commission believes that waiver of the 30-day operative delay would provide immediate clarity to the Exchange's rules described above. Because the proposal would provide consistent descriptions of the same functionality on BZX Options and EDGX Options, the Commission believes that the proposal could avoid potential confusion by users of the Exchange that are also participants on EDGX Options. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>14</sup> The Commission hereby grants the Exchange's request and designates the proposal operative upon filing.

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:

<sup>13</sup> In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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.

<sup>14</sup> 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).

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2016-07 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-BATS-2016-07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BATS-2016-07 and should be submitted on or before March 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-02733 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77067; File No. SR-NYSEARCA-2016-24]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule

February 5, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 1, 2016, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule ("Fee Schedule"). The Exchange proposes to implement the fee change effective February 1, 2016. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of this filing is to clarify an aspect of the tiers for the Firm and Broker Dealer Monthly Firm Cap. The Exchange proposes to have the clarification effective February 1, 2016.

Currently, for trade-related charges for standard options, the Exchange has a Firm and Broker Dealer Monthly Firm Cap ("Firm Cap") that places a limit, or cap, of \$100,000 per month on combined Firm Proprietary Fees and Broker Dealer Fees for transactions in standard options contracts cleared in the customer range for Manual (Open Outcry) Executions, and QCC Transactions executed by a Floor Broker from the Floor of the Exchange. The Firm Cap excludes Strategy Executions, Royalty Fees, and firm trades executed via a Joint Back Office agreement, and also excludes Mini option contracts.

On August 1, 2015, the Exchange adopted Tiered Caps based on the Firm's achieving one of the higher Customer and Professional Customer Monthly Posting Credit Tiers.<sup>4</sup> Firms receiving the base Posting Credit for Customer or Professional Customer Order executions in Penny Pilot issues would continue to be capped at a \$100,000 per month Firm Cap. Firms that achieve a higher Customer and Professional Customer Monthly Posting Credit Tier would be capped at progressively lower totals, dependent on achieving higher tiers.

At the time the Tiered Caps were adopted, there were six Customer and Professional Customer Monthly Posting Credit Tiers. Recently, on November 2, 2015, the Exchange adopted a seventh Customer and Professional Customer Monthly Posting Credit Tier.<sup>5</sup> However, at the time that the additional Customer and Professional Customer Monthly Posting Credit Tier was added, there was no modification to the Firm and Broker Dealer Monthly Firm Cap Tiers, nor was there any intention to do so.

The Exchange has received a request for clarification, and in the interest of reducing any possible investor confusion, proposes to amend the Fee Schedule to provide that the Firm Cap currently applicable to Tier 6 is also applicable to Tier 7, as follows (proposed new text *italicized*):

#### FIRM AND BROKER DEALER MONTHLY FIRM CAP TIERS

Customer and professional customer monthly posting credit tier achieved	Firm cap
Base or Tier 1 .....	\$100,000
Tier 2 .....	85,000
Tier 3 .....	80,000
Tier 4 .....	75,000
Tier 5 .....	70,000
Tier 6 or 7 .....	65,000

##### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>7</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes the proposed change clarifying Tiered Firm Caps is reasonable, equitable, and not unfairly discriminatory, because the proposed rule change does not change any fees, but rather clarifies that the Firm Cap level currently in place for the Customer and Professional Customer Monthly Posting Credit Tier 6 would also be applicable to the Customer and Professional Customer Monthly Posting Credit Tier 7. Accordingly, the proposed rule change is designed to promote transparency and reduce investor confusion by aligning all of the eligible Customer and Professional Monthly Posting Credit Tiers with the Firm Caps.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,<sup>8</sup> 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. Instead, the Exchange believes that the proposed change would continue to encourage competition, including by attracting a wider variety of business to the Exchange, which would continue to make the Exchange a more competitive venue for, among other things, order execution and price discovery.

The Exchange notes that it operates in a highly competitive market in which

<sup>4</sup> See Exchange Act Release No. 75704 (August 14, 2015) 80 FR 50683 (August 20, 2015) (SR-NYSEArca-2015-71).

<sup>5</sup> See Exchange Act Release No. 76438 (November 13, 2015) 80 FR 72465 (November 19, 2015) (SR-NYSEArca-2015-108).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>8</sup> 15 U.S.C. 78f(b)(8).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

market participants can readily favor competing venues.

In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>9</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>10</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>11</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2016-24 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange

Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2016-24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2016-24, and should be submitted on or before March 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-02732 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

**[Investment Company Act Release No. 31986; File No. 812-14505]**

**Good Hill Partners LP and Good Hill ETF Trust; Notice of Application**

February 5, 2016.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 12(d)(1)(A), (B), and (C) of the Act and

under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act. The requested order would permit certain registered open-end investment companies to acquire shares of certain registered open-end investment companies, registered closed-end investment companies, business development companies, as defined in section 2(a)(48) of the Act, and unit investment trusts (collectively, "Underlying Funds") that are within and outside the same group of investment companies as the acquiring investment companies, in excess of the limits in section 12(d)(1) of the Act.

**APPLICANTS:** Good Hill ETF Trust, a Massachusetts business trust that intends to register under the Act as an open-end management investment company with multiple series and Good Hill Partners LP, a Delaware limited partnership registered as an investment adviser under the Investment Advisers Act of 1940.

**FILING DATES:** The application was filed on June 30, 2015 and amended on October 16, 2015.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 1, 2016 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to Rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants: c/o William Hauf, Good Hill Partners LP, 1599 Post Road East, Westport, Connecticut 06880.

**FOR FURTHER INFORMATION CONTACT:** Bruce R. MacNeil, Senior Counsel, at (202) 551-6817, or James M. Curtis, Branch Chief, at (202) 551-6712 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>12</sup> 17 CFR 200.30-3(a)(12).

number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm>, or by calling (202) 551-8090.

### Summary of the Application

1. Applicants request an order to permit (a) a Fund<sup>1</sup> (each a “Fund of Funds”) to acquire shares of Underlying Funds<sup>2</sup> in excess of the limits in sections 12(d)(1)(A) and (C) of the Act and (b) the Underlying Funds that are registered open-end investment companies or series thereof, their principal underwriters and any broker or dealer registered under the Securities Exchange Act of 1934 to sell shares of the Underlying Fund to the Fund of Funds in excess of the limits in section 12(d)(1)(B) of the Act.<sup>3</sup> Applicants also request an order of exemption under sections 6(c) and 17(b) of the Act from the prohibition on certain affiliated transactions in section 17(a) of the Act to the extent necessary to permit the Underlying Funds to sell their shares to, and redeem their shares from, the Funds of Funds.<sup>4</sup> Applicants state that such transactions will be consistent with the policies of each Fund of Funds and each Underlying Fund and with the general

<sup>1</sup> Applicants request that the order apply to each existing and future series of Good Hill ETF Trust and to each existing and future registered open-end investment company or series thereof that is advised by Good Hill Partners LP or its successor or by any entity controlling, controlled by or under common control with Good Hill Partners LP or its successor and is part of the same “group of investment companies” as Good Hill ETF Trust (each, a “Fund”). For purposes of the requested order, “successor” is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization. For purposes of the request for relief, the term “group of investment companies” means any two or more investment companies, including closed-end investment companies and business development companies, that hold themselves out to investors as related companies for purposes of investment and investor services.

<sup>2</sup> Certain of the Underlying Funds have obtained exemptions from the Commission necessary to permit their shares to be listed and traded on a national securities exchange at negotiated prices and, accordingly, to operate as an exchange-traded fund (“ETF”).

<sup>3</sup> Applicants represent that a Funds of Funds will not invest in reliance on the order in business development companies or closed-end investment companies that are not listed and traded on a national securities exchange.

<sup>4</sup> A Fund of Funds generally would purchase and sell shares of an Underlying Fund that operates as an ETF through secondary market transactions rather than through principal transactions with the Underlying Fund. Applicants nevertheless request relief from section 17(a) to permit a Fund of Funds to purchase or redeem shares from the ETF. A Fund of Funds will purchase and sell shares of an Underlying Fund that is a closed-end fund through secondary market transactions at market prices rather than through principal transactions with the closed-end fund. Accordingly, applicants are not requesting section 17(a) relief with respect to transactions in shares of closed-end funds (including business development companies).

purposes of the Act and will be based on the net asset values of the Underlying Funds.

2. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the application. Such terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over an Underlying Fund that is not in the same “group of investment companies” as the Fund of Funds through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A), (B), and (C) of the Act.

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-02764 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77074; File No. SR-NYSEMKT-2016-14]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Supplementary Material .10 to Rule 103B—Equities To Provide That Any Senior Official of a Listed Company With the Rank of Corporate Secretary or Higher Can Sign the Written Request of a Listed Company Seeking To Change Its Designated Market Maker Unit

February 5, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 27, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“SEC” or “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

The Exchange proposes to amend Supplementary Material .10 to Rule 103B—Equities to provide that any senior official of a listed company with the rank of Corporate Secretary or higher can sign the written request of a listed company seeking to change its designated market maker (“DMM”) unit. The proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below,

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Supplementary Material .10 to Rule 103B—Equities to provide that any senior official of a listed company with the rank of Corporate Secretary or higher can sign the written request of a listed company seeking to change its DMM unit required by that provision.

Supplementary Material .10 to Rule 103B—Equities establishes a process to be followed by any listed company wishing to change to a new DMM unit. The rule provides that a listed company wishing to change DMM units must file with the Corporate Secretary of the Exchange a written notice (the "Issuer Notice"), signed by the company's chief executive officer. The Issuer Notice is required to indicate the specific issues prompting this request. It has been the Exchange's experience that companies have occasionally found it burdensome to obtain the signature of their CEO for purposes of submitting an Issuer Notice and that this requirement has caused an undesirable delay when companies are making their submissions. We also note that this requirement is inconsistent with the provisions of Rule 103B—Equities in relation to an issuer's initial selection of a DMM, which provides that any senior official with the rank of Corporate Secretary or higher (or, in the case of a structured product listing, a senior officer of the issuer) can sign the notice in which a listed company informs the Exchange of its initial selection of a DMM unit. It has been the Exchange's experience that a senior officer other than the chief executive officer often manages the DMM relationship on behalf of the listed company and has authority to take action in relation to that relationship. We also note that the NYSE recently amended its parallel provision (Section 806.01 of the NYSE's Listed Company Manual) to address this issue by providing that an Issuer Notice may be signed by an official of the listed company with the rank of Corporate Secretary or higher.<sup>3</sup> Consequently, we propose to amend Supplementary Material .10 to Rule 103B—Equities to make the same change.

<sup>3</sup> See Securities Exchange Act Release No. 76591 (December 8, 2015), 80 FR 77392 (December 14, 2015) (SR-NYSE-2015-63).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>4</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>5</sup> in particular in that it is designed 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 and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of Section 6(b)(5) because it is designed to ensure that listed companies are able to expeditiously change their DMM unit when senior management of the listed company believes it is desirable to do so. An effective relationship between the listed company and the DMM is important to the maintenance of a high quality market for the company's securities and is therefore in the interests of investors.

*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 proposed rule change is designed to permit listed companies to apply for a change in the DMM unit allocated to their securities on the basis of a notice signed by any officer with the title of Corporate Secretary or higher rather than requiring that it be signed in all cases by the CEO, as is currently the case. The proposed amendment simply provides more flexibility in providing the required paperwork and conforms the signing requirements with respect to the commencement and severing of a listed company's relationship with its DMM unit, but does not change any of the substantive rights of the listed company or the DMM unit in any way. As such, the Exchange does not expect the rule change to have any significant impact on competition.

<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>6</sup> and Rule 19b-4(f)(6) thereunder.<sup>7</sup> Because the 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, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>10</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>11</sup> the Commission may 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 proposed rule change may become operative immediately. The Exchange believes that providing greater flexibility in the preparation of the paperwork needed to request a change of DMM unit is in the interests of investors as it is important to the maintenance of a high quality market for an issuer's stock that the issuer has a good relationship with its DMM. As the Exchange notes in its filing, the proposal would better conform the process for changing a DMM to that which is used for initially selecting a DMM. In particular, the officer's signature that would be required to change a company's DMM

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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.

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii).

must be that of a senior official at the company with a rank of Corporate Secretary or above. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. For this reason, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>12</sup>

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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-14 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-NYSEMKT-2016-14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2016-14, and should be submitted on or before March 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-02729 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77072; File No. SR-NYSE-2015-53]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, To Provide That the Co-Location Services Offered by the Exchange Include Three Time Feeds and Four Partial Cabinet Bundle Options

February 5, 2016.

#### I. Introduction

On November 27, 2015 the New York Stock Exchange LLC ("the Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to provide that the co-location services offered by the Exchange include three time feeds and four bundles of co-location services ("Partial Cabinet Solution bundles"). The proposed rule change was published for comment in the **Federal Register** on

<sup>13</sup> 17 CFR 200.30-3(a)(12), (59).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

December 16, 2015.<sup>3</sup> The Commission received one comment letter on the proposed rule change.<sup>4</sup> On January 20, 2016, the Exchange filed a response letter.<sup>5</sup> On January 28, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>6</sup> The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

#### II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to change its rules to provide that the co-location services offered by the Exchange include three time feeds and four Partial Cabinet Solution bundles, and to establish fees for these services.

##### Time Feeds

The Exchange proposes to offer Users the option to purchase connectivity to one or more of three time feeds.<sup>7</sup> Each proposed time feed provides a feed with the current time of day using one of three different time protocols: Global Positioning System ("GPS") Time Source, the Network Time Protocol ("NTP"), and Precision Timing Protocol

<sup>3</sup> See Securities Exchange Act Release No. 34-76612 (December 10, 2015), 80 FR 78269 ("Notice"). On January 28, 2016, the Exchange consented to extending the time period for the Commission to either approve or disapprove the proposed rule change, or to institute proceedings to determine whether to approve or disapprove the proposed rule change, to February 5, 2016.

<sup>4</sup> See letter from Kermit Kubitz to the Commission, dated January 6, 2016 ("Kubitz Letter").

<sup>5</sup> See letter from Martha Redding Senior Counsel & Assistant Secretary, NYSE to Brent J. Fields, Secretary of the Commission, dated January 20, 2016 ("Exchange Response Letter").

<sup>6</sup> Amendment No. 1 (i) updates the proposal to specify that that Partial Cabinet Solution Bundles, originally proposed to be offered on January 1, 2016, instead will be offered on the date that is the later of February 1, 2016 and the date of any Commission approval of the proposal; and (ii) as described further below, adds clarity to the proposal by specifying the differences in precision among the three time feeds.

<sup>7</sup> For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange, a "Hosting User" means a User that hosts a Hosted Customer in the User's co-location space, and a "Hosted Customer" means a customer of a Hosting User that is hosted in a Hosting User's co-location space. See Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC and NYSE Arca, Inc. See Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR-NYSE-2013-59).

(“PTP”).<sup>8</sup> GPS is a time and location system maintained by the United States government.<sup>9</sup> The Exchange accesses the GPS Time Source feed through dedicated equipment and subscribing Users connect to the feed over dedicated cables.<sup>10</sup> For the NTP and PTP time feeds, the Exchange routes the GPS data through dedicated equipment that reformats the GPS data into NTP and PTP.<sup>11</sup> Subscribing Users connect to PTP over dedicated cables and NTP over the Liquidity Center Network (“LCN”), a local area network available in the data center.<sup>12</sup> According to the Exchange, the GPS Time Source feed is a sub-microsecond time feed, providing the highest level of accuracy of the three time feeds.<sup>13</sup> PTP has an accuracy of less than 10 microseconds, while the accuracy of NTP can be greater than 10 milliseconds.<sup>14</sup> The Exchange states that a User does not require connectivity to a time feed to trade on the Exchange.<sup>15</sup> The proposed connectivity to time feeds would provide Users a convenient way to access time protocols.<sup>16</sup> According to the Exchange, Users make use of time feeds to receive time and to synchronize clocks between computer systems or

throughout a computer network, and time feeds assist Users in other functions, including record keeping or measuring response times.<sup>17</sup>

Currently, Users have the option of either renting a dedicated cabinet or a partial cabinet to house their servers and other equipment in the data center.<sup>18</sup> Under the proposal, only the NTP and PTP time feeds will be available to partial cabinet Users, whereas dedicated cabinet Users will have access to all three time feeds.<sup>19</sup> According to the Exchange, connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to interference from the cable power connections, interfering with the delivery of the GPS data.<sup>20</sup> The Exchange states that if a partial cabinet User is in need of the GPS feed, it could either purchase a dedicated cabinet or become a Hosted Customer of a Hosting User that has the GPS feed.<sup>21</sup> In addition, the Exchange states that the NTP time feed is offered only over the LCN due to a lack of demand for the NTP over the IP network, and notes that

a User that requires connectivity to the NTP could connect to the LCN.<sup>22</sup>

The Exchange proposes to charge a non-recurring fee of \$300, \$1000, and \$3000 for connectivity to the NTP, PTP, and GPS time feeds, respectively.<sup>23</sup> The Exchange will also charge a monthly recurring fee of \$100, \$250, and \$400 for the NTP, PTP, and GPS time feeds, respectively.<sup>24</sup> Subscribing Users that order the proposed time feed services will be subject to a 12-month minimum commitment, after which they are subject to a 60-day rolling commitment.<sup>25</sup>

Partial Cabinet Solution Bundles

The Exchange also proposes to offer four Partial Cabinet Solution bundles and establish fees therefor.<sup>26</sup> As more fully described in the Notice, each Partial Cabinet Solution bundle option would include network access, two fiber cross connections, and connectivity to either the NTP or PTP time feed.<sup>27</sup> Subscribing Users would be assessed a non-recurring fee and monthly charge for each bundle option as set forth below.<sup>28</sup>

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an aggregate cabinet footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle.	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.  Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.  Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$3,000 monthly for first 12 months of service, and \$6,000 monthly thereafter. • For Users that order after December 31, 2016: \$6,000 monthly.  \$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$3,500 monthly for first 12 months of service, and \$7,000 monthly thereafter. • For Users that order after December 31, 2016: \$7,000 monthly.  \$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$7,000 monthly for first 12 months of service, and \$14,000 monthly thereafter. • For Users that order after December 31, 2016: \$14,000 monthly.

<sup>8</sup> See Notice, 80 FR at 78269.

<sup>9</sup> See *id.* at 78270.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Amendment No. 1, at 4.

<sup>14</sup> See *id.*

<sup>15</sup> See Notice, 80 FR at 78269, n.6.

<sup>16</sup> See *id.* at 78270.

<sup>17</sup> See *id.* at 78269–78270. For example, a User may connect to a time feed for record keeping purposes if it uses that specific time protocol for all its activities, both inside and out of the data center. See *id.* at 78270, n.7.

<sup>18</sup> See *id.* at 78270.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at n.10.

<sup>21</sup> See *id.* at 78272.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 78270.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 78271.

Type of service	Description	Amount of charge
	Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$10,000 initial charge per bundle plus monthly charge per bundle as follows: <ul style="list-style-type: none"> <li>• For Users that order on or before December 31, 2016: \$7,500 monthly for first 12 months of service, and \$15,000 monthly thereafter.</li> <li>• For Users that order after December 31, 2016: \$15,000 monthly.</li> </ul>

Additionally, a User purchasing a Partial Cabinet Solution bundle would be subject to a 90-day minimum commitment, after which period it would be subject to the 60-day rolling time period.<sup>29</sup>

As more fully described in the Notice, the Exchange states that the purpose of offering four Partial Cabinet Solution bundles is to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.<sup>30</sup> The Exchange proposes that the Partial Cabinet Solution bundles would be available to Users provided: (1) The subscribing User purchases only one Partial Cabinet Solution bundle; (2) the subscribing User and its Affiliates must not currently have a Partial Cabinet Solution bundle; and (3) after the purchase of the Partial Cabinet Solution bundle, the subscribing User, together with its Affiliates, has an Aggregate Cabinet Footprint of no more than 2 kW.<sup>31</sup> The Exchange proposes that for purposes of the Partial Cabinet Solution bundles, an "Affiliate" of a User would be any other User or a Hosted Customer that is under 50% or greater common ownership or control of the first User.<sup>32</sup> Further, the term "Aggregate Cabinet Footprint" of a User or Hosted Customer is proposed to be defined as: (a) For a User, the total kW of the User's cabinets, including both partial and dedicated cabinets, and (b), for a Hosted Customer, the total kW of the portion of the Hosting User's cabinet, whether partial or dedicated, allocated to such Hosted Customer.<sup>33</sup>

A User would be required to inform the Exchange immediately of any event that causes the User or a Hosted Customer to become ineligible for a Partial Cabinet Solution bundle, including an event that causes another User or Hosted Customer to become an Affiliate as this can make the subscribing User ineligible for the bundle.<sup>34</sup> If a subscribing User ceases to meet the conditions for access to the Partial Cabinet Solution bundle, it would be charged for each of the services individually, at the price for each such service set out in the Price List and Fee Schedule.<sup>35</sup> Such price change would be effective as of the date that the subscribing User ceased to meet the conditions.<sup>36</sup>

Further, if a subscribing User purchased each of the components of a Partial Cabinet Solution bundle, whether over several purchases or in one order, and met the conditions described above for access to the Partial Cabinet Solution bundle, the Exchange would automatically treat that User's services as a Partial Cabinet Solution bundle and, effective the date of installation of the final component, reduce the User's recurring fee to the recurring fee for the relevant bundle.<sup>37</sup> In addition, a User that changes its Partial Cabinet Solution bundle from one option to another will not be subject to a second initial charge, but will be required to pay the difference, if any, between the bundles' initial charges.<sup>38</sup>

Finally, the Exchange proposes to make non-substantive changes to the Price List and Fee Schedule to add subheadings under "Co-Location Fees"

for "Definitions" and "General Notes."<sup>39</sup>

### III. Summary of Comment Letter and Exchange Response

As noted above, the Commission received one comment letter on the proposed rule change,<sup>40</sup> and a response from the Exchange.<sup>41</sup> The commenter expressed concern about the potential for "GPS spoofing" (intentional interference with GPS feeds from a distance) if GPS data are from an unsecured source.<sup>42</sup> According to the commenter, a successful GPS spoofing attack could cause time feed data to become corrupted, which could cause Users, such as High Frequency Trading ("HFT") firms that represent substantial market volume, to withdraw from the market and lead to market disruption.<sup>43</sup> The commenter asked particularly whether purchasers of Partial Cabinet Solution bundles that have access to the PTP and NTP feeds, but not the dedicated GPS time feed, would have any "special vulnerability to some sort of feed failure" as a result of "GPS spoofing" or otherwise.<sup>44</sup>

The Exchange responded that "[t]o the best of the Exchange's knowledge, Users that connect to the NTP or the PTP, rather than the GPS Time Source, do not have a special vulnerability to feed failure, irrespective of whether they utilize a partial or dedicated cabinet."<sup>45</sup> The Exchange stated that it uses the same GPS time feed equipment for its production environment and to provide time feeds to Users;<sup>46</sup> and that Users purchasing time feeds from the Exchange (whether GPS, PTP, or NTP) benefit from the same protections that the Exchange has implemented for its

<sup>29</sup> See *id.* at 78272. The Exchange proposes to have a reduced minimum commitment period for the Partial Cabinet Solution bundle to further reduce the cost commitment for such Users. The Exchange acknowledges that the proposal may also attract some entities that are currently Hosted Customers or would have become Hosted Customers.

<sup>30</sup> See *id.* at 78270.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at n.15.

<sup>33</sup> See *id.* at 78270–78271. For example, a User with a 4 kW dedicated cabinet would not be eligible for a Partial Cabinet Solution bundle, as its

aggregate cabinet footprint would be either 5 kW or 6 kW once a Partial Cabinet Solution bundle was added.

<sup>34</sup> See *id.* at 78271. The Exchange would review available information regarding the entities and may request additional information to verify the Affiliate status of a User or Hosted Customer. The Exchange would approve a request for a Partial Cabinet Solution bundle unless it determines that the certification is not accurate.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 78271–78272.

<sup>38</sup> See *id.* at 78271, n.19.

<sup>39</sup> See *id.* at 78272.

<sup>40</sup> See Kubitz Letter, *supra* note 4.

<sup>41</sup> See Exchange Response Letter, *supra* note 5.

<sup>42</sup> See Kubitz Letter, *supra* note 4.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* The commenter further requested that the Commission more broadly investigate and report on any risks associated with time feeds, and measures to protect these and other data feeds. See *id.* The Commission notes that this suggestion is beyond the scope of the proposed rule change.

<sup>45</sup> See Exchange Response Letter, *supra* note 5, at 3.

<sup>46</sup> See *id.* at 4.

own GPS antennas and receivers.<sup>47</sup> The Exchange also stated that GPS is the source information for all three time feeds and that the Exchange routes the GPS data through dedicated equipment that reformats the GPS data to propagate the NTP and PTP.<sup>48</sup> The Exchange further stated that any disruption to the GPS time feed would impact the NTP and PTP time feeds in the same way as the GPS feed; and that the Exchange has no knowledge of any other method to “spoof” the NTP or PTP feeds if the GPS feed were not compromised.<sup>49</sup>

#### IV. Discussion and Commission Findings

After careful review and consideration of the Exchange’s proposal, the comment letter and the Exchange’s response, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>50</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(4) of the Act,<sup>51</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,<sup>52</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to

<sup>47</sup> See *id.* The Exchange added that that discussion of these protections in a proposed rule change would impair their effectiveness. See *id.* at 5.

<sup>48</sup> See *id.* at 3.

<sup>49</sup> See *id.* Regarding the commenter’s concern about the potential for GPS spoofing to lead to market disruption, the Exchange stated that it could not comment on the behavior of HFT Users during a “spoofing event” regardless of whether the HFT User received its time feed from the Exchange or a third party vendor. The Exchange noted, however, that the proposal was limited to time feeds provided by the Exchange and that Users purchasing time feeds from the Exchange benefit from the same protections that the Exchange has implemented for its own GPS antennas and receivers. See *id.* at 5.

<sup>50</sup> In approving this proposed rule change, as modified by Amendment No. 1, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>51</sup> 15 U.S.C. 78f(b)(4).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed rule change is consistent with Section 6(b)(4) of the Act. The Commission notes the Exchange’s representation that the proposed fees for the time feed connectivity and Partial Cabinet Solution bundles are reasonable because the Exchange proposes to offer the services as a convenience to Users, but in doing so will incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for the initial installation, monitoring, support and maintenance of such services.<sup>53</sup> The Exchange states that the higher fee in connection with the GPS time feed reflects the greater costs for its equipment, installation and maintenance in comparison with the other time feeds.<sup>54</sup> In addition, all Users that voluntarily select connectivity to one or more of the proposed time feeds would be charged the same amount for the same services. With respect to the proposed Partial Cabinet Solution bundles in particular, the Commission also notes that all Users are subject to the same conditions and fees for the service selected; all Users are subject to the same limits on the number of Partial Cabinet Solution bundles and aggregate cabinet footprint; all Users that order a bundle on or before December 31, 2016 would have their monthly charges reduced by 50 percent for the first 12 months; and all Users that change their Partial Cabinet Solution bundles would not be charged a second initial charge but instead charged the difference, if any, between the initial charges.

The Commission further believes that the Exchange’s proposal to offer Users optional connectivity to the GPS, PTP, and NTP time feeds is consistent with the requirements of Section 6(b)(5) of the Act. The proposal to offer connectivity to different time feed options allows a User to select the time protocol that best suits it needs, helping to tailor its data center operations to the requirements of its business operations, and to operate more efficiently. As set forth in the Exchange Response Letter, the Exchange states that whether a User purchases access to the GPS, NTP, or PTP time feed, it benefits from the same precautions as the Exchange’s production environment, as the Exchange uses the same GPS time feed equipment, including antennas and receivers, to provide time feeds to

<sup>53</sup> See Notice, 80 FR at 78273.

<sup>54</sup> See *id.*

Users.<sup>55</sup> The Commission therefore believes that the proposed time feeds, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest. The Exchange represents that connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to interference from the cable power connections, interfering with the delivery of the GPS data.<sup>56</sup> The Exchange also represents that connectivity to the NTP time feed is not proposed to be offered over the IP network due to lack of demand.<sup>57</sup> For these reasons, the Commission believes that providing connectivity to the GPS Time Source for dedicated cabinets but not partial cabinets, and to the NTP time feed through the LCN but not the IP network, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds the Exchange’s proposal to offer Partial Cabinet Solution bundles consistent with Section 6(b)(5) of the Act. As noted, all Users seeking to purchase a Partial Cabinet Solution bundle would be subject to the same conditions. The Commission believes that the proposed Partial Cabinet Solution bundles are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services, and therefore that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

For the foregoing reasons, the Commission also finds that, the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

#### V. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether this filing, as modified by Amendment No. 1, is

<sup>55</sup> See Exchange Response Letter, *supra* note 5, at 4.

<sup>56</sup> See *supra*, notes 20 and 21 and accompanying text.

<sup>57</sup> See *supra*, note 22 and accompanying text.

consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSE-2015-53 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 No. SR-NYSE-2015-53. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSE-2015-53, and should be submitted on or before March 3, 2016.

#### VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of Amendment No. 1 in the **Federal Register**. As discussed above, Amendment No. 1 updates dates in the original proposed rule change and adds

clarity on the differences between the three time feeds in terms of their precision.<sup>58</sup> The Commission believes that these revisions provide clarity on when partial cabinet bundle discounts will apply along with additional information on the differences between the various time feeds. Furthermore, the Commission believes it is appropriate to have these changes incorporated into the rules of the Exchange concurrently with those changes discussed in the original filing.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>59</sup>

#### VII. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>60</sup> that the proposed rule change, as modified by Amendment No. 1, (File No. SR-NYSE-2015-53) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>61</sup>

**Brent J. Fields,**  
Secretary.

[FR Doc. 2016-02736 Filed 2-10-16; 8:45 am]

BILLING CODE 8011-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77066; File No. SR-NASDAQ-2016-008]

#### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Rule 4120

February 5, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 29, 2016, The NASDAQ Stock Market LLC ("Nasdaq" or the "Exchange") filed with the Securities and Exchange Commission (the "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.

<sup>58</sup> See *supra*, note 6.

<sup>59</sup> 15 U.S.C. 78s(b)(2).

<sup>60</sup> See *id.*

<sup>61</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

#### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq is proposing to amend Rule 4120 and the Nasdaq process for commencing trading of a security that is the subject of Nasdaq and non-Nasdaq-listed initial public offerings ("IPOs") and trading halts.

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at the Exchange'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

Nasdaq is proposing to make a minor modification to the Nasdaq process for commencing trading of a security that is the subject of Nasdaq and non-Nasdaq-listed IPOs or trading halts. Specifically, the Exchange is proposing to modify the way in which orders are accepted prior to the commencement of trading for securities subject to trading halt or IPO. This small change will simplify the order submission operations for market participants during trading halts and IPOs.

Currently, Nasdaq Rule 4120(c)(4)(B) provides that during any trading halt or pause for which a halt cross under Rule 4753 will not occur, market participants may enter orders during the trading halt or pause and designate such orders to be held until the termination of the trading halt or pause. Under this rule, such orders will be held in a suspended state until the termination of the halt or pause, at which time they will be entered into the system.

Nasdaq Rules 4120(a)(1), (4), (5), (6), (9), (10), (11), and (12)(F) provide specific instances when the Exchange may halt trading of a security listed on Nasdaq. Nasdaq Rule 4120(c)(7)(A) establishes the process for lifting the

halt and commencing trading. It provides that a trading halt or pause initiated under the rules listed above is terminated by the Exchange once it releases the security for trading. For any such security listed on the Exchange, prior to terminating the halt or pause, there will be a 5-minute "Display Only Period" during which market participants may enter quotations and orders in that security in Nasdaq systems.

Additionally, when a trading halt is in effect prior to the commencement of the Display Only Period, market participants may enter orders in a security that is the subject of the trading halt on the Exchange and designate such orders to be held until the beginning of the Display Only Period. Such orders will be held in a suspended state until the beginning of the Display Only Period, at which time they will be entered into the system.

Nasdaq Rule 4120(a)(7) provides that the Exchange may halt trading in a security that is the subject of an IPO on Nasdaq. Nasdaq Rule 4120(c)(8)(A) establishes the process for lifting the halt and commencing trading. Under this rule, prior to terminating the halt, there is a 15-minute Display-Only Period during which market participants may enter quotes and orders into the Nasdaq Market Center. Additionally, beginning at 4:00 a.m. (EST), market participants may enter orders in a security that is the subject of an IPO on the Exchange and designate such orders to be held until the beginning of the Display Only Period. Such orders will be held in a suspended state until the beginning of the Display Only Period, at which time they will be entered into the system. At the conclusion of the Display-Only Period, the security will enter a "Pre-Launch Period" of indeterminate duration. The Pre-Launch Period ends and the security is released for trading by the Exchange once the conditions described in paragraphs (c)(8)(A)(i), (ii), and (iii) of Nasdaq Rule 4120 are all met.

The process of holding orders in a suspended state prior to the commencement of the Display Only Period is functionality that is utilized by just a small portion of orders. The Exchange believes that the proposed rule change will simplify this process for market participants by making it easier for them to enter orders prior to the release of an IPO or halted security for trading on the Exchange.

The proposed rule change is to amend Nasdaq Rule 4120(c)(4)(B), Nasdaq Rule 4120(c)(7)(A), and Nasdaq Rule 4120(c)(8)(A) pertaining to the Nasdaq process for commencing trading of a

security that is subject to Nasdaq and non-Nasdaq-listed IPOs and trading halts.

For Nasdaq-listed securities, Nasdaq proposes amending Nasdaq Rule 4120(c)(7)(A) and (c)(8)(A). Nasdaq Rule 4120(c)(8)(A) functionality was added in 2012 to make it easier for firms to enter orders during halts or IPOs for Nasdaq-listed securities, without regard for the security being in a Display Only Period or having resumed trading.<sup>3</sup> The process required special settings on participant ports and, as mentioned above, the orders are held in a suspended state. With this change, orders for Nasdaq-listed securities will be immediately accepted and entered into the system without any special port settings and will no longer be held in a suspended state. Such orders will be eligible for cross execution and will remain on the book after the auction if the order's Time in Force allows.<sup>4</sup> As mentioned above, this simplification will streamline the process and make it easier for firms to submit orders to the Exchange prior to the commencement of trading in an IPO or halted security.

For non-Nasdaq-listed securities, the functionality will revert back to what had been done previously, which is that the Exchange will not accept any order entered during a trading halt prior to its release on the primary market.<sup>5</sup> Nasdaq notes that this will reduce confusion about where to send orders for IPO or halt auctions. Market participants that want to participate in the IPO auction or halt resumption for non-Nasdaq-listed securities may use Nasdaq routing strategies that submit orders to the primary listing exchange for auctions or submit their orders directly to the primary listing exchange. The Exchange proposes that Nasdaq Rule 4120(c)(4)(B) be revised to simply state that during any trading halt or pause for which a halt cross under Rule 4753 will not occur, which would be the case for a security not listed on Nasdaq that is subject to a halt or pause, Nasdaq will not accept orders entered by market

participants during the trading halt or pause.

Both the changes for non-Nasdaq-listed securities and for Nasdaq-listed securities will clarify references to instances where a trading halt is in effect prior to the commencement of the Display Only Period and that market participants may enter orders in a security that is the subject of the trading halt on the Exchange. Specifically, for both Nasdaq Rule 4120(c)(7)(A) and (c)(8)(A), the subsections will be amended by deleting language referencing that orders will be held until the beginning of the Display Only Period. Nasdaq Rule 4120(c)(7)(A) will be amended further by deleting language referencing that orders will be held in a suspended state until the beginning of the Display Only Period. For both subsections, this language will be replaced with language that states such orders will now be accepted and entered into the system.

The Exchange has also notified FINRA of the proposed rule change and that Nasdaq would treat the quotes collected during the halt in the same manner that the Exchange handles the pre-existing quotes (*i.e.*, by disseminating these quotes in a non-tradable state where they are clearly identified as being closed and are in fact non-actionable). As a result, the Exchange believes that the proposed rule change would not violate Nasdaq Rule 3340<sup>6</sup> or the similar FINRA Rule 5260.<sup>7</sup>

The implementation of the existing functionality for accepting orders prior to the commencement of the Display Only Period has not been widely used and the Exchange believes the proposed rule change will both improve and simplify the Nasdaq process for market participants.<sup>8</sup> The Exchange will issue an Equity Trader Alert notifying Exchange member firms of the changes.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Section 6(b)(5) of the

<sup>3</sup> See Securities Exchange Act Release No. 66652 (March 23, 2012), 77 FR 19044 (March 29, 2012) (SR-NASDAQ-2012-038); see also Securities Exchange Act Release No. 69563 (May 13, 2013), 78 FR 29187 (May 17, 2013) (SR-NASDAQ-2013-073). Both filings were designated by the Exchange and accepted by the Commission as filings submitted under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

<sup>4</sup> Certain orders' Time in Force allows the order to remain on the Exchange book after the auction (See *e.g.*, MDAY, MGTC, SDAY and SGTC in Nasdaq Rule 4703(a)).

<sup>5</sup> Any order subject to instructions that it be directed to another exchange as described in Nasdaq Rule 4758 will be forwarded to the exchange as per the member's instructions.

<sup>6</sup> See Nasdaq Rule 3340. Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts.

<sup>7</sup> See FINRA Rule 5260. Prohibition on Transactions, Publication of Quotations, or Publication of Indications of Interest During Trading Halts.

<sup>8</sup> The New York Stock Exchange LLC ("NYSE") may accept orders at any time prior to an IPO for NYSE-listed and NYSE MKT LLC-listed securities. See [https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE\\_Opening\\_and\\_Closing\\_Auctions\\_Fact\\_Sheet.pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Opening_and_Closing_Auctions_Fact_Sheet.pdf).

<sup>9</sup> 15 U.S.C. 78f.

Act,<sup>10</sup> in particular, in that the proposal 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 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.

Nasdaq believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system through an improved and simplified Nasdaq process for commencing trading of a security that is the subject of Nasdaq and non-Nasdaq-listed IPOs and trading halts.

The current functionality for accepting orders prior to the commencement of the Display Only Period is used infrequently and consequently the proposed rule change will have little impact on customers. To the extent that there is any impact, it will be that accepting orders immediately rather than holding them in a suspended state will clarify the state of participant orders, which will reduce confusion for market participants in times of increased activity such as during a halt or IPO. This simpler Nasdaq process will make it easier for market participants by streamlining the process for entering orders in securities subject to an IPO or halt prior to the commencement of the Display Only Period. Additionally, returning to the functionality of not accepting orders prior to the resumption of trading that was previously in place for non-Nasdaq-listed securities prior to 2013,<sup>11</sup> will reduce confusion for market participants about where to send orders for IPO or halt auctions. Orders sent to Nasdaq will not be accepted unless they are designated to use one of the routing options that may be sent to the primary listing market.<sup>12</sup>

The proposed rule change also will remove impediments to and perfect the mechanism of a free and open market through competition. Specifically, the proposed rule change will enhance

competition by increasing Nasdaq's attractiveness as a venue for trading securities and as a primary listing exchange for securities issuers.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Nasdaq believes that the proposed rule change will result in an improved and simplified process for market participants, which in turn will reduce confusion during important market events. Nasdaq believes that this change will enhance competition by increasing its attractiveness as a venue for trading securities.

#### *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**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-008 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-2016-008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2016-008, and should be submitted on or before March 3, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-02731 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> See Securities Exchange Act Release No. 66652 (March 23, 2012), 77 FR 19044 (March 29, 2012) (SR-NASDAQ-2012-038); see also Securities Exchange Act Release No. 69563 (May 13, 2013), 78 FR 29187 (May 17, 2013) (SR-NASDAQ-2013-073).

<sup>12</sup> For example, the LIST routing option sends orders in non-Nasdaq-listed securities to the primary listing exchange for auctions—open, close, IPOs, halts, pauses, etc. See Nasdaq Rule 4758(a)(1)(A)(x).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77070; File No. SR-NYSEArca-2015-102]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Provide That the Co-Location Services Offered by the Exchange Include Three Time Feeds and Four Partial Cabinet Bundle Options

February 5, 2016.

#### I. Introduction

On November 27, 2015 the NYSE Arca, Inc. (the “Exchange”) (“the Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to provide that the co-location services offered by the Exchange include three time feeds and four bundles of co-location services (“Partial Cabinet Solution bundles”). The proposed rule change was published for comment in the **Federal Register** on December 16, 2015.<sup>3</sup> The Commission received one comment letter on the proposed rule change.<sup>4</sup> On January 28, 2016, the Exchange filed a response letter.<sup>5</sup> On January 28, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>6</sup> The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons and is approving the proposed rule change, as

modified by Amendment No. 2, on an accelerated basis.

#### II. Description of the Proposal, as Modified by Amendment No. 2

The Exchange proposes to change its rules to provide that the co-location services offered by the Exchange include three time feeds and four Partial Cabinet Solution bundles, and to establish fees for these services.

##### Time Feeds

The Exchange proposes to offer Users the option to purchase connectivity to one or more of three time feeds.<sup>7</sup> Each proposed time feed provides a feed with the current time of day using one of three different time protocols: Global Positioning System (“GPS”) Time Source, the Network Time Protocol (“NTP”), and Precision Timing Protocol (“PTP”).<sup>8</sup> GPS is a time and location system maintained by the United States government.<sup>9</sup> The Exchange accesses the GPS Time Source feed through dedicated equipment and subscribing Users connect to the feed over dedicated cables.<sup>10</sup> For the NTP and PTP time feeds, the Exchange routes the GPS data through dedicated equipment that reformats the GPS data into NTP and PTP.<sup>11</sup> Subscribing Users connect to PTP over dedicated cables and NTP over the Liquidity Center Network (“LCN”), a local area network available in the data center.<sup>12</sup> According to the Exchange, the GPS Time Source feed is a sub-microsecond time feed, providing the highest level of accuracy of the three time feeds.<sup>13</sup> PTP has an accuracy of less than 10 microseconds, while the accuracy of NTP can be greater than 10 milliseconds.<sup>14</sup> The Exchange states that a User does not require connectivity to a time feed to trade on the Exchange.<sup>15</sup>

The proposed connectivity to time feeds would provide Users a convenient way to access time protocols.<sup>16</sup> According to the Exchange, Users make use of time feeds to receive time and to synchronize clocks between computer systems or throughout a computer network, and time feeds assist Users in other functions, including record keeping or measuring response times.<sup>17</sup>

Currently, Users have the option of either renting a dedicated cabinet or a partial cabinet to house their servers and other equipment in the data center.<sup>18</sup> Under the proposal, only the NTP and PTP time feeds will be available to partial cabinet Users, whereas dedicated cabinet Users will have access to all three time feeds.<sup>19</sup> According to the Exchange, connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to interference from the cable power connections, interfering with the delivery of the GPS data.<sup>20</sup> The Exchange states that if a partial cabinet User is in need of the GPS feed, it could either purchase a dedicated cabinet or become a Hosted Customer of a Hosting User that has the GPS feed.<sup>21</sup> In addition, the Exchange states that the NTP time feed is offered only over the LCN due to a lack of demand for the NTP over the IP network, and notes that a User that requires connectivity to the NTP could connect to the LCN.<sup>22</sup>

The Exchange proposes to charge a non-recurring fee of \$300, \$1000, and \$3000 for connectivity to the NTP, PTP, and GPS time feeds, respectively.<sup>23</sup> The Exchange will also charge a monthly recurring fee of \$100, \$250, and \$400 for the NTP, PTP, and GPS time feeds, respectively.<sup>24</sup> Subscribing Users that order the proposed time feed services will be subject to a 12-month minimum commitment, after which they are subject to a 60-day rolling commitment.<sup>25</sup>

##### Partial Cabinet Solution Bundles

The Exchange also proposes to offer four Partial Cabinet Solution bundles

<sup>16</sup> See *id.* at 78276.

<sup>17</sup> See *id.* For example, a User may connect to a time feed for record keeping purposes if it uses that specific time protocol for all its activities, both inside and out of the data center. See *id.* at n.7.

<sup>18</sup> See *id.* at 78276.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at n.10.

<sup>21</sup> See *id.* at 78279.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 78276.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 34-76616 (December 10, 2015), 80 FR 78275 (“Notice”). On January 28, 2016, the Exchange consented to extending the time period for the Commission to either approve or disapprove the proposed rule change, or to institute proceedings to determine whether to approve or disapprove the proposed rule change, to February 5, 2016.

<sup>4</sup> See letter from Kermit Kubitz to the Commission, dated January 6, 2016 (“Kubitz Letter”).

<sup>5</sup> See letter from Martha Redding Senior Counsel & Assistant Secretary, NYSE to Brent J. Fields, Secretary of the Commission, dated January 28, 2016 (“Exchange Response Letter”).

<sup>6</sup> On January 28, 2016, the Exchange filed Amendment No. 1 but withdrew it on the same day, replacing it with Amendment No. 2. Amendment No. 2 (i) updates the proposal to specify that that Partial Cabinet Solution Bundles, originally proposed to be offered on January 1, 2016, instead will be offered on the date that is the later of February 1, 2016 and the date of any Commission approval of the proposal; and (ii) as further explained below, adds clarity to the proposal by specifying the differences in precision among the three time feeds.

<sup>7</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange, a “Hosting User” means a User that hosts a Hosted Customer in the User’s co-location space, and a “Hosted Customer” means a customer of a Hosting User that is hosted in a Hosting User’s co-location space. See Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR-NYSEArca-2015-82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange LLC and NYSE MKT LLC. See Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR-NYSEArca-2013-80).

<sup>8</sup> See Notice, 80 FR at 78276.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Amendment No. 2, at 4.

<sup>14</sup> See *id.*

<sup>15</sup> See Notice, 80 FR at 78276, n.6.

and establish fees therefor.<sup>26</sup> As more fully described in the Notice, each Partial Cabinet Solution bundle option would include network access, two fiber

cross connections, and connectivity to either the NTP or PTP time feed.<sup>27</sup> Subscribing Users would be assessed a non-recurring fee and monthly charge

for each bundle option as set forth below.<sup>28</sup>

Type of service	Description	Amount of charge
Partial Cabinet Solution bundles ..... Note: A User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time. A User and its Affiliates must have an aggregate cabinet footprint of 2 kW or less to qualify for a Partial Cabinet Solution bundle.	Option A: 1 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.  Option B: 2 kW partial cabinet, 1 LCN connection (1 Gb), 1 IP network connection (1 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.  Option C: 1 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.  Option D: 2 kW partial cabinet, 1 LCN connection (10 Gb), 1 IP network connection (10 Gb), 2 fiber cross connections and either the Network Time Protocol Feed or Precision Timing Protocol.	\$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$3,000 monthly for first 12 months of service, and \$6,000 monthly thereafter • For Users that order after December 31, 2016: \$6,000 monthly. \$7,500 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$3,500 monthly for first 12 months of service, and \$7,000 monthly thereafter • For Users that order after December 31, 2016: \$7,000 monthly. \$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$7,000 monthly for first 12 months of service, and \$14,000 monthly thereafter. • For Users that order after December 31, 2016: \$14,000 monthly. \$10,000 initial charge per bundle plus monthly charge per bundle as follows: • For Users that order on or before December 31, 2016: \$7,500 monthly for first 12 months of service, and \$15,000 monthly thereafter. • For Users that order after December 31, 2016: \$15,000 monthly.

Additionally, a User purchasing a Partial Cabinet Solution bundle would be subject to a 90-day minimum commitment, after which period it would be subject to the 60-day rolling time period.<sup>29</sup>

As more fully described in the Notice, the Exchange states that the purpose of offering four Partial Cabinet Solution bundles is to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs attendant with having a dedicated cabinet or greater network connection bandwidth are too burdensome.<sup>30</sup> The Exchange proposes that the Partial Cabinet Solution bundles would be available to Users provided: (1) The subscribing User purchases only one Partial Cabinet Solution bundle; (2) the subscribing

User and its Affiliates must not currently have a Partial Cabinet Solution bundle; and (3) after the purchase of the Partial Cabinet Solution bundle, the subscribing User, together with its Affiliates, has an Aggregate Cabinet Footprint of no more than 2 kW.<sup>31</sup> The Exchange proposes that for purposes of the Partial Cabinet Solution bundles, an “Affiliate” of a User would be any other User or a Hosted Customer that is under 50% or greater common ownership or control of the first User.<sup>32</sup> Further, the term “Aggregate Cabinet Footprint” of a User or Hosted Customer is proposed to be defined as: (a) For a User, the total kW of the User’s cabinets, including both partial and dedicated cabinets, and (b), for a Hosted Customer, the total kW of the portion of the Hosting User’s cabinet, whether partial

or dedicated, allocated to such Hosted Customer.<sup>33</sup>

A User would be required to inform the Exchange immediately of any event that causes the User or a Hosted Customer to become ineligible for a Partial Cabinet Solution bundle, including an event that causes another User or Hosted Customer to become an Affiliate as this can make the subscribing User ineligible for the bundle.<sup>34</sup> If a subscribing User ceases to meet the conditions for access to the Partial Cabinet Solution bundle, it would be charged for each of the services individually, at the price for each such service set out in the Price List and Fee Schedule.<sup>35</sup> Such price change would be effective as of the date that the subscribing User ceased to meet the conditions.<sup>36</sup>

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* 78276–78277.

<sup>28</sup> See *id.* at 78278.

<sup>29</sup> See *id.* The Exchange proposes to have a reduced minimum commitment period for the Partial Cabinet Solution bundle to further reduce the cost commitment for such Users. The Exchange acknowledges that the proposal may also attract some entities that are currently Hosted Customers or would have become Hosted Customers.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 78277.

<sup>32</sup> See *id.* at n.15.

<sup>33</sup> See *id.* at 78277. For example, a User with a 4 kW dedicated cabinet would not be eligible for a Partial Cabinet Solution bundle, as its aggregate cabinet footprint would be either 5 kW or 6 kW once a Partial Cabinet Solution bundle was added.

<sup>34</sup> See *id.* The Exchange would review available information regarding the entities and may request additional information to verify the Affiliate status of a User or Hosted Customer. The Exchange would approve a request for a Partial Cabinet Solution bundle unless it determines that the certification is not accurate.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

Further, if a subscribing User purchased each of the components of a Partial Cabinet Solution bundle, whether over several purchases or in one order, and met the conditions described above for access to the Partial Cabinet Solution bundle, the Exchange would automatically treat that User's services as a Partial Cabinet Solution bundle and, effective the date of installation of the final component, reduce the User's recurring fee to the recurring fee for the relevant bundle.<sup>37</sup> In addition, a User that changes its Partial Cabinet Solution bundle from one option to another will not be subject to a second initial charge, but will be required to pay the difference, if any, between the bundles' initial charges.<sup>38</sup>

Finally, the Exchange proposes to make non-substantive changes to the Price List and Fee Schedule to add subheadings under "Co-Location Fees" for "Definitions" and "General Notes."<sup>39</sup>

### III. Summary of Comment Letter and Exchange Response

As noted above, the Commission received one comment letter on the proposed rule change,<sup>40</sup> and a response from the Exchange.<sup>41</sup> The commenter expressed concern about the potential for "GPS spoofing" (intentional interference with GPS feeds from a distance) if GPS data are from an unsecured source.<sup>42</sup> According to the commenter, a successful GPS spoofing attack could cause time feed data to become corrupted, which could cause Users, such as High Frequency Trading ("HFT") firms that represent substantial market volume, to withdraw from the market and lead to market disruption.<sup>43</sup> The commenter asked particularly whether purchasers of Partial Cabinet Solution bundles that have access to the PTP and NTP feeds, but not the dedicated GPS time feed, would have any "special vulnerability to some sort of feed failure" as a result of "GPS spoofing" or otherwise.<sup>44</sup>

The Exchange responded that "[t]o the best of the Exchange's knowledge, Users that connect to the NTP or the PTP, rather than the GPS Time Source, do not have a special vulnerability to

feed failure, irrespective of whether they utilize a partial or dedicated cabinet."<sup>45</sup> The Exchange stated that it uses the same GPS time feed equipment for its production environment and to provide time feeds to Users;<sup>46</sup> and that Users purchasing time feeds from the Exchange (whether GPS, PTP, or NTP) benefit from the same protections that the Exchange has implemented for its own GPS antennas and receivers.<sup>47</sup> The Exchange also stated that GPS is the source information for all three time feeds and that the Exchange routes the GPS data through dedicated equipment that reformats the GPS data to propagate the NTP and PTP.<sup>48</sup> The Exchange further stated that any disruption to the GPS time feed would impact the NTP and PTP time feeds in the same way as the GPS feed; and that the Exchange has no knowledge of any other method to "spoof" the NTP or PTP feeds if the GPS feed were not compromised.<sup>49</sup>

### IV. Discussion and Commission Findings

After careful review and consideration of the Exchange's proposal, the comment letter and the Exchange's response, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>50</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(4) of the Act,<sup>51</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and

other persons using its facilities, and with Section 6(b)(5) of the Act,<sup>52</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed rule change is consistent with Section 6(b)(4) of the Act. The Commission notes the Exchange's representation that the proposed fees for the time feed connectivity and Partial Cabinet Solution bundles are reasonable because the Exchange proposes to offer the services as a convenience to Users, but in doing so will incur certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for the initial installation, monitoring, support and maintenance of such services.<sup>53</sup> The Exchange states that the higher fee in connection with the GPS time feed reflects the greater costs for its equipment, installation and maintenance in comparison with the other time feeds.<sup>54</sup> In addition, all Users that voluntarily select connectivity to one or more of the proposed time feeds would be charged the same amount for the same services. With respect to the proposed Partial Cabinet Solution bundles in particular, the Commission also notes that all Users are subject to the same conditions and fees for the service selected; all Users are subject to the same limits on the number of Partial Cabinet Solution bundles and aggregate cabinet footprint; all Users that order a bundle on or before December 31, 2016 would have their monthly charges reduced by 50 percent for the first 12 months; and all Users that change their Partial Cabinet Solution bundles would not be charged a second initial charge but instead charged the difference, if any, between the initial charges.

The Commission further believes that the Exchange's proposal to offer Users optional connectivity to the GPS, PTP, and NTP time feeds is consistent with the requirements of Section 6(b)(5) of the Act. The proposal to offer connectivity to different time feed options allows a User to select the time protocol that best suits it needs, helping to tailor its data center operations to the requirements of its business operations,

<sup>37</sup> See *id.* at 78278.

<sup>38</sup> See *id.* at 78277, n.19.

<sup>39</sup> See *id.* at 78278.

<sup>40</sup> See Kubitz Letter, *supra* note 4.

<sup>41</sup> See Exchange Response Letter, *supra* note 5.

<sup>42</sup> See Kubitz Letter, *supra* note 4.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* The commenter further requested that the Commission more broadly investigate and report on any risks associated with time feeds, and measures to protect these and other data feeds. See *id.* The Commission notes that this suggestion is beyond the scope of the proposed rule change.

<sup>45</sup> See Exchange Response Letter, *supra* note 5, at 3.

<sup>46</sup> See *id.* at 4.

<sup>47</sup> See *id.* The Exchange added that that discussion of these protections in a proposed rule change would impair their effectiveness. See *id.* at 5.

<sup>48</sup> See *id.* at 3.

<sup>49</sup> See *id.* Regarding the commenter's concern about the potential for GPS spoofing to lead to market disruption, the Exchange stated that it could not comment on the behavior of HFT Users during a "spoofing event" regardless of whether the HFT User received its time feed from the Exchange or a third party vendor. The Exchange noted, however, that the proposal was limited to time feeds provided by the Exchange and that Users purchasing time feeds from the Exchange benefit from the same protections that the Exchange has implemented for its own GPS antennas and receivers. See *id.* at 5.

<sup>50</sup> In approving this proposed rule change, as modified by Amendment No. 2, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>51</sup> 15 U.S.C. 78f(b)(4).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

<sup>53</sup> See Notice, 80 FR at 78279.

<sup>54</sup> See *id.*

and to operate more efficiently. As set forth in the Exchange Response Letter, the Exchange states that whether a User purchases access to the GPS, NTP, or PTP time feed, it benefits from the same precautions as the Exchange's production environment, as the Exchange uses the same GPS time feed equipment, including antennas and receivers, to provide time feeds to Users.<sup>55</sup> The Commission therefore believes that the proposed time feeds, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest. The Exchange represents that connectivity to the GPS time feed is not available for partial cabinets because the proximity of the GPS and power connections into a partial cabinet would expose the GPS to interference from the cable power connections, interfering with the delivery of the GPS data.<sup>56</sup> The Exchange also represents that connectivity to the NTP time feed is not proposed to be offered over the IP network due to lack of demand.<sup>57</sup> For these reasons, the Commission believes that providing connectivity to the GPS Time Source for dedicated cabinets but not partial cabinets, and to the NTP time feed through the LCN but not the IP network, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds the Exchange's proposal to offer Partial Cabinet Solution bundles consistent with Section 6(b)(5) of the Act. As noted, all Users seeking to purchase a Partial Cabinet Solution bundle would be subject to the same conditions. The Commission believes that the proposed Partial Cabinet Solution bundles are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services, and therefore that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

For the foregoing reasons, the Commission also finds that, the proposed rule change, as modified by

Amendment No. 2, is consistent with the Act.

#### V. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether this filing, as modified by Amendment No. 2, is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEArca-2015-102 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 No. SR-NYSEArca-2015-102. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEArca-2015-102, and should be submitted on or before March 3, 2016.

#### VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of Amendment No. 2 in the **Federal Register**. As discussed above, Amendment No. 2 updates dates in the original proposed rule change and adds clarity on the differences between the three time feeds in terms of their precision.<sup>58</sup> The Commission believes that these revisions provide clarity on when partial cabinet bundle discounts will apply along with additional information on the differences between the various time feeds. Furthermore, the Commission believes it is appropriate to have these changes incorporated into the rules of the Exchange concurrently with those changes discussed in the original filing.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>59</sup>

#### VII. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>60</sup> that the proposed rule change, as modified by Amendment No. 2, (SR-NYSEArca-2015-102) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>61</sup>

**Brent J. Fields**,  
Secretary.

[FR Doc. 2016-02734 Filed 2-10-16; 8:45 am]

**BILLING CODE 8011-01-P**

#### DEPARTMENT OF STATE

[Public Notice: 9442]

#### Biodiversity Beyond National Jurisdiction; Notice of Public Meeting

**ACTION:** Notice of Public Meeting.

*Title:* Biodiversity Beyond National Jurisdiction; Notice of Public Meeting.  
**SUMMARY:** The Department of State will hold an information session regarding issues related to upcoming United Nations meetings concerning marine biodiversity in areas beyond national jurisdiction.

<sup>58</sup> See *supra*, note 6.

<sup>59</sup> 15 U.S.C. 78s(b)(2).

<sup>60</sup> See *id.*

<sup>61</sup> 17 CFR 200.30-3(a)(12).

<sup>55</sup> See Exchange Response Letter, *supra* note 5, at 4.

<sup>56</sup> See *supra*, notes 20 and 21 and accompanying text.

<sup>57</sup> See *supra*, note 22 and accompanying text.

**DATES:** The public meeting will be held on February 24, 2016, 1:00 p.m.–2:30 p.m.

**ADDRESSES:** The meeting will be held at the Harry S. Truman Main State Building, Room 3940, 2201 C Street NW., Washington, DC 20520.

**FOR FURTHER INFORMATION CONTACT:** If you would like to participate in this meeting, please send your (1) Name, (2) organization/affiliation, and (3) email address and phone number, as well as any requests for reasonable accommodation, to Elana Katz-Mink at [Katz-MinkEH@state.gov](mailto:Katz-MinkEH@state.gov).

**SUPPLEMENTARY INFORMATION:** In March 2016, the United States will participate in a two-week meeting of the United Nations General Assembly (UNGA) Preparatory Committee on conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The first meeting of the Preparatory Committee will begin a two-year process established by the UNGA to make substantive recommendations on the elements of a draft text of a legally binding instrument on conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

We would like to invite interested stakeholders to share comments, concerns, and questions about these issues. We, in turn, will provide a brief overview of the structure of the upcoming Preparatory Committee and will listen to your comments on the upcoming discussions at the March meeting.

The information obtained from this session and any subsequent related meetings will be used to help us prepare for U.S. participation in international meetings and specifically U.S. participation in the first meeting of the Preparatory Committee on conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

**Reasonable Accommodation:** This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other reasonable accommodation should be directed to (see **FOR FURTHER INFORMATION**) at least 5 days prior to the meeting date. Requests received after that date will be considered, but might not be possible to fulfill.

Personal data for entry into the Harry S. Truman building are requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and E.O. 13356. The purpose of the collection is to validate the identity

of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at <https://foia.state.gov/docs/SORN/State-36.pdf> for additional information.

Dated: February 8, 2016.

**Evan Bloom,**

*Director, Office of Ocean and Polar Affairs, Bureau of Oceans and International, Environmental and Scientific Affairs, Department of State.*

[FR Doc. 2016–02805 Filed 2–10–16; 8:45 am]

**BILLING CODE 4710–09–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Seventh Meeting: RTCA Special Committee (230) Airborne Weather Detection Systems (Joint With EUROCAE WG–95)

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

**ACTION:** Notice of Seventh RTCA Special Committee 230 meeting.

**SUMMARY:** The FAA is issuing this notice to advise the public of the Seventh RTCA Special Committee 230 meeting.

**DATES:** The meeting will be held February 16–18, 2016 from 8:30 a.m.–5 p.m.

**ADDRESSES:** The meeting will be held at GKN Aerospace, Percival Way, Luton, Bedfordshire, LU2 9PQ, United Kingdom, Tel: (202) 330–0680.

**FOR FURTHER INFORMATION CONTACT:** The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at <http://www.rtca.org>; or Karan Hofmann, Program Director, RTCA, Inc., [khofmann@rtca.org](mailto:khofmann@rtca.org), (202) 330–0680; or Anna von Groote, [anna.vongrotte@eurocae.net](mailto:anna.vongrotte@eurocae.net), +33 1 40 92 79 26; or Tom Richards, local contact, [Thomas.richards@gknaerospace.com](mailto:Thomas.richards@gknaerospace.com); +44 (0)1582 811249, cell +44 (0)7919624190.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 230. The agenda will include the following:

**Tuesday, February 16, 2016 (8:30 a.m.–5 p.m.)**

1. Plenary Meeting (8:30 a.m.–11 a.m.)

- a. Welcome (WG–95/WG–95 SG)
  - b. Introduction—tour de table (WG–95/WG–95 SG)—Logistic & Agenda
  - c. Presentation of GKN AEROSPACE
  - d. Short presentation (WG–95)—TOR—Work Plan—Remaining work
  - e. Short presentation (WG–95 SG)—TOR—Work Plan
  - f. Future Meetings—April 2016
  - g. Summary of progress through WG–95 SG Webex—Camille
  - h. Summary of Dec 11th WG–95 Webex
  - i. Review of common Actions between WG–95 and the subgroup WG–95 SG
2. WG–95 Meeting (11 a.m.–5 p.m.)
3. WG–95 SG Meeting (11 a.m.–5 p.m.)
- a. Review of WG–95 SG Actions
  - b. Review of the EUROCAE document folder
  - c. List of the documentation material for each part of the feasibility study
  - d. Presentation of HAIC 2016 Flight test campaign (preliminary results) (Honeywell & Airbus)
  - e. Review of the draft Section 0: Introduction/Context
  - f. Review of the draft Section 1: Bibliography

**Wednesday, February 17, 2016 (9 a.m.–5 p.m.)**

1. WG–95 Meeting (9 a.m.–5 p.m.)
  - a. Continue Review of WG–95 Actions
  - b. Review & Finalize Chapter 6
2. WG–95 SG Meeting (9 a.m.–5 p.m.)
  - a. Review of the draft Section 0: Introduction/Context
  - b. Review of the draft Section 1: Bibliography
  - c. Review of the draft Section 2: Definition of Intended function
  - d. Presentation of Airbus HMI evaluation for HAIC function (C.CARUHEL—Airbus)
  - e. Review of the draft Section 2: Definition of Intended function
  - f. Review of the draft Section 3: Operational performance goal

**Thursday, February 18, 2016 (9 a.m.–4 p.m.)**

1. WG–95 Meeting (9 a.m.–2 p.m.)
  - a. Review & Finalize Chapter 6
  - b. Review the entire document, actions for improvements
  - c. Meeting Wrap-up, review of Actions
2. WG–95 SG Meeting (9 a.m.–2 p.m.)
  - a. Review of the draft Section 2: Definition of Intended function
  - b. Review of the draft Section 3: Operational performance goal
  - c. Presentation of the outline of Section 4: Discussion on Radar compliance with operational performance goal (J.FINLEY—Rockwell-Collins)

- d. Meeting wrap-up (update of action list, next meeting scheduling . . . )  
 e. Conclusion
3. Plenary Meeting (2 p.m.–4 p.m.)  
 a. Presentation of WG–95 SG progress report to WG–95  
 b. Q&A sessions

Attendance is open to the interested public but limited to space availability. All visitors to GKN Aerospace Luton must complete an ITAR visitor's form. A scanned copy of the signed form must be returned to Tom Richards prior to your visit. Also, all visitors from outside the UK must bring their passport as a suitable photo ID. With the approval of the chairman, members of the public may present oral statements at the meeting. Plenary information will be provided upon request. Persons who wish to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on February 8, 2016.

**Latasha Robinson,**

*Management & Program Analyst, NextGen, Enterprise Support Services Division, Federal Aviation Administration.*

[FR Doc. 2016–02547 Filed 2–8–16; 11:15 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement: Cherokee and Forsyth Counties, Georgia.

**AGENCY:** Federal Highway Administration (FHWA) United States Department of Transportation (USDOT).

**ACTION:** Rescind Notice of Intent To Prepare an EIS.

**SUMMARY:** The FHWA is issuing this notice to advise the public that the Notice of Intent (NOI) for the preparation of an Environmental Impact Statement (EIS) to study the proposed transportation project (State Route 20) located in Cherokee and Forsyth Counties, Georgia, is being rescinded. The NOI was published in the **Federal Register** on April 11, 2013. A Draft EIS was not released. The rescission is based on federal aid funding has been eliminated from the on the SR 20 project. The Georgia Department of Transportation (GDOT) will fund the project using state transportation funding.

**FOR FURTHER INFORMATION CONTACT:** Chetna P. Dixon, Environmental

Coordinator, Federal Highway Administration Georgia Division, 61 Forsyth Street, Suite 17T100, Atlanta, Georgia 30303. Phone 404–562–3630 or Nicole Law, Project Manager, Georgia Department of Transportation, 600 West Peachtree Street, 25th Floor, Atlanta, Georgia 30308. Telephone: (404) 631–1723, Email: [nlaw@dot.ga.gov](mailto:nlaw@dot.ga.gov).

**SUPPLEMENTARY INFORMATION:** On December 8, 2015, GDOT announced the improvements to SR 20 would be funded with state funding. Comments or questions concerning the rescission of the proposed action and the EIS should be directed to the FHWA at the address provided above.

Issued on: February 5, 2016.

**William Farr,**

*Assistant Division Administrator, Federal Highway Administration, Atlanta, Georgia.*

[FR Doc. 2016–02766 Filed 2–10–16; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0347]

#### Qualification of Drivers; Exemption Applications; Vision

##### Correction

In notice document 2016–00472 beginning on page 1474 in the issue of Tuesday, January 12, 2016, make the following correction:

1. On page 1474, in the third column, in the **DATES** section, “[Insert date 30 days after date of publication in the **Federal Register**].” should read “February 11, 2016.”

[FR Doc. C1–2016–00472 Filed 2–10–16; 8:45 am]

**BILLING CODE 1501–01–D**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[Docket Number FRA–2015–0126]

#### Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated February 27, 2015, Union Pacific Railroad (UP) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232, Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices.

Specifically, UP requests a waiver of compliance from the requirements of 49 CFR 232.205, *Class I brake test—initial terminal inspection*, to permit a train to be split en route using the same initial terminal inspection. FRA assigned the petition Docket Number FRA–2015–0126.

In its petition, UP states that it is launching trains with multiple locomotive consists within the train so that the train can be split at an appropriate point en route, creating two separate trains bound for different destinations. A combined train of this type undergoes a Class 1 air brake test at departure pursuant to 49 CFR 232.205. At a location less than 1,000 miles from the departure point, the combined train is cut at the distributed power units. No new locomotive units are added to the resulting second train. The second train is equipped with an end-of-train device or equivalent device, linked to what is now the lead locomotive in the consist. No cars are added to the second train. The cars on the second train were all part of the original train and have not been off air for more than 4 hours. These cars undergo a Class 3 air brake test pursuant to 49 CFR 232.211, *Class III brake tests—trainline continuity inspection*, before continuing to their destination.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at [www.regulations.gov](http://www.regulations.gov) and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200

New Jersey Avenue SE., W12-140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by March 14, 2016 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy). See also <http://www.regulations.gov/#!privacyNotice> for the privacy notice of regulations.gov.

**Robert C. Lauby,**

*Associate Administrator for Railroad Safety, Chief Safety Officer.*

[FR Doc. 2016-02776 Filed 2-10-16; 8:45 am]

**BILLING CODE 4910-06-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2014-0096; Notice 2]

#### Tesla Motors, Inc. (Tesla), Grant of Petition for Decision of Inconsequential Noncompliance

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

**ACTION:** Grant of petition.

**SUMMARY:** Tesla Motors, Inc. (Tesla) has determined that certain model year (MY) 2008 Tesla Roadster passenger cars do not fully comply with paragraph S4.4(c)(2), of Federal Motor Vehicle Safety Standard (FMVSS) No. 138, *Tire Pressure Monitoring Systems*. Tesla filed a report dated August 1, 2014, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Tesla then petitioned NHTSA under 49 CFR part 556 requesting a decision that the subject noncompliance is inconsequential to motor vehicle safety.

**ADDRESSES:** For further information on this decision contact Kerrin Bressant, Office of Vehicles Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-1110, facsimile (202) 366-3081.

#### SUPPLEMENTARY INFORMATION:

##### I. Overview

Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR part 556, Tesla submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on June 24, 2015, in the **Federal Register** (80 FR 36403). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number “NHTSA-2014-0096.”

##### II. Vehicles Involved

Affected are approximately 542 MY 2008 Roadster model passenger cars manufactured from February 1, 2008 through October 29, 2009.

##### III. Noncompliance

Tesla explains that if a fault is detected in a sensor, because the sensor is faulty, missing or unapproved, the Tire Pressure Monitoring System (TPMS) malfunction telltale will flash for 60 to 90 seconds and then remain continuously illuminated as required by FMVSS No. 138. However, the TPMS malfunction telltale fails to operate properly when a faulty, missing or unapproved sensor is detected and then the vehicle's ignition is cycled off and back on. In this situation, the malfunction telltale in the subject vehicles does not re-illuminate immediately as required when the vehicle's ignition system is re-activated. Instead, the affected vehicles must reach a speed between 20 miles per hour (mph) and 25 mph for a maximum period of at least 90 seconds before the TPMS malfunction telltale re-illuminates.

##### IV. Rule Text

Paragraph S4.4(c)(2) of FMVSS No. 138 requires in pertinent part:

S4.4 TPMS Malfunction.  
\* \* \* \* \*

(c) *Combination low tire pressure/TPMS malfunction telltale.* The vehicle meets the requirements of S4.4(a) when equipped with a combined Low Tire Pressure/TPMS malfunction telltale that:

(2) Flashes for a period of at least 60 seconds but no longer than 90 seconds upon detection of any condition specified in S4.4(a) after the ignition locking system is activated to the “On” (“Run”) position. After each period of prescribed flashing, the telltale must remain continuously illuminated as long as a malfunction exists and the ignition locking system is in the “On” (“Run”) position. This flashing and illumination sequence must be repeated each time the ignition locking system is placed in the “On” (“Run”) position until the situation causing the malfunction has been corrected. . . .

##### V. Summary of Tesla's Analyses

Tesla stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(A) Tesla stated that although the TPMS malfunction indicator will not illuminate immediately after the vehicle is restarted, it generally will illuminate shortly thereafter and in any event it will illuminate in no more than 90 seconds after the vehicle accelerates between 20–25 mph. Tesla further explained that additional warnings via the “fault” display in the dashboard and the auxiliary display warnings will appear anew. Clearing this “new” warning in the auxiliary screen will require the driver to “actively” (take positive action) to clear the screen. Tesla believes these additional steps required to clear the auxiliary screen warning ensures driver attention to the issue.

(B) Tesla states that they provide warnings and alerts above and beyond what is required by regulations. Checks include wheel sensor fitment (compatibility) and tire pressures. If sensors are “new” (*i.e.*, different from those verified at the previous ignition cycle), the sensors are “learned” and after calibrations performed, a check of all tires is again performed for any low pressure conditions. In addition, the subject vehicles are equipped with an “auxiliary” screen which displays a diagram of the vehicle with respective tire positions and status of those respective tires. Tesla explained that this type of detailed information and multiple alerts ensures the driver is well informed of a potential low tire pressure condition.

(C) Tesla said that the noncompliance is confined to one particular aspect of the functionality of the otherwise compliant TPMS malfunction indicator. All other aspects of the low-pressure monitoring system functionality are fully compliant with the requirements of FMVSS No. 138.

(D) Tesla stated that it is not aware of any customer complaints, field communications, incidents or injuries related to the failure of the TPMS noncompliance.

In summation, Tesla believes that the described noncompliance of the subject vehicles is inconsequential to motor vehicle safety, and that its petition, to

exempt Tesla from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the noncompliance as required by 49 U.S.C. 30120 should be granted.

#### NHTSA's Decision

*NHTSA's Analysis:* Tesla explained that although the malfunction indicator does not re-illuminate immediately after the vehicle is restarted, it will illuminate shortly thereafter—within 90 seconds after the vehicle reaches a speed between 20 mph and 25 mph.

NHTSA recognizes that the malfunction indicator will not illuminate as required for very short periods of time—when the vehicle is traveling at low speeds and thus poses little risk to vehicle safety. Under normal driving conditions, a driver will begin a trip by accelerating moderately beyond 20–25 mph, and as explained by Tesla, once the vehicle accelerates above 20–25 mph, the malfunction indicator re-illuminates and then it will remain illuminated for the entire ignition cycle, regardless of vehicle speed. We understand the noncompliance will only occur in the very rare case where the driver begins a trip and never exceeds the 20–25 mph threshold, the speed required to re-activate the malfunction indicator. No real safety risk exists because at such low speeds there is little risk of vehicle loss of control due to underinflated tires. Furthermore, the possibility that the vehicle will experience both a low inflation pressure condition and a malfunction simultaneously is highly unlikely.

Tesla states that they provide warnings and alerts above and beyond what is required by regulations and that the subject vehicles are equipped with an “auxiliary” screen which displays a diagram of the vehicle with respective tire positions and status of those respective tires. Tesla explained that this type of detailed information and multiple alerts ensures the driver is well informed of a potential low tire pressure condition.

The agency evaluated the displays Tesla uses in the noncompliant vehicles. In addition to the combination telltale indicator lamp, the subject vehicles are equipped with a “plan view” icon which displays the pressures for all four wheels individually. If any wheel has a malfunctioning pressure sensor the indicator for that wheel displays several dashes indicating that there is a problem with that respective wheel. The additional information is not required by the safety standard but can

be used as an aid to the driver to determine the status of a vehicle's tires.

Tesla discussed that the noncompliance only involves one specific aspect of the malfunction functionality and that the primary function of the TPMS, identification of other malfunctions and of low inflation pressure scenarios, is not affected. Tesla explained that in the subject vehicles, the TPMS only fails to operate properly when a faulty, missing or non-approved sensor is detected and the ignition is recycled. According to Tesla, if such a fault is detected, and then the ignition is cycled off and back on, the MIL will reset, thus requiring the system to re-detect the fault or missing/unapproved sensor versus immediately re-illuminating the MIL from the previously detected fault.

The agency agrees with Tesla's reasoning that the primary function of the TPMS is to identify low tire inflation pressure conditions which Tesla's system does as required by the safety standard. There are a variety of other malfunctions that can occur in addition to the incompatible wheel/tire malfunction identified in this petition. We understand from Tesla that its TPMS will perform as required during all other type system malfunctions.

Tesla mentioned that they have not received or are aware of any consumer complaints, field communications, incidences or injuries related to this noncompliance. In addition to the analysis done by Tesla that looked at customer complaints, field communications, incidents or injuries related to this condition, NHTSA conducted additional checks of NHTSA's Office of Defects Investigations consumer complaint database and found no related complaints.

*NHTSA's Decision:* In consideration of the foregoing analysis, NHTSA has decided that Tesla has met its burden of demonstrating that the FMVSS No. 138 noncompliance is inconsequential to motor vehicle safety. Accordingly, Tesla's petition is hereby granted and Tesla is exempted from the obligation of providing notification of, and a remedy for, that the subject noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this

decision only applies to the subject nonconforming vehicles that Tesla no longer controlled at the time it determined that the noncompliance existed. However, the granting of this decision does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Tesla notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

**Jeffrey M. Giuseppe,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2016–02722 Filed 2–10–16; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA–2014–0094; Notice 2]

#### Ferrari North America, Inc., Grant of Petition for Decision of Inconsequential Noncompliance

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

**ACTION:** Grant of petition.

**SUMMARY:** Ferrari North America, Inc. (FNA), has determined that certain model year (MY) 2007–2009 Ferrari F430 passenger cars do not fully comply with paragraph S4.4(c)(2), of Federal Motor Vehicle Safety Standard (FMVSS) No. 138, *Tire Pressure Monitoring Systems*. FNA filed a report dated July 16, 2014, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. FNA then petitioned NHTSA under 49 CFR part 556 requesting a decision that the subject noncompliance is inconsequential to motor vehicle safety.

**ADDRESSES:** For further information on this decision contact Kerrin Bressant, Office of Vehicles Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–1110, facsimile (202) 366–3081.

#### SUPPLEMENTARY INFORMATION:

##### I. Overview

Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR part 556, FNA submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C.

Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on June 17, 2015, in the **Federal Register** (80 FR 34787). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2014-0094."

## II. Vehicles Involved

Affected are approximately 1,975 MY 2007-2009 Ferrari model F430 passenger cars manufactured from September 1, 2007 through July 29, 2009.

## III. Noncompliance

FNA explains that the Tire Pressure Monitoring System (TPMS) malfunction indicator illuminates as required by FMVSS No. 138 when a malfunction is first detected, however, if the malfunction is caused by an incompatible wheel, when the vehicle ignition is deactivated and then reactivated to the "On" ("Run") position after a five-minute period, the malfunction indicator does not re-illuminate immediately as required. FNA added, that the malfunction indicator in the subject vehicles will re-illuminate after a maximum of 40 seconds of driving above 23 miles per hour (mph).

## IV. Rule Text

Paragraph S4.4(c)(2) of FMVSS No. 138 requires in pertinent part:

S4.4 TPMS Malfunction.

\* \* \* \* \*

(c) *Combination low tire pressure/TPMS malfunction telltale.* The vehicle meets the requirements of S4.4(a) when equipped with a combined Low Tire Pressure/TPMS malfunction telltale that:

(2) Flashes for a period of at least 60 seconds but no longer than 90 seconds upon detection of any condition specified in S4.4(a) after the ignition locking system is activated to the "On" ("Run") position. After each period of prescribed flashing, the telltale must remain continuously illuminated as long as a malfunction exists and the ignition locking system is in the "On" ("Run") position. This flashing and illumination sequence must be repeated each time the ignition locking system is placed in the "On" ("Run") position until the situation causing the malfunction has been corrected. . . .

## V. Summary of FNA's Analyses

FNA stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(A) FNA stated that the TPMS in the subject vehicles generally functions properly to alert the driver to a low tire pressure. Moreover, the TPMS malfunction indicator illuminates as required when a problem is first detected. If, however, there is an incompatible wheel and tire unit, when the vehicle ignition is deactivated and then reactivated after a five-minute period, the malfunction indicator does not re-illuminate immediately as required by FMVSS No. 138. According to FNA, the malfunction indicator will illuminate shortly thereafter, and, in any event, it will illuminate in no more than 40 seconds after the vehicle accelerates above 23 mph. Once the vehicle has accelerated above 23 mph for a period of 15 seconds, the TPMS will seek to confirm the sensors fitted to the vehicle, and in the case a sensor is not fitted, the TPMS will detect this condition within a maximum of 25 additional seconds and activate the malfunction indicator. Thus, FNA explained that even in the presence of the noncompliance, drivers are warned of the malfunction in less than one minute of driving at or above normal urban speeds.

(B) FNA further explained that if the TPMS fails to detect a compatible wheel sensor, the TPMS monitor will display no value for the tire pressure of the affected wheel(s). The TPMS monitor will alert the driver to the fact that something is not functioning properly with the system, pending the illumination of the malfunction indicator.

(C) FNA said that the noncompliance is confined to one particular aspect of the functionality of the otherwise compliant TPMS malfunction indicator. All other aspects of the low-pressure monitoring system functionality are fully compliant with the requirements of FMVSS No. 138.

(D) FNA said it is not aware of any customer complaints, field communications, incidents or injuries related to this condition.

In summation, FNA believes that the described noncompliance of the subject vehicles is inconsequential to motor vehicle safety, and that its petition, to exempt FNA from providing notification of noncompliance as required by 49 U.S.C. 30118 and remedying the noncompliance as required by 49 U.S.C. 30120 should be granted.

## NHTSA's Decision

*NHTSA's Analysis:* FNA explained that although the malfunction indicator does not re-illuminate immediately after the vehicle is restarted, it will illuminate shortly thereafter—within 40 seconds after the vehicle speed exceeds 23 mph.

NHTSA agrees with FNA that the malfunction indicator will not illuminate as required during very short periods of time when the vehicle is traveling at low speeds and thus poses little risk to vehicle safety. Under normal driving conditions, a driver will begin a trip by accelerating moderately beyond 23 mph, and as explained by FNA, once the vehicle accelerates above 23 mph, the malfunction indicator re-illuminates and then it will remain illuminated for the entire ignition cycle, regardless of vehicle speed. We agree the noncompliance will only occur in the very rare case where the driver begins a trip and never exceeds the 23 mph threshold, the speed required to re-activate the malfunction indicator. No real safety risk exists because at such low speeds there is little risk of vehicle loss of control due to underinflated tires. Furthermore, the possibility that the vehicle will experience both a low inflation pressure condition and a malfunction simultaneously is highly unlikely.

FNA stated that if the TPMS fails to detect the wheel sensors, a TPMS monitor is also provided that displays on its TPMS pressures screen "—" warning the driver that the status of the wheel sensor is not confirmed. The agency evaluated the displays FNA uses in the noncompliant vehicles. In addition to the combination telltale indicator lamp, the subject vehicles are equipped with a "plan view" icon which displays the pressures for all four wheels individually. If any wheel has a malfunctioning pressure sensor the indicator for that wheel displays several dashes indicating there is a problem with that respective wheel. The additional information is not required by the safety standard, but can be used as an aid to the driver to determine the status of a vehicle's tires.

FNA discussed that the noncompliance only involves one specific aspect of the malfunction and that the primary functions of the TPMS, identification of other malfunctions and identification of low inflation pressure scenarios, is not affected.

The agency agrees with FNA's reasoning that the primary function of the TPMS is to identify low tire inflation pressure conditions which FNA's system does as required by the

safety standard. Also, there are a variety of other malfunctions that can occur in addition to the delayed re-illumination malfunction identified in this petition. We understand from FNA that the TPMS installed in the subject vehicles will otherwise perform as required.

FNA mentioned that they have not received or are aware of any consumer complaints, field communications, incidences or injuries related to this noncompliance. In addition to the analysis done by FNA that looked at customer complaints, field communications, incidents or injuries related to this condition, NHTSA conducted additional checks of NHTSA's Office of Defects Investigations consumer complaint database and found two subject vehicle complaints both of which were determined to be unrelated to this petition.

*NHTSA's Decision:* In consideration of the foregoing analysis, NHTSA has decided that FNA has met its burden of demonstrating that the FMVSS No. 138 noncompliance is inconsequential to motor vehicle safety. Accordingly, FNA's petition is hereby granted and FNA is exempted from the obligation of providing notification of, and a remedy for, the subject noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject noncompliant vehicles that FNA no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after FNA notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

**Jeffrey M. Giuseppe,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. 2016-02726 Filed 2-10-16; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2014-0077; Notice 2]

#### Automobili Lamborghini S.p.A., Grant of Petition for Decision of Inconsequential Noncompliance

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

**ACTION:** Grant of petition.

**SUMMARY:** Automobili Lamborghini S.p.A. (Lamborghini) has determined that certain model year (MY) 2008-2014 Lamborghini passenger cars do not fully comply with paragraph S4.4(c)(2), of Federal Motor Vehicle Safety Standard (FMVSS) No. 138, *Tire Pressure Monitoring Systems*. Lamborghini filed a report dated May 23, 2014, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Lamborghini then petitioned NHTSA under 49 CFR part 556 requesting a decision that the subject noncompliance is inconsequential to motor vehicle safety.

**ADDRESSES:** For further information on this decision contact Kerrin Bressant, Office of Vehicles Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-1110, facsimile (202) 366-3081.

#### SUPPLEMENTARY INFORMATION:

*I. Overview:* Pursuant to 49 U.S.C. 30118(d) and 30120(h) and the rule implementing those provisions at 49 CFR part 556, Lamborghini submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on June 17, 2015, in the **Federal Register** (80 FR 34788). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: <http://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2014-0077."

*II. Vehicles Involved:* Affected are 690 MY 2012-2014 Lamborghini Aventador Coupe and Roadster model passenger cars manufactured between July 15, 2011 and May 13, 2014; 456 MY 2008-2010 Lamborghini Murcielago Coupe and Roadster model passenger cars manufactured between April 3, 2007

and April 29, 2010; and 2361 Lamborghini Gallardo Coupe and Spyder model passenger cars manufactured between June 14, 2007 and November 20, 2013, for a total of 3507 vehicles.

*III. Noncompliance:* Lamborghini explains that during testing of the tire pressure monitoring system (TPMS) it was noted that the fitment of an incompatible wheel and tire unit was correctly detected and the malfunction indicator telltale illuminated as required by FMVSS No. 138. However, when the vehicle ignition was deactivated and then reactivated after a five minute period, there was no immediate re-illumination of the malfunction indicator telltale as required when the malfunction still exists. Although the malfunction indicator telltale does not re-illuminate immediately after the vehicle ignition is reactivated, it does illuminate in no more than 40 seconds after the vehicle is driven above 23 miles per hour (mph).

*IV. Rule Text:* Paragraph S4.4(c)(2) of FMVSS No. 138 requires in pertinent part:

S4.4 TPMS Malfunction.

\* \* \* \* \*

(c) *Combination low tire pressure/TPMS malfunction telltale.* The vehicle meets the requirements of S4.4(a) when equipped with a combined Low Tire Pressure/TPMS malfunction telltale that:

(2) Flashes for a period of at least 60 seconds but no longer than 90 seconds upon detection of any condition specified in S4.4(a) after the ignition locking system is activated to the "On" ("Run") position. After each period of prescribed flashing, the telltale must remain continuously illuminated as long as a malfunction exists and the ignition locking system is in the "On" ("Run") position. This flashing and illumination sequence must be repeated each time the ignition locking system is placed in the "On" ("Run") position until the situation causing the malfunction has been corrected. . . .

*V. Summary of Lamborghini's Analyses:* Lamborghini stated its belief that the subject noncompliance is inconsequential to motor vehicle safety for the following reasons:

(A) Lamborghini stated that although the TPMS malfunction indicator telltale will not illuminate immediately after the vehicle is restarted, it will illuminate shortly thereafter and in any event it will illuminate in no more than 40 seconds. Lamborghini further explained that once the vehicle has started and is moving above 23 mph for a period of 15 seconds, the TPMS will seek to confirm the sensors fitted to the vehicle. Lamborghini explains that a wheel without a sensor will be detected within an additional 15-25 seconds and

the TPMS malfunction indicator will then illuminate correctly. Once the malfunction indicator is illuminated, it will remain illuminated throughout that ignition cycle regardless of vehicle speed.

(B) Lamborghini explained that if the TPMS fails to detect the wheel sensors, the TPMS will in fact display on the TPMS pressures screen within the instrument cluster no value for the tire pressure on the affected tire, indicating that the status of the wheel sensor is unconfirmed. This information will provide the driver notification of a TPMS anomaly.

(C) Lamborghini states that the noncompliance is confined to one particular aspect of the functionality of the otherwise compliant TPMS malfunction indicator. All other aspects of the low-pressure monitoring system functionality are fully compliant with the requirements of FMVSS No. 138.

(D) Lamborghini mentioned that NHTSA recognized in the TPMS final rule (70 FR 18150, April 8, 2005), "A TPMS malfunction does not itself represent a safety risk to vehicle occupants, and we expect that the chances of having a TPMS malfunction and a significantly under-inflated tire at the same time are unlikely."

Lamborghini responded by saying that if a TPMS malfunction is not considered a safety risk, then *ipso facto* the limited noncompliance of the malfunction indicator in this case does not present an unreasonable risk to safety.

(E) Lamborghini stated that it is not aware of any customer complaints, field communications, incidents or injuries related to this condition.

(F) Lamborghini said it has fixed all unsold vehicles in its custody and control so that they are fully compliant with FMVSS No 138.

In summation, Lamborghini believes that the described noncompliance of the subject vehicles is inconsequential to motor vehicle safety, and that its petition, to exempt Lamborghini from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120 should be granted.

#### NHTSA's Decision

*NHTSA's Analysis:* Lamborghini explained that although the malfunction indicator does not re-illuminate immediately after the vehicle is restarted, it will illuminate shortly thereafter—within no more than 40 seconds once the vehicle has accelerated above 23 mph.

NHTSA agrees with Lamborghini that the malfunction indicator will not

illuminate as required during very short periods of time when the vehicle is traveling at low speeds and thus poses little risk to vehicle safety. Under normal driving conditions, a driver will begin a trip by accelerating moderately beyond 23 mph, and as explained by Lamborghini, the malfunction indicator illumination will occur shortly thereafter—within no more than 40 seconds. The malfunction indicator subsequently re-illuminates and then it will remain illuminated for the entire ignition cycle, regardless of vehicle speed. We agree the noncompliance will only occur in the very rare case where the driver begins a trip and never exceeds the 23 mph threshold, the speed required to re-activate the malfunction indicator. No real safety risk exists because at such low speeds there is little risk of vehicle loss of control due to underinflated tires. Furthermore, the possibility that the vehicle will experience both a low inflation pressure condition and a malfunction simultaneously is highly unlikely.

Lamborghini explained that if the TPMS fails to detect the wheel sensors, the TPMS will in fact display on the TPMS pressures screen within the instrument cluster no value for the tire pressure of the affected tire, indicating that the status of the wheel sensor is unconfirmed.

The agency evaluated the displays Lamborghini uses in the noncompliant vehicles. In addition to the combination telltale indicator lamp, the subject vehicles are equipped with a "plan view" icon which displays either the pressures for all four wheels individually or specifically identifies an individual tire with a large drop in pressure. If any wheel has a malfunctioning pressure sensor the indicator for that wheel displays either a red danger symbol (Priority 1) or a yellow warning symbol (Priority 2) depending on the nature of the problem. This additional information is not required by the safety standard, but can be used as an aid to the driver to determine the status of a vehicle's tires.

Lamborghini discussed that the noncompliance only involves one specific aspect of the malfunction functionality and that the primary function of the TPMS, identification of other malfunctions and identification of low inflation pressure scenarios, is not affected.

The agency agrees with Lamborghini's reasoning that the primary function of the TPMS is to identify low tire inflation pressure conditions which Lamborghini's system does as required by the safety standard. There are a

variety of other malfunctions that can occur in addition to the incompatible wheel/tire warning malfunction identified in this petition. We understand from Lamborghini that the TPMS installed in the subject vehicles will otherwise perform as required.

Lamborghini mentioned that they have not received or are aware of any consumer complaints, field communications, incidences or injuries related to this noncompliance. In addition to the analysis done by Lamborghini that looked at customer complaints, field communications, incidents or injuries related to this condition, NHTSA conducted additional checks of NHTSA's Office of Defects Investigations consumer complaint database and found no related complaints.

*NHTSA's Decision:* In consideration of the foregoing analysis, NHTSA has decided that Lamborghini has met its burden of demonstrating that the FMVSS No. 138 noncompliance is inconsequential to motor vehicle safety. Accordingly, Lamborghini's petition is hereby granted and Lamborghini is exempted from the obligation of providing notification of, and a remedy for, the subject noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject noncompliant vehicles that Lamborghini no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Lamborghini notified them that the subject noncompliance existed.

**Authority:** 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8.

**Jeffrey M. Giuseppe,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2016-02721 Filed 2-10-16; 8:45 am]

**BILLING CODE 4910-59-P**

**DEPARTMENT OF TRANSPORTATION****Pipeline and Hazardous Materials Safety Administration**

[Docket No. PHMSA–2016–0013]

**Pipeline Safety: Dangers of Abnormal Snow and Ice Build-Up on Gas Distribution Systems**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

**ACTION:** Notice; Issuance of advisory bulletin.

**SUMMARY:** This advisory bulletin advises owners and operators of petroleum gas and natural gas facilities of the need to take the appropriate steps to prevent damage to pipeline facilities from accumulated snow or ice. Past events on natural gas distribution system facilities appear to have been related to either the stress of snow and ice or the malfunction of pressure control equipment due to ice blockage of pressure control equipment vents. This advisory reminds owners and operators of the need to take precautionary actions to prevent adverse events.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Lee, Director, Engineering and Research, at 202–366–2694 or by email at *Kenneth.lee@dot.gov*.

**SUPPLEMENTARY INFORMATION:****I. Background**

The accumulation of snow and ice increases the potential for damage to meters and regulators and other aboveground pipeline facilities and components. Incidents have occurred in past winters on natural gas distribution system facilities that appear to have

been related to either the stress of snow and ice or malfunction of pressure control equipment due to ice blockage of pressure control equipment vents. Exposed piping at metering and pressure regulating stations, at service regulators, and at propane tanks, are at greatest risk. Damage may result from the stresses imposed by the additional loading of the snow or ice. Damage to facilities may also result from the impact of snow or ice falling from roofs, ice forming in or on regulators preventing their proper operation, or shoveling snow from roofs to protect dwellings from abnormal snow accumulation.

**II. Advisory Bulletin (ADB–2016–03)**

*To:* Owners and Operators of Petroleum Gas and Natural Gas Facilities in Areas Subject to Heavy Snowfall or Abnormally Icy Weather.

*Subject:* Dangers of Abnormal Snow and Ice Build-up on Gas Distribution Systems.

*Purpose:* To remind owners and operators of the need to (1) monitor the potential impact of excessive snow and ice on these facilities; and (2) inform the public about possible hazards from snow and ice accumulation on regulators and other pipeline facilities.

*Advisory:* PHMSA is advising operators of petroleum gas and natural gas pipeline facilities, regardless of whether those facilities are regulated by PHMSA or state agencies, to consider the following steps to address the safety risks from accumulated snow and ice on pipeline facilities:

1. Notify customers and other entities of the need for caution associated with excessive accumulation and removal of snow and ice. Notice should include the

need to clear snow and ice from exhaust and combustion air vents for gas appliances to:

(a) Prevent accumulation of carbon monoxide in buildings; or

(b) Prevent operational problems for the combustion equipment.

2. Pay attention to snow and ice related situations that may cause operational problems for pressure control and other equipment.

3. Monitor the accumulation of moisture in equipment and snow or ice blocking regulator or relief valve vents which could prevent regulators and relief valves from functioning properly.

4. The piping on service regulator sets is susceptible to damage that could result in failure if caution is not exercised in cleaning snow from around the equipment. Where possible, use a broom instead of a shovel to clear snow off regulators, meters, associated piping, propane tanks, tubing, gauges or other propane system appurtenances.

5. Remind the public to contact the gas company or designated emergency response officials if there is an odor of gas present or if gas appliances are not functioning properly. Also, remind the public that they should leave their residences immediately if they detect a gas or propane odor and report the odor to their gas company, propane operator or designated emergency response officials.

Issued in Washington, DC, on February 4, 2016, under authority delegated in 49 CFR 1.97.

**Alan K. Mayberry,**

*Deputy Associate Administrator for Policy and Programs.*

[FR Doc. 2016–02704 Filed 2–10–16; 8:45 am]

**BILLING CODE 4910–60–P**



# FEDERAL REGISTER

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Part II

Department of the Interior

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Fish and Wildlife Service

Department of Commerce

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National Marine Fisheries Service

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50 CFR Part 424

Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat; Final Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Marine Fisheries Service****50 CFR Part 424**

[Docket No. FWS-HQ-ES-2012-0096;  
Docket No. 120106025-5640-03;  
4500030114]

RIN 1018-AX86; 0648-BB79

**Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat**

**AGENCY:** U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”), amend portions of our regulations that implement the Endangered Species Act of 1973, as amended (Act). The revised regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for adding species to the Lists of Endangered and Threatened Wildlife and Plants and designating and revising critical habitat. Specifically, the amendments make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. These amendments are based on the Services’ review of the regulations and are intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical habitat designation process. Finally, the amendments are also part of the Services’ response to Executive Order 13563 (January 18, 2011), which directs agencies to review their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

**DATES:** *Effective date:* This rule is effective March 14, 2016. *Applicability date:* This rule applies to rules for which a proposed rule was published after March 14, 2016.

**ADDRESSES:** Public input and a list of references cited for this final rule are available on the Internet at <http://www.regulations.gov>. Supporting documentation used in the preparation of this rule will be available for public

inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike; Falls Church, VA 22041-0041, telephone 703/358-2171; facsimile 703/358-1735 and National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301-713-1401; facsimile 301-713-0376.

**FOR FURTHER INFORMATION CONTACT:**

Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041, telephone 703/358-2527; facsimile 703/358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427-8469; facsimile 301/713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** This document is one of three listed below, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of “destruction or adverse modification” of critical habitat. The previous regulatory definition had been invalidated by several courts for being inconsistent with the language of the Act. That final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RINs) are 1018-AX88 and 0648-BB80, and the final rule may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0072.

- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services’ experiences over the years in interpreting and applying the statutory definition of “critical habitat,” highlighted the need to clarify or revise the regulations. This final rule (this document) amends 50 CFR part 424. It is published under RINs 1018-AX86 and 0648-BB79 and may be found on <http://www.regulations.gov> at Docket No. FWS-HQ-ES-2012-0096 or at Docket No. NOAA-NMFS-2014-0093.

- A final policy pertaining to exclusions from critical habitat and how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and

homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the revised regulations at 50 CFR part 424 and clarifies expectations regarding critical habitat, and provides for a more predictable and transparent exclusion process. The policy is published under RIN 1018-AX87 and 0648-BB82 and may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0104.

**Background**

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment. Habitat destruction and degradation have been a contributing factor causing the decline of a majority of species listed as threatened or endangered species under the Act (Wilcove *et al.* 1998). The present or threatened destruction, modification, or curtailment of a species’ habitat or range is included in the Act as one of the factors on which to base a determination of threatened or endangered species status. One of the tools provided by the Act to conserve species is the designation of critical habitat.

The purpose of critical habitat is to identify the areas that are essential to the species’ recovery. Once critical habitat is designated, it can contribute to the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides a form of early conservation planning guidance (*e.g.*, identifying some of the areas that are needed for recovery, the physical and

biological features needed for the species' life history, and special management considerations or protections) to bridge the gap until the Services can complete recovery planning.

In addition to serving as an educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies ensure, in consultation with the Services under section 7(a)(2) of the Act, that their actions are not likely to destroy or adversely modify critical habitat. The Federal Government, through its role in water management, flood control, regulation of resources extraction and other industries, Federal land management, and the funding, authorization, and implementation of myriad other activities, may propose actions that are likely to affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. This benefit is especially valuable when, for example, species presence or habitats are ephemeral in nature, species presence is difficult to establish through surveys (e.g., when a plant's "presence" is sometimes limited to a seed bank), or protection of unoccupied habitat is essential for the conservation of the species.

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to part 424 of the implementing regulations since 1984. In the years since those changes took place, the Services have gained considerable experience in implementing the critical habitat requirements of the Act, and there have been numerous court decisions regarding the designation of critical habitat.

On May 1, 2012, the Services finalized the revised implementing regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the

**Federal Register** for codification in the Code of Federal Regulations (77 FR 25611). That final rule revised 50 CFR 424.12(c) to make the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective. Since the final rule became effective on May 31, 2012, the Services have continued the publication of maps of proposed and final critical habitat designations in the **Federal Register**, but the inclusion of any textual description of the designation boundaries in the **Federal Register** for codification in the Code of Federal Regulations is optional. Because we revised 50 CFR 424.12(c) separately, we do not discuss that paragraph further in this final rule.

On August 28, 2013, the Services finalized revisions to the regulations for impact analyses of critical habitat (78 FR 53058). These changes were made as a result of the President's February 28, 2012, Memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. These revisions also state that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat. Because we have revised 50 CFR 424.19 separately, we do not discuss that section further in this final rule.

#### **Summary of Comments and Recommendations**

In the proposed rule published on May 12, 2014 (79 FR 27066), we requested that all interested parties submit written comments on the proposal by July 11, 2014. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties, and invited them to comment on the proposal. We did not receive any requests for a public hearing. We did receive several requests for an extension of the public comment period, and on June 26, 2014 (79 FR 36284), we extended the public comment period to October 9, 2014. All substantive information provided during the comment periods has either been incorporated directly into this final determination or addressed in the more specific response to comments below.

#### *General Issues*

(1) *Comment:* Several commenters, including several States, provided edits to the proposed regulation.

*Our Response:* We have reviewed the edits provided and, where appropriate, we have incorporated them into this final regulation. The more specific comments and edits are addressed below.

(2) *Comment:* Several comments stated that the proposed changes to the regulation would vastly expand the area of critical habitat designation, in direct conflict with using the critical habitat designation as a conservation tool.

*Our Response:* The proposed changes to the regulation are not likely to vastly expand the areas included in any particular critical habitat designation. Many commenters focused on the inclusion of unoccupied areas or perception that the proposed changes expand the Services' authority to include such areas in a critical habitat designation. Section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. However, the existing implementing regulations state that such unoccupied habitat can be considered only if a determination is made that the Service(s) cannot recover the species with the inclusion of only the "geographical area presently occupied" by the species, which is generally understood to refer to habitat occupied at the time of listing (50 CFR 424.12(e)). As discussed in the proposed rule, we have determined that the provision is an unnecessary and redundant limitation on the use of an important conservation tool. Further, we have learned from years of implementing the critical habitat provisions of the Act that a rigid step-wise approach, *i.e.*, first designating all occupied areas that meet the definition of "critical habitat" (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following any general conservation strategy that has been developed for the species. In some cases (e.g., wide ranging species like the spotted owl or lynx), we have found and expect that we will continue to find that the inclusion of all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a

critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing unnecessary regulatory burdens.

(3) *Comment:* Several commenters including one State noted that recovery planning and critical habitat designation are two different processes. A commenter also asked how the Services will “infer” that unoccupied areas will eventually become necessary for recovery given that recovery plans do not exist at the time of listing and when it is not appropriate to designate unoccupied areas that are essential for recovery.

*Our Response:* While we agree that the designation of critical habitat and the recovery planning processes are different and guided by two separate provisions of the Act and implementing regulations, the ultimate goal of developing effective conservation tools and measures to recover a listed species is the same. A general draft conservation strategy or criterion that informs the construction of a critical habitat designation is often developed in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

We have replaced the word “infer” with the word “determine” in our preambular discussion to be clearer. We will determine from the record and based on any existing conservation strategy for the species if any unoccupied areas are likely to become necessary to support the species’ recovery. In order to designate unoccupied areas, we are required by section 3(5)(A) of the Act to determine that such areas are essential for the conservation of the species.

(4) *Comment:* Several commenters stated that this attempt by the Services to expand their own discretion and authority without congressional authorization is neither justified nor lawful.

*Our Response:* The amended regulations do not expand the Services’ discretion. Rather, they clarify the existing process by which we designate critical habitat based on lessons learned over many years of implementing critical habitat and relevant case law. The amendments synchronize the language in the implementing regulations with that in the Act to minimize confusion, and clarify the discretion and authority that Congress provided to the Secretaries under the

Act. The Services are exercising their discretion to resolve ambiguities and fill gaps in the statutory language, and the amended regulations are a permissible interpretation of the statute.

(5) *Comment:* Several commenters were concerned that the changes would lead to extensive litigation because the Services failed to establish clear, measurable, and enforceable criteria for what should or should not be considered “habitat” for a given species, let alone whether an area should or should not be considered critical habitat under the Act.

*Our Response:* The amended regulations do not substantially change the manner in which critical habitat is designated. Rather, the amendments primarily clarify how the Services already have been developing critical habitat designations. We have set forth criteria in the final rule below. We will also refine, to the extent practicable, and articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final critical habitat rules. Our intent is to be more transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to provide for a more predictable and transparent critical habitat designation process.

(6) *Comment:* Several commenters stated that the Services have misled stakeholders and effectively failed to provide adequate notice and opportunity for public comment. The comments assert that we should withdraw our proposal, republish it with a more accurate and clear summary of the changes to the regulations and their implications, and provide further opportunity for public comment.

*Our Response:* The Services have not misled stakeholders. We initially provided a 60-day public comment period on the proposed rule. In response to public comments requesting an extension, we extended the comment period for an additional 90 days. This followed extensive coordination and discussion with potentially affected Federal agencies, States, and stakeholders and partners, as well as formal interagency review under Executive Order 12866. We also held subsequent calls and extensive webinars with many stakeholders to further inform them about the proposed rule and address any questions or concerns they may have had at the time. This satisfies the Services obligation to

provide notice and comment under the Act and the Administrative Procedure Act (APA).

(7) *Comment:* Several tribes commented that traditional ecological knowledge should constitute the best scientific data available and be used by the Services.

*Our Response:* Traditional ecological knowledge (TEK) is important and useful information that can inform us as to the status of a species, historical and current trends, and threats that may be acting on it or its habitat. The Services have often used TEK to inform decisions under the Act regarding listings, critical habitat, and recovery. The Act requires that we use the best scientific and commercial data available to inform decisions to list a species and the best scientific data available to inform designation of critical habitat, and in some cases TEK may be the best data available. The Services cannot determine, as a general rule, that TEK will be the best available data in every rulemaking. However, we will consider TEK along with other available data, weighing all data appropriately in the decision process. We will explain the sources of data, the weight given to various types of data, and how data are used to inform our decision. Further, any data, including TEK, used by the Services to support a listing determination or in the development of a critical habitat designation may be subject to disclosure under the Freedom of Information Act (FOIA).

(8) *Comment:* One State strongly advised the Services to withdraw the **Federal Register** notice and form a Policy Advisory group on the issue. The Western Governors’ Association requested that the rule be reworked in cooperation with Western States and utilize State data to reach a more legally defensible result and to foster partnerships.

*Our Response:* We appreciate the interest by the State and Western Governors’ Association to form a policy advisory group and work collaboratively with the Services. However, the Services have already coordinated with States, Federal agencies, and partners to develop the amended regulations, and do not agree that a Policy Advisory group is necessary. The Services have relied on input from States and other entities, as well as lessons we have learned from implementing the provisions for critical habitat under the Act, to make the regulations consistent with the statute, codify our existing practices, and provide greater clarity and flexibility to designate critical habitat so that it can be a more effective conservation tool. We will continue

working collaboratively with Federal, State, and private partners to ensure that our critical habitat designations are based on the best available scientific information and balance the conservation needs of the species with the considerations permitted under section 4(b)(2).

#### *Scope and Purpose (Section 424.01)*

(9) *Comment:* Several commenters including several States suggested that we retain the words “where appropriate” to qualify the reference to designation or revision of critical habitat as it is a phrase of limiting potential. Some commenters suggested that we replace the words with “unless deemed imprudent” to better clarify the intention of this proposed change.

*Our Response:* As discussed in our proposal, the phrase “where appropriate” was misleading and implied a greater flexibility than the Services have regarding whether to designate critical habitat. The Services have the discretion not to designate critical habitat only for species listed prior to 1978 for which critical habitat has not previously been designated or where an explicit determination is made that designation is not prudent. Based on our experiences with designating critical habitat, a determination that critical habitat is not prudent is rare. Removing the phrase “where appropriate” still allows the Services to determine that critical habitat is not prudent for a species if such determination is supported by the best available scientific information. Replacing it with the phrase “unless deemed imprudent” implies that not prudent determinations are common, which is not our intent. Deleting “where appropriate” provides the necessary clarification concerning the discretion the Services have in determining when to designate critical habitat.

(10) *Comment:* Several commenters suggested that we add the words “at the appropriate time” in place of the words “where appropriate” to qualify the reference to designation or revision of critical habitat in § 424.01(a).

*Our Response:* The Services are required under section 4(a)(3)(A) of the Act to designate critical habitat, to the maximum extent prudent and determinable, at the time a species is listed. The inclusion of the phrase “at the appropriate time” and the implication that the Services have flexibility regarding the timing of the designation process runs counter to the statutory text.

#### *Definitions*

(11) *Comment:* Several commenters including one State asked us to keep the definitions for “critical habitat,” “endangered species,” “plant,” “Secretary,” “State Agency,” and “threatened species” in the regulation for the purpose of transparency and clarity because they are core definitions in the authorizing statute and are important terms in the regulations.

*Our Response:* These terms are defined in the Act itself, thus repeating them verbatim in the implementing regulations is redundant and does not resolve any ambiguity.

(12) *Comment:* Several commenters were concerned that the addition of the phrase “i.e., the species is recovered” to the definition of “conserve, conserving, and conservation” to explain the point at which the measures provided under the Act are no longer necessary resulted in a higher standard for conservation than is warranted. Others commented that the Services are implying that conservation of critical habitat is equated to meeting recovery goals.

*Our Response:* The use of “recovered” in the definition of “conserve, conserving, and conservation” does not introduce a new standard for conservation. Rather, it clarifies the existing link between conservation and recovery. Conservation is the use of all methods and procedures that are necessary to bring any species to the point at which measures provided by the Act are no longer necessary. Recovery is improvement in the status of listed species to the point at which listing is no longer appropriate. Also see our response to comment 2.

(13) *Comment:* One commenter stated that if the “i.e., the species is recovered” is added to the definition of “conserve, conserving, and conservation,” then the Services should also add the phrase “or extinct” since these examples describe when the action of conservation (a set of methods and procedures) are not necessary anymore.

*Our Response:* “Conserve, conserving, and conservation” is defined in the Act as to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Extinction does not meet this definition because extinct species have not been brought to the point at which listing is no longer necessary. Our regulations at § 424.11(d) state that a species may be delisted for one or more of the following reasons: (1) Extinction; (2) Recovery; (3) Original data for classification in error. Each of

these is a separate category, and only recovered species have reached the recovered state contemplated by the definition of “conserve, conserving, and conservation.” (See our response to comment 12).

(14) *Comment:* Several commenters stated that proposing to define “geographical area occupied by the species” is an amendment to the definition in the Act and is illegal.

*Our Response:* The Act does not define the phrase “geographical area occupied by the species.” The Services may develop, clarify, and revise regulations implementing the provisions of a statute, provided that our interpretations do not conflict with or exceed the authority provided by the statute. Since there has been considerable confusion as to the specific area and scale the phrase refers to, we find that it is important to provide a reasonable and practicable definition for this phrase based on what we have learned over the many years of implementing critical habitat under the Act. Providing this definition will clarify how we designate critical habitat and which areas are considered occupied at the time of listing.

(15) *Comment:* Several States commented that the definition of “geographical area occupied by the species” provides no objective criteria, which will only lead to further confusion and more litigation. One State requested that we abandon the definition. Several States offered revised language.

*Our Response:* The Services are defining the term “geographical area occupied by the species” because the phrase is found in the Act but is not defined in the Act’s regulations, and because there has been considerable confusion over the proper interpretation of the phrase. We have clearly stated and explained the definition in our proposal. Further, we will specify the criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules for a particular critical habitat designation. Our intent is to be more clear and transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to enhance its use as a conservation tool.

(16) *Comment:* One State commented that “regular or consistent use” is a hallmark of a finding of occupied habitat, and should be required by the

“geographical area occupied by the species” definition, not excluded. The State pointed to the decision in *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), in which the court upheld the application of the Service’s definition of occupied habitat for the Mexican spotted owl as “areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time.” Another State similarly commented that the use of the term “even if not used on a regular basis” in the definition of geographical area occupied by the species will now enable the Services to designate critical habitat within areas infrequently used by a species.

*Our Response:* We respectfully disagree with the commenter that the definition of “geographical area occupied by the species” should be limited to only those areas in which the use by the species is “regular or consistent.” As discussed at length in our proposal, we find that the phrase “geographical area occupied by the species” should also include areas that the species uses on an infrequent basis such as ephemeral or migratory habitat or habitat for a specific life-history phase. We find that this more inclusive interpretation is consistent with legislative history and *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), and congressional intent. Additionally, based on our experience of implementing the provisions of critical habitat for many years, we have found that there has been considerable confusion and differing interpretations of this phrase. Our intent through the definition provided in our proposal was to provide greater clarity regarding how we interpret the phrase and the general scale at which we define occupancy. We give examples in the rule of areas such as migratory corridors, seasonal habitats, and habitats used periodically (but not solely by vagrant individuals). We will use the best scientific data available to determine if such areas occur for a species. Each species’ life cycle is different and the details of such areas, if they exist, would be explained in the proposed and final rules designating critical habitat for a particular species. These areas would also have to meet the criteria for occupied areas in the definition of critical habitat found in the Act.

*(17) Comment:* One commenter stated that the definition of “geographical area occupied by the species” fails to include paragraph 3(5)(C) from the Act: “Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area

which can be occupied by the threatened or endangered species.”

*Our Response:* The regulatory definition is intended to clarify how we interpret the phrase, not to repeat the language of the statute. Further, paragraph 3(5)(C) in the Act, applies to the geographic area that *can* be occupied by a species, as opposed to the geographic area actually occupied by the species.

*(18) Comment:* Several commenters including several States stated that the definition of “geographical area occupied by the species” provides unlimited discretion and authority to the Secretary to determine the boundaries and size of the critical habitat area.

*Our Response:* While we agree that the Secretaries are afforded significant discretion and authority to define and designate critical habitat, we respectfully disagree with the commenter that the discretion and authority is unlimited. First, critical habitat is to be defined and designated based on the best scientific data available. Second, we have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, *i.e.*, first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. By providing a definition of “geographical areas occupied by the species” along with the other revisions and clarifications in our proposal, we can be more precise and deliberate in the development of our critical habitat designations following any general conservation strategy that has been developed for the species. Lastly, we are still bound by paragraph 3(5)(C) (see response to Comment 17 above).

*(19) Comment:* Several commenters asked, “What standards will be in place to substantiate that such areas are used as part of a species’ life cycle and not just an individual vagrant’s life cycle” in the definition of “geographical area occupied by the species.” Several States also commented that the vagrant animal exception in the rule is vague and subject to varying interpretations because no definition of “vagrant” is provided.

*Our Response:* As stated in our proposed rule, vagrant individuals are species who wander far from the known range of the species. We will use the

best scientific data available to determine whether an area is used by a species for part of its life cycle versus an individual vagrant’s life cycle. The basis for our determination on this point will be articulated in our proposed and final rules designating critical habitat for a particular species and subject to public review and comments, as well as peer review.

*(20) Comment:* Several commenters suggested that we add the word “regularly” to the sentence “Such areas may include those areas used *regularly* throughout all or part of the species’ life cycle” in the definition of “geographical area occupied by the species.”

*Our Response:* The suggested addition would conflict with the second part of the sentence, in which we state “even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).” If the best scientific data available indicates that these areas are used periodically during some portion of the listed species’ life history, then these areas should be considered in the development of a critical habitat designation.

*(21) Comment:* Several commenters questioned what would happen to the size, shape, and location of critical habitat areas that were designated in areas that were not regularly used as conditions change and travel corridors shift or breeding areas move.

*Our Response:* As discussed in our proposal and throughout this final rule, critical habitat is to be based on the best scientific data available, and to the maximum extent prudent and determinable promulgated concurrent with the listing of a species. Often at the time of listing when we are developing a designation of critical habitat for a species, we may have only limited data concerning the distribution of the species, its life-history requirements, and other factors that can inform the identification of features or specific areas essential to the conservation of the species. Such limited data may still be the best scientific data available. The Services are required in a proposed and final designation of critical habitat to clearly articulate what data are being used and the criteria for defining the specific essential features and areas. The Services must also allow for public review and comments on the proposal to ensure public involvement in the process and provide as much clarity and transparency as possible. The designation of critical habitat results in a regulation in which the boundaries of critical habitat for a species are defined. These boundaries can be changed only

through rulemaking. Thus, if habitat changes following a designation, such that those specific areas no longer meet the definition of “critical habitat,” the areas within the boundaries of critical habitat are still critical habitat until such time as a revision to the designation is promulgated. Any interested party may file a petition with the Services to request revision of a critical habitat designation.

(22) *Comment:* A number of commenters, including several States, asserted that the proposed definition of “geographical area occupied by the species” is so vague it could lead to huge areas of unoccupied and potentially unsuitable habitat being designated as critical habitat that would result in the public or the regulated community having no consistency.

*Our Response:* The proposed definition would not lead to more expansive critical habitat designations. We do not designate areas that are occupied at the time of listing unless those areas have one or more of the physical or biological features present that are essential to the conservation of the species and may require special management considerations or protection. Any unoccupied habitat at the time of listing could only be designated critical habitat under section 3(5)(A)(ii) of the Act, which requires a determination by the Secretary that such areas are essential for the conservation of the species. Further, we will articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species during the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules designating critical habitat for that species. Our intent is to be more clear and transparent about how we define the criteria for designation and how in the development of a critical habitat designation we use any generalized conservation strategy that may have been developed for the species. The proposed rule would inform the public, including landowners and businesses, of our critical habitat designation and allow them time to review and provide comments.

(23) *Comment:* Two States commented that the Services have justified the new definition of “geographical area occupied by the species” by misrepresenting the court’s decision in *Otay Mesa Property L.P. v. DOI*, 646 F.3d 914 (D.C. Cir. 2011), reversing 714 F. Supp. 2d 73 (D.D.C. 2010). The States contend that we asserted that the D.C. Circuit’s decision supported our interpretation, even

though a thorough review of the decision reveals the court did not hold or find that the Act allows the Services to make a post-listing determination of occupancy if based on adequate data, simply because the court did not decide that particular issue.

*Our Response:* We agree that the D.C. Circuit did not hold or find that the ESA allows the Services to make a post-listing determination of occupancy. Our proposed rule, however, did not assert that the *circuit court* opinion supported our interpretation. Instead, the proposed rule correctly noted that the *district court* opinion supported our interpretation. See 714 F. Supp. 2d at 83 (“The question, therefore, is not whether FWS knew in 1997, when it listed the San Diego fairy shrimp as endangered, that there were San Diego fairy shrimp on Plaintiffs’ property but, rather, whether FWS reasonably concluded, based on data from 2001, that the shrimp had been on the property in 1997.”). Because that decision was reversed by the D.C. Circuit, however, we needed to explain what effect that D.C. Circuit’s decision had on the district court opinion with respect to this issue. Because the D.C. Circuit reversed the district court’s opinion on other grounds (*i.e.*, that the evidence in the record was inadequate), the D.C. Circuit did not address the interpretive issue of whether later data can support a determination of occupancy at the time of listing. Thus, we stated, accurately, that the D.C. Circuit “did not disagree” with this aspect of the district court’s opinion. We did not mean to suggest that the D.C. Circuit had considered and affirmed this aspect of the district court’s opinion.

(24) *Comment:* One State commented that the Service’s reliance on the decision in *Arizona Cattle Growers’ Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), to expand the definition of “occupied” is misplaced because the Services oversimplify and misstate the court’s ruling. The State provided additional detail regarding the court’s analysis, noting a variety of factors that the court suggested were relevant to a case-by-case determination of occupancy, and the court’s emphasis on reasonableness.

*Our Response:* None of the detail provided by the State is inconsistent with our summary of the holding: “a determination that a species was likely to be temporarily present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present.”

(25) *Comment:* One commenter asserted that the “physical or biological

features” definition has too many if and if/then scenarios that appear too scientifically attenuated to serve as an appropriate basis for critical habitat designations.

*Our Response:* In defining physical and biological features, we provided examples of types of features and conditions that we have found to be essential to certain species based on experience over many years of designating critical habitat for a wide variety of species. The determination of specific features essential to the conservation of a particular species will be based on the best scientific data available and explained in the proposal to designate critical habitat for that species, which will be available for public comment and peer review.

(26) *Comment:* Several States commented that the new definition of “physical or biological features” is excessively broad and completely unnecessary. They stated that the new definition goes too far and allows the Services to include areas that do not currently have any essential physical or biological features necessary for a species; they asserted that the original language of the Act provides enough latitude to allow for ephemeral, essential habitat requirements. Two States also asked the Services to more clearly define the phrase “reasonable expectation” found in the preamble discussion (“the Services could conclude that essential physical or biological features exist in a specific area . . . if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again”).

*Our Response:* Because the term “physical or biological features” is not defined in the Act, the Services clarify how they have been using this term. A “reasonable expectation” would be based on the best scientific data available showing that the habitat has a temporal or cyclical nature in that in some years particular habitat elements may not be present, but the record indicates that, once certain conditions are met, the habitat will recur and be used by the species.

(27) *Comment:* One State contended that the Services support the new definition of “physical or biological features” with a flawed interpretation of the opinion in *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004). According to the State: That opinion does not justify expanding the meaning and breadth of the phrase; the Services should withdraw the definition because the Services cite no authority for making

such a change and thus lack any justification for doing so; the Court explicitly rejected the Service's attempt to broaden the scope of critical habitat designation; and the Services should not attempt to expand their authority by circumventing the Federal courts.

*Our Response:* The district court rejected the U.S. Fish and Wildlife Service's critical habitat designation for the piping plover as including lands that did not currently contain the features defined in the rule, but noted that it was not addressing whether dynamic land capable of supporting plover habitat can itself be one of the physical or biological features essential to the conservation of the plover. The court noted that the Service had not made that assertion in the context of the piping plover designation. To address this unintentional gap, we are setting out our interpretation as part of the framework regulations. This new definition clarifies that features can be dynamic or ephemeral habitat characteristics. We clearly state in the rule that an area within the geographical area occupied by the species, with habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the features at the time of designation to be critical habitat.

*(28) Comment:* Several commenters recommended that the Services separately define "physical features" and "biological features" to provide greater clarity.

*Our Response:* The Act refers to "physical or biological features," so it is not necessary to define them separately. We find that the definition provided in the draft proposal along with the examples and accompanying explanation provides sufficient clarity and that separately defining these terms in the final regulation would not be helpful. However, the Services must clearly articulate, in proposed and final rules designating critical habitat for a particular species, which physical or biological features are essential to the conservation of the species and the basis for that critical habitat.

*(29) Comment:* Several commenters suggested that we remove "at a scale determined by the Secretary to be appropriate" and add "for a specific unoccupied area to be designated as critical habitat, it must be reasonably foreseeable that (1) such area will develop the physical and biological features necessary for the species and (2) such features will be developed in an amount and quality that the specific area will serve an essential role in the conservation of the species."

*Our Response:* We determine whether unoccupied areas are essential for the conservation of the species by considering the best available scientific data regarding the life-history, status, and conservation needs of the species, which include considerations similar to those raised by the commenter. However, we do not agree that the specific findings suggested by the commenter either are required under the statute or are useful limitations for the Services to impose on themselves. Further, our rationale for why unoccupied areas are essential for the conservation of the species will be articulated in the proposed rule designating critical habitat for a particular species and available for public review and comment. Finally, we decline to remove the language "at a scale determined by the Secretary to be appropriate because we have concluded that it is useful to clarify that different circumstances will require different scales of analysis, and the Secretary retains the discretion to choose an appropriate scale."

*(30) Comment:* A commenter suggested that we add the phrase "based on the best scientific data available" after the word "appropriate" in "the Secretary will identify, at a scale determined by the Secretary to be appropriate" in § 424.12(b)(2). The commenter further stated that this provides a reference to the scientific basis on which the Secretary will determine this scale.

*Our Response:* The phrase "based on the best scientific data available" is captured in § 424.12(b)(1)(ii). Under section 4(b)(2) of the statute, it also states that the Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available. It would be redundant to add the phrase to the section the commenter has suggested. Nevertheless, as stated above, the Secretary's choice of scale will be based on the best available scientific data.

*(31) Comment:* A commenter suggested that we replace the phrase "conservation needs of the species" with "physical or biological features" in § 424.12(b)(2). The commenter stated that the phrase "conservation needs of the species" is undefined and adds ambiguity to the regulation.

*Our Response:* Section 424.12(b)(2) refers to the designation of critical habitat in unoccupied areas. Under section 3(5)(A)(ii) of the statute, unoccupied areas are subject only to the requirement that the Secretary determine that such areas are essential for the conservation of the species. The

presence of physical or biological features is not required by the statute for the inclusion of unoccupied areas in a designation of critical habitat. Incorporating the edit suggested by the commenter would limit Secretarial discretion in a way inconsistent with the statute by mandating the presence of essential features as a prerequisite to inclusion of unoccupied areas in a critical habitat designation. Therefore, it would be inappropriate to use the term "physical or biological features" in this section.

*(32) Comment:* Several commenters stated that the Services' claim that they may designate acres or even square miles without evidence that those areas contain features essential to the conservation of the species is contrary to the Act. Two States commented that the scale of critical habitat should not be left to the Secretary's absolute discretion and must be chosen and justified at a scale that both makes sense in terms of the habitat needs of the species and is fine enough to demonstrate that the physical or biological features are found in each specific area of occupied habitat. One State also provided revised language for § 424.12(b)(1) by replacing "at a scale determined by the Secretary to be appropriate" with "at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation."

*Our Response:* We state in the proposed regulation that the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of critical habitat. However, setting out defined guidelines for the scale of an analysis in regulations would not be practicable for the consideration of highly diverse biological systems and greatly differing available data. Each critical habitat designation is different in terms of area proposed, the conservation needs of the species, the scope of the applicable Federal actions, economic activity, and the scales for which data are available. Additionally, the scale of the analysis is very fact specific. Therefore, the Services must have flexibility to evaluate these different areas in whatever way is most biologically and scientifically meaningful. For example, for a narrow-endemic species, a critical habitat proposal may cover a small area; in contrast, for a wide-ranging species, a critical habitat proposal may cover an area that is orders of magnitude greater. The appropriate scale for these two species may not be the same. For the narrow-endemic species, we may look at a very fine scale with a great level of detail. In contrast, for the wide-ranging

species, which may cover wide expanses of land or water, we may use a coarser scale, due to the sheer size of the proposed designation. Each critical habitat proposal includes a description of the scope of the area being proposed, and uses a scale appropriate to that situation based on the best scientific data available. The suggested language would not allow for the Secretarial discretion that is needed to be flexible to meet the conservation needs of the species. The proposed rule designating critical habitat for a particular species is made available for public review and comment, and interested parties may comment on the scale for a specific designation.

*(33) Comment:* Several commenters stated that, in reaching this determination, the Services appear to conflate disparate terminology (specific areas versus occurrences) and rely upon a vague term (range) that does not adequately delineate what geographic areas are actually occupied by a species. Several commenters also requested additional explanation of the term “range.”

*Our Response:* Under section 3(5)(A)(i) of the Act, specific areas designated as critical habitat include those specific areas within the geographical area occupied by the species at the time the species is listed. As discussed in our proposal and this final rule, the geographical area that may generally be delineated around the species’ occurrences is synonymous with the species’ range. The term “range” used in our proposal refers to the general area currently occupied by the species at the time the listing determination is made. These areas are occupied by the species throughout all or part of the species’ life cycle, even if not used on a regular basis. Some examples we give are migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals. This scale of occupancy is different from a very narrow or limited delineation of areas of occupancy identified through presence and absence surveys for localized occurrences of the species. We, therefore, disagree that we are using a vague term in referring to range.

*(34) Comment:* Several commenters including one State stated that by defining the geographical area occupied by the species as coextensive with the “range” and including multiple areas of occurrence, the Services are expanding the geographic extent of occupied habitat beyond the limits of judicial interpretation. They suggested we should define the area occupied by the species as limited to the specific

location where the species occurs on a regular or consistent basis.

*Our Response:* We have indicated that the geographical area occupied by the species is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). We are not suggesting that the specific areas included in critical habitat should fill this area. To limit the definition to specific locations where the species occurs on a regular or consistent basis would not allow the Secretaries to designate areas that may be important for the conservation of a listed species that may only be periodically used by a species, such as breeding areas, foraging areas, and migratory corridors, thereby limiting Secretarial discretion.

*(35) Comment:* One State asked if the range in the geographical area occupied by the species definition refers to the historical range or the currently occupied range.

*Our Response:* The term “range” as indicated in our proposal refers to the generalized area currently occupied by the species at the time the listing determination is made, not the historical range.

*(36) Comment:* One State also wanted to know if land-use restrictions within the geographical area occupied by the species would be put into place in addition to the designated critical habitat.

*Our Response:* The revised regulations would not result in any change to land-use restrictions beyond the existing regulatory requirements under section 7 of the Act that Federal agencies consult with the Services to ensure that the actions they carry out, fund, or authorize are not likely to destroy or adversely modify critical habitat (see the final rule published elsewhere in today’s **Federal Register**). The Act provides no special regulatory protections for those areas within the geographic area occupied by the species that are not designated as critical habitat, although the section 7 prohibition on jeopardy and the section 9 prohibitions may still be applicable.

*(37) Comment:* Several States disagree with the Services’ interpretation of the definition of “occupied.” This interpretation and inclusion of “periodic or temporary” areas will lead to a much larger consideration of critical habitat that is largely unnecessary for species recovery.

*Our Response:* Identifying the geographic area occupied at the time of listing is only the first step in designating critical habitat. In occupied areas, we can only designate critical habitat if one or more of the physical or

biological features are present and are found to be essential to the conservation of the species and may require special management considerations or protection. The inclusion of periodic or temporary areas would be based on the best scientific data available for the species and these areas would have to meet the criteria above.

*(38) Comment:* Several commenters asked what constitutes being “temporarily present?” The Services should explain that occupied areas require a demonstration of regular or consistent use within a reasonable period of time. One State commented that the Services should clarify the meaning of the terms “periodically” and “temporarily” to provide adequate guidance and set reasonable limits for potential critical habitat designations.

*Our Response:* We will use the best scientific data available to determine occupied areas including those that are used only periodically or temporarily by a listed species during some portion of its life history. This will be determined on a species-by-species basis, and our rationale would be explained in the proposed and final rules for these species, which would be available for public review and comment.

*(39) Comment:* Several commenters, including two States, were concerned about using “indirect or circumstantial” evidence to determine occupancy and questioned whether this qualified as the best scientific data available. One of the commenters asserted that the Services should only designate areas as occupied based on scientific evidence (including traditional and local knowledge) that breeding, foraging, or migratory behaviors actually occur in that location on a regular or consistent basis.

*Our Response:* The Services will rely on the best scientific data available in determining which specific areas were occupied at the time of listing and which of these contain the features essential to the conservation of the species. The best available scientific data in some cases may only be indirect or circumstantial evidence. We will explain in the proposed rule designating critical habitat for a particular species if and how such evidence was used to determine occupancy and will provide the public with an opportunity to review and comment.

*(40) Comment:* Several commenters, including two States, asked us to define and explain “life-history needs.”

*Our Response:* We give a sample list of life-history needs in the rule. This list includes but is not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. The

life-history needs are what the species needs throughout its different life stages to survive and thrive.

(41) *Comment:* One State commented that the term “sites” in the definition of “physical or biological features” is wholly ambiguous and must be defined, explained, or deleted.

*Our Response:* We included the term “sites” in the definition of physical or biological features to keep the same level of specificity as currently is called for in the regulations, and our current regulations list “sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal” among the examples of primary constituent elements that might be specified (50 CFR 424.12(b)(4)). The term “sites” does not need to be defined or further explained because we rely on a plain dictionary meaning of “site”: The place, scene, or point of an occurrence or event (Merriam-Webster, 2015).

(42) *Comment:* One State suggested that we simplify the “physical or biological features” definition as follows: “Geographic or ecological elements within a species’ range that are essential to its survival and reproduction, whether single or in combination, or necessary to support ephemeral habitats. Features may be described in conservation biology terms, including patch size and connectivity.”

*Our Response:* We appreciate the State providing edits to simplify the phrase; however, based on our years of experience designating critical habitat and implementing it, we find that the text in our proposal and this final rule will provide greater clarity.

(43) *Comment:* Several commenters, including one State, indicated that we needed a more specific delineation of what features may be considered and how they relate to the needs of the species.

*Our Response:* We respectfully disagree with the commenters that further clarification should be added in this revised regulation. However, we do agree that we need to clearly articulate in our proposed and final rules designating critical habitat for each species how the essential features relate to the life-history and conservation needs of the species. This type of specificity will be in the individual proposed and final rules designating critical habitat for each species. As is our general practice, we will clearly lay out the features and how they relate to the needs of the species in each rule.

(44) *Comment:* Several commenters asked us to clarify the distinction, if any, between features that support the life-history needs of the species and

features that are essential to the conservation of the species.

*Our Response:* Our definition of physical or biological features is the first step, and we do not assume that all features are essential. In many circumstances the features that support life-history needs of the species are the features that are essential to the conservation of the species. The features that are essential to the conservation of the species are those found in the appropriate quality, quantity, and spatial and temporal arrangements in the context of the life history, status, and conservation needs of the species. This varies according to the species. For example, for a small, endemic species the features that support the life-history needs may be essential themselves, but for a wide-ranging species what rises to the level of essential features may rely more on the quality, quantity, and arrangement of those features.

(45) *Comment:* Several commenters sought an explanation for how the requisite physical and biological features would be identified, documented, and verified during the critical-habitat-designation process.

*Our Response:* We use the best scientific data available to determine the life-history needs of the species. The essential physical or biological features support the life-history and conservation needs of the species. A description of the essential features for each species and how they relate to its life-history and conservation needs will be articulated in the proposed and final rules designating critical habitat for a particular species. This description of the essential features, as well as the designation that is based on them, will be available for public review and comment during the rulemaking process.

(46) *Comment:* Several commenters stated that the description of the relevant features cannot be in broad terms, but must be specific enough to limit critical habitat to the most “essential areas” and help provide an understanding of what the species actually requires to return from the brink of extinction.

*Our Response:* When evaluating occupied habitat, we agree that the statute requires us to determine which areas contain physical or biological features essential to the conservation of the species (that may require special management considerations or protection). In every proposed and final rule designating critical habitat for a particular species, we describe those features that we have determined to be essential and explain the basis for our determination. However, we

respectfully disagree that broadly described features are necessarily inappropriate. The level of specificity in our description of the features is primarily determined by the state of the best scientific information available for that species. We will provide as much specificity as is appropriate in light of what is known about the species’ habitat needs, while recognizing that the available science may still be evolving for that species. Where the available information is still evolving, it may not be possible or necessary to provide a high level of specificity, and it may frustrate the conservation purposes of the Act to attempt to do so. *See Arizona Cattle Growers’ Ass’n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 n.2 (D. Ariz. 2008), *aff’d sub nom. Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010).

Finally, we must disagree with the commenter’s suggestion that in identifying essential features the Services must identify what the species’ actually requires to return from “the brink of extinction.” Critical habitat is generally required for threatened species as well as endangered species. Moreover, the Services are not required to have developed a recovery plan prior to designating critical habitat for any species. *Home Builders Ass’n of Northern Cal. v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989–90 (9th Cir. 2010). Our determinations of which features are “essential” thus depend on an understanding of the species’ habitat needs rather than on a specific projection of how the species could be recovered.

(47) *Comment:* Several commenters stated that the plain language of the Act limits the scope of any designated area to those features essential to the species, and does not authorize the designation of areas that may include those subsidiary characteristics that are essential for the development of the features themselves.

*Our Response:* We respectfully disagree and interpret the statutory language not to limit “features” to those habitat characteristics that make habitat immediately usable by the species. In other words, the physical or biological features referred to in the definition of “critical habitat” can include features that allow for the periodic development of habitat characteristics immediately usable by the species. An interpretation of “features” that referred only to immediately usable habitat would render many essential areas ineligible for designation as critical habitat, thwarting Congress’s intent that designation of critical habitat should contribute to species’ conservation.

We will use the best scientific data available to identify features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. Thus, the physical or biological features essential to the conservation of the species may include features that support the occurrence of ephemeral or dynamic habitat conditions. The example we gave in the proposed rule was a species that may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. The flooding event would not be a subsidiary characteristic as suggested by the commenter, but would itself be a feature necessary for the vegetation to return. So in this case, it would be a combination of features, flooding, and vegetation that would be necessary to the conservation of the species.

*(48) Comment:* Several commenters, including two States, were concerned that designating critical habitat based on the presence of certain characteristics that may be necessary to eventually support the periodic occurrence of riparian vegetation, without evidence that the vegetation would actually develop, constitutes an impermissible reliance upon hope and speculation. They further stated that the Services must go through a separate inquiry determining why it is reasonably foreseeable to conclude that the potential critical habitat will develop the physical or biological features at some point in the future.

*Our Response:* We will use the best scientific data available to support the identification of features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which

could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. This does not constitute reliance on mere hope or speculation but is based on an understanding of the relevant ecological processes. We also disagree with the characterization of this situation as involving “potential critical habitat” that “will develop the physical or biological features at some point in the future.” Properly understood, the essential features would currently exist in these areas, even though they may not be currently manifesting the shorter-term habitat conditions immediately usable by the species. Such areas may currently meet the definition of “critical habitat” and not be merely “potential critical habitat.”

*(49) Comment:* Several commenters stated that the Services’ position that “most circumstances” require “special management” is inconsistent with congressional intent to narrow the definition of “critical habitat” to require a very careful analysis of what is actually needed for survival of the species. Several commenters, including two States, also indicated that the Services must continue to make the factual determination that special management is needed as required by the Act.

*Our Response:* We make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules designating critical habitat for each critical habitat area. However, it has been our experience that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management considerations or protection in all areas in which they occur. This is particularly true for species that have significant habitat-based threats, which is the case for most of our listed species. The statute directs us to identify the essential physical or biological features which “may require” special management considerations or protection, a standard that suggests we should be cautious and protective. We do acknowledge that if in some areas the essential features clearly do not require special management considerations or protection, then that area does not meet this part (section 3(5)(A)(i)) of the definition of “critical habitat.” However, we expect based on our experience with designating critical habitat that these circumstances will be rare. In our proposed and final critical habitat rules, we will continue to make factual determinations as to whether

special management considerations or protection may be required.

*(50) Comment:* Several States commented that the new interpretation of “special management considerations or protection” set out in the preamble appears to presume that areas covered by existing protection plans will actually be more likely to be designated as critical habitat, and could act as a disincentive to implementing voluntary pre-designation conservation initiatives, in direct contravention to recent Services’ policies attempting to incentivize voluntary conservation.

*Our Response:* We respectfully disagree. We are directed by the Act to identify areas that meet the definition of “critical habitat” (*i.e.*, occupied areas that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential for the conservation of a species) without regard to land ownership. We also make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules for each critical habitat area. The consideration of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area. This does not preclude the Services from considering the exclusion of these areas under section 4(b)(2) of the Act based on conservation programs, plans, and partnerships prior to issuing the final critical habitat rule.

*(51) Comment:* Several commenters stated that the Services cannot designate critical habitat based on the general assertions that the area contains the essential physical or biological features. Instead, the Services must demonstrate that the relevant features are found within a specific area.

*Our Response:* In the first part of the definition of “critical habitat” in the Act, we are required to identify specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. In our proposed and final critical habitat rules, we identify which features occur in the area, the basis on which we are identifying them as essential features, including how they provide for the life-history and conservation needs of the species, and whether they may require special management considerations or

protection. These rules will be available for public review and comment.

(52) *Comment:* Several commenters suggested that we remove “principles of conservation biology” from the definition of “physical and biological features.”

*Our Response:* We respectfully disagree. The sentence “Features may also be expressed in terms of relating to principles of conservation biology, such as patch size, distribution distances, and connectivity” explains more clearly how we may identify the features. The principles of conservation biology are generally accepted among the scientific community and consistently used in species-at-risk status assessments and development of conservation measures and programs.

(53) *Comment:* Several commenters requested that we add language delineating the area “around” the species occurrences, either by using a distance or a reference to the species’ natural functions in the geographic area definition.

*Our Response:* We are unable to determine a universal distance or a reference to the species’ natural functions that would be applicable to all species. This analysis and determination is best left to the specific critical habitat rulemaking for a given species. In those proposed and final rules, we can be specific for each species based on its life-history needs and more precisely define the geographical area occupied by the species. The rules will be available for public review and comment.

(54) *Comment:* Several commenters, including one State, indicated that the proposed § 424.12(b)(2) and deletion of current § 424.12(e) would relieve the Services of any requirements that they justify the designation of unoccupied habitat by demonstrating the inadequacies of occupied habitat for the conservation of the species. They further stated that this was a major departure in the law regarding designation of critical habitat.

*Our Response:* We respectfully disagree. The proposed rule clearly explains that the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. The regulatory provision at 424.12(e) merely restated the requirement from the statutory definition in a different way. We will still explain based on the best scientific data available, why the unoccupied areas are essential for the conservation of the species.

(55) *Comment:* Several commenters pointed out that we use “no longer necessary” in the new definition of

“conserve, conserving, and conservation” and the words “no longer appropriate” in the definition of “recovery” in 50 CFR 402.02. The commenters asserted that these are two different standards and that we should pick one of them.

*Our Response:* The words “no longer necessary” are used in the statutory definition of “conserve, conserving, and conservation” in the Act. The rule simply points out that the concept described in the statutory language is equivalent to “recovery.” That term is defined in § 402.02, which we are not revising at this time.

(56) *Comment:* Several commenters stated that the National Marine Fisheries Service’s interpretation of the phrase “which interbreeds when mature” was upheld by the Ninth Circuit in *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024 (9th Cir. 2010), and that the Act also requires that a group of organisms must interbreed when mature to qualify as a distinct population segment (DPS), which is in contrast to the Services’ interpretation of the phrase in the proposed rule.

*Our Response:* We respectfully disagree that our interpretation of “interbreeds when mature” is at odds with the ruling in *Modesto Irrigation District*. In that case, the Ninth Circuit did not hold that actual interbreeding among different populations is required in order to include such populations in a single DPS. To the contrary, the court made it clear that Congress did not intend to create a “rigid limitation” on the Services’ discretion to define DPSs. On the “narrow issue” of whether the ESA or the DPS Policy required that NMFS place interbreeding steelhead and rainbow trout in the same DPS, the court deferred to NMFS’s judgment that there was no such requirement. *Id.* at 1037. While NMFS did state in the challenged rule that “[t]he ESA requirement that a group of organisms must interbreed when mature to qualify as a DPS is a necessary but not exclusive condition” (71 FR 834, 838 (Jan. 5, 2006)), nothing in the rule suggested that NMFS’s position was that *actual* interbreeding among disparate populations was required, and that biological capacity to interbreed would not be sufficient.

(57) *Comment:* Several commenters stated that the Services did in fact revise the regulations in our discussion of “interbreeds when mature” by inserting the phrase “A distinct population segment “interbreeds when mature” when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature” to the definition of a “species.”

They further stated that this was an Administrative Procedure Act violation and that the phrase should be removed in the final rule.

*Our Response:* The commenters are correct that we proposed to amend the definition of “species.” In the preamble we wrote, “Finally, we explain our interpretation of the meaning of the phrase ‘interbreeds when mature,’ which is found in the definition of ‘species.’ . . . Although we are not proposing to revise the regulations at this time, we are using this notice to inform the public of our longstanding interpretation of this phrase.” Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of “species” to insert, “A distinct population segment ‘interbreeds when mature’ when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature.” We have removed the proposed language from the definition of “species” in this final rule and left only the language in the preamble. The Services are not amending the definition.

(58) *Comment:* A commenter suggested that the Services clarify the meaning of “being considered by the Secretary” in the definition of the term “candidate.” The commenter suggested that the final rule substitute the more narrow definition found in the FWS candidate species fact sheet, which states: “Candidate species are plants and animals for which the U.S. Fish and Wildlife Service has sufficient information on their biological status and threats to propose them as endangered or threatened under the Endangered Species Act, but for which development of a proposed listing regulation is precluded by other higher priority listing activities.”

*Our Response:* We agree with the commenter that the statement in the FWS candidate fact sheet is an appropriate meaning of the phrase “being considered by the Secretary” found in the definition of candidate. We emphasize that we did not change the definition of “candidate” in this regulation.

#### *Criteria for Designating Critical Habitat*

(59) *Comment:* The Western Governors’ Association requested that the Services provide a thorough, data-based explanation of the basis for the determination that areas outside the range occupied at the time of listing are or will be essential habitat.

*Our Response:* Under section 3(5)(A)(ii) of the Act, to designate as critical habitat specific areas that are outside the geographical area occupied by the species at the time the species is listed, the Services must determine that the areas are essential for the conservation of the species. This determination must be based on the best scientific data available concerning the particular species and its conservation needs. When the Services propose to designate specific areas pursuant to section 3(5)(A)(ii), they have under the existing regulations and will under the revised regulations explain the basis for the determination, including the supporting data. Thus, the Services' explanation will be available for public comment.

*(60) Comment:* Several commenters, including one State, were concerned that the essential areas in unoccupied areas may not even be suitable for the species and that this is an erroneous and unreasonable interpretation of an otherwise clear statutory statement and should be withdrawn.

*Our Response:* Section 3(5)(A)(ii) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. These areas do not have to contain the physical or biological features and are not subject to a finding that they may require special management considerations or protection. This is in contrast to what is required under the first part of the definition of "critical habitat" (section 3(5)(A)(i) of the Act) for areas occupied at the time of listing.

*(61) Comment:* Several commenters stated that the Services may only properly make a "not prudent" finding if there is specific information that increased poaching would result from designating critical habitat.

*Our Response:* We respectfully disagree with the commenters' assertion. The current regulations (49 FR 38900; October 1, 1984, and at 50 CFR 424.12(a)(1)) allow for a determination that critical habitat is not prudent for a species if such designation would: (1) Increase the degree of threat to the species through the identification of critical habitat, or (2) not be beneficial to the species. The determination that critical habitat is not prudent for a listed species is uncommon, especially given that most species are listed, in part, because of impacts to their habitat or curtailment of their range. Most "not prudent" findings have resulted from a determination that there would be increased harm or

threats to a species through the identification of critical habitat. For example, if a species was highly prized for collection or trade, then identifying specific localities of the species could render it more vulnerable to collection and, therefore, further threaten it. However, in some circumstances, a species may be listed because of factors other than threats to its habitat or range, such as disease, and the species may be a habitat generalist. In such a case, on the basis of the existing and revised regulations, it is permissible to determine that critical habitat is not beneficial and, therefore, not prudent. It is also permissible to determine that a designation would not be beneficial if no areas meet the definition of "critical habitat."

*(62) Comment:* Several commenters inquired about whether the Services would revise the regulations to provide greater flexibility in defining a greater breadth of circumstances where a determination can be made that the designation of critical habitat for a species is not beneficial to its conservation and, therefore, not prudent.

*Our Response:* As noted above, it is permissible under the current and revised regulations to determine that designating critical habitat for a species is not beneficial and, therefore, not prudent. The text of these revised regulations further clarifies the non-exclusive list of factors the Services may consider in evaluating whether designating critical habitat is not beneficial. The inclusion of "but not limited to" to modify the statement "the factors the Services may consider include" allows for the consideration of alternative fact patterns where a determination that critical habitat is not beneficial would be appropriate. We think it is important to expressly reflect this regulatory flexibility in the revised regulations. Nonetheless, based on the Services' history of implementing critical habitat, we anticipate that making a not-prudent determination on any fact pattern will be rare.

*(63) Comment:* One State commented that the Services dropped the word "probable" from the revised § 424.12(a) when talking about economic impacts and that the word should be retained in the final rule.

*Our Response:* We agree and have retained the word "probable" in this final rule. It is consistent with the revised final regulation in 50 CFR 424.19 (78 FR 53058) and our draft policy on exclusions under section 4(b)(2) of the Act. We note that in this context the term "probable" means reasonably likely to occur.

*(64) Comment:* Several commenters recommended adding after the word "threat" in the second sentence to § 424.12(a)(1)(ii), the words "sufficient to warrant listing the species as threatened or endangered."

*Our Response:* While we agree with the commenters' intent, we find that adding the phrase would be redundant because we would only be making a determination as to whether critical habitat is prudent if the species was either being proposed for listing simultaneously or is already listed.

*(65) Comment:* Several commenters thought the Services should simply delete § 424.12(a)(1)(ii) instead of expanding it. They further stated that the Act does not require that a species currently be threatened by habitat loss before critical habitat is designated and protected, and the spirit of the Act would not be served by the imposition of such a requirement by regulation.

*Our Response:* Critical habitat is a conservation tool under the Act that can provide for the regulatory protection of a species' habitat. The current regulations and the proposed revisions do not establish a requirement that a species be threatened by the modification, fragmentation, or curtailment of its range for critical habitat to be beneficial and, therefore, prudent to designate. However, the regulation and revisions establish a framework whereby if a species is listed under the Act and it is determined through that process that its habitat is not limited or threatened by destruction, modification, or fragmentation, then it may not be beneficial or prudent to designate critical habitat. While this provision is intended to reduce the burden of regulation in rare circumstances in which designating critical habitat does not contribute to conserving the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

*(66) Comment:* Several commenters stated that § 424.12(a)(2) is not consistent with the plain meaning of the Act and should be deleted from the final rule. They stated the proposed minor word changes did not improve the situation.

*Our Response:* The minor word changes to § 424.12(a)(2) are meant to make the language more consistent with the language in the Act. This section is necessary to inform the public as to the circumstances in which the Services will make a not-determinable finding on critical habitat and thereby invoking the 1-year extension of section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. 1533(b)(6)(C)(ii).

(67) *Comment:* A commenter stated that when the Services deem critical habitat as not determinable due to a lack of data for habitat analyses or lack of knowledge on biological needs of the species, the Services should regularly check for new data and/or make efforts to collect necessary data and move forward with critical habitat designations. One State also commented that critical habitat designations should only be made based on the best available scientific data and information, and in instances where data or information is lacking, the Services have an obligation to delay a designation until such time that sufficient information is acquired.

*Our Response:* Finding that critical habitat is not determinable only invokes a 1-year extension of the deadline for finalizing a critical habitat designation under section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. 1533(b)(6)(C)(ii). At the conclusion of the year, the Services must move forward with the designation and have no authority under the Act to further delay designation (unless we determine that designation is not prudent). We agree that critical habitat designations must only be made based on the best scientific data available as required by the Act. If we initially do not have enough data to make a critical habitat determination, then we can invoke the 1-year extension allowed under the Act. The Services use that time to gather additional data. At the end of the 1-year extension, the Services must use the best scientific data available to make the critical habitat determination.

(68) *Comment:* One State suggested that climate change is more appropriately addressed during a 5-year status review and the critical habitat revision process than trying to attempt to accommodate future critical habitat by predicting areas necessary to support the species' recovery. It further asserted that the Services' proposed authority to designate areas that are currently unoccupied and which are not now necessary to support the species' recovery, but may eventually become necessary, is a vast expansion of the critical habitat program and contrary to the focus in the Act on current habitat conditions.

*Our Response:* We agree that 5-year status reviews and the critical habitat revision process can play important roles regarding the conservation needs of a species in response to habitat changes resulting from climate change. However, the statute as written allows for sufficient flexibility to address the effects of climate change in a critical habitat designation, and, therefore, the

clarifications provided in our proposal and this final rule do not expand the Services' authority. There have been specific circumstances, as discussed in our proposal, where data have been available showing the shift in habitat use by a species in response to the effects of climate change. In those cases where the best scientific data available indicate that a species may be shifting habitats or habitat use, then it is permissible to include specific areas accommodating these changes in a designation, provided that the Services can explain why the areas meet the definition of "critical habitat." Although some such instances are based on reasonable predictions of how habitat will be used by the species in the future, they are based on determinations that the areas are currently essential to the species. In other words, we may find that an unoccupied area is currently "essential for the conservation" even though the functions the habitat is expected to provide may not be used by the species until a point in the foreseeable future. The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical habitat. The Services will consider whether habitat is occupied or unoccupied when determining whether to designate it as critical habitat and use the best available scientific data on a case-by-case basis regarding the current and future suitability of such habitat for recovery of the species, and when developing conservation measures.

(69) *Comment:* Several commenters requested clarification of new § 424.12(e) with regard to the differences in the way the Services handle designation of critical habitat for species listed prior to the 1982 amendments to the Act versus species listed after the 1982 amendments.

*Our Response:* If the Services designate critical habitat for species listed prior to the 1982 amendments, the designation is procedurally treated like a revision of existing critical habitat even if critical habitat was never designated. Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision "should not be made" and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data (see 16 U.S.C. 1533(b)(6)(B)(i)).

(70) *Comment:* Several commenters, including two States, indicated that removing references to "primary constituent elements" dramatically and unnecessarily expands the scope of critical habitat and confuses instead of clarifies critical habitat designation, leading to more litigation.

*Our Response:* Removing references to "primary constituent elements" from the regulation will not result in expansion of the scope of critical habitat. Removing this phrase is not intended to substantively alter anything about the designation of critical habitat, but to eliminate redundancy in how we describe the physical or biological features. The phrase "primary constituent element" is not found in the Act and the regulations have never been clear as to how primary constituent elements relate to or are distinct from physical or biological features essential to the conservation of the species, which is the phrase used in the Act. In fact, the removal of the phrase "primary constituent elements" will alleviate the tension caused by trying to understand the relationship between the phrases. The specificity of the primary constituent elements that has been discussed in previous designations will now be discussed in the descriptions of the physical or biological features essential to the conservation of the species.

(71) *Comment:* Several commenters including several States were opposed to elimination of § 424.12(e) as this section is necessary and intentionally limiting and is an accurate implementation of the statutory definition and Congressional intent. Several commenters also questioned that when the Services promulgated § 424.12(e) in 1980, that we explained in the preamble to that rule that the limitation in § 424.12(e) was intended to "implement the statutory requirement" that unoccupied areas may be designated "only if necessary to ensure the conservation of the species." The Services do not address this prior interpretation at all, or explain why a rule that it once enacted as necessary to implement a statutory requirement is now unnecessary.

*Our Response:* We respectfully disagree. Section 424.12(e) did not allow us to designate unoccupied areas unless a designation limited to its present range (occupied) would be inadequate to ensure the conservation of the species. As we stated in the proposed rule, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied areas may be essential.

Further, section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. There is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. However, the existing implementing regulations state that such unoccupied habitat could only be considered if a determination was made that the Service(s) could not recover the species with the inclusion of only the occupied habitat.

We have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, *i.e.*, first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following at minimum a general conservation strategy for the species. In some cases, we have and may continue to find, that the inclusion of all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools.

Additionally, there is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. The statutory language is sufficiently clear that it does not need explanation in the revised regulation, and, moreover, to the extent that the 1980 regulation language differs from the statutory language, it does not add any clarity.

(72) *Comment:* Several commenters, including one State, disagreed that unoccupied areas need not have the features essential to the conservation of the species and that the Services propose to unlawfully write this statutory requirement out of the Act. The State also pointed out that the

Services’ current position on this issue is distinctly contrary to the position the Services took in 1984 when the existing regulations were adopted.

*Our Response:* Under the second part of the definition of “critical habitat” in the Act (section 3(5)(A)(ii)), the Services are to identify specific areas outside the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. In contrast to section 3(5)(A)(i), this provision does not mention physical or biological features, much less require that the specific areas contain the physical or biological features essential to the conservation of the species. These are two clearly distinct provisions. The unoccupied areas do not have to presently contain any of the physical or biological features, which is not a change from the way we have been designating unoccupied critical habitat (*see, e.g., Markle Interests v. USFWS*, 40 F. Supp. 3d 744 (E.D. La. 2014)).

(73) *Comment:* One State recommended that the Services develop a policy or metric to determine whether a particular area should be designated as critical habitat in unoccupied areas.

*Our Response:* This final rule explains the Services’ general parameters for designating critical habitat. The details of why a specific area is determined to be essential to the conservation of the species will in part be directed by any generalized conservation strategy developed for the species, and clearly articulated in our proposed and final rules designating critical habitat. That determination is a fact-specific analysis and is based on the best available scientific data for the species and its conservation needs. The proposed rule for each critical habitat designation will be subject to public review and comment.

(74) *Comment:* A commenter suggested that the Services designate enough critical habitat at the time of listing to ensure that a species can recover.

*Our Response:* In evaluating which areas qualify as critical habitat and specific areas finalized (subject to section 4(b)(2) exclusions, *see* final policy published elsewhere in today’s **Federal Register**), we follow the statutory requirements to identify those occupied areas that contain the physical or biological features essential to the species’ conservation that may require special management considerations or protection and any unoccupied areas that we determine to be essential for the

species’ conservation. Designation of critical habitat is one important tool that contributes to recovery, but a critical habitat designation alone may not be sufficient to achieve recovery. Indeed, given the limited regulatory role of a critical habitat designation (*i.e.*, through section 7’s mandate that Federal agencies avoid destruction or adverse modification of critical habitat, *see* final rule published elsewhere in today’s **Federal Register**), it is generally not possible to look to a critical habitat designation alone to ensure recovery. Also, we must designate critical habitat according to mandatory timeframes, very often prior to development of a formal recovery plan. *See Home Builders Ass’n of Northern Cal. v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989–90 (9th Cir. 2010). However, although a critical habitat designation will not necessarily ensure recovery, it will further recovery because the Services base the designation on the best available scientific information about the species’ habitat needs at the time of designation. The best available information will include any generalized conservation strategy or criteria that may have been developed for the species in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

(75) *Comment:* A commenter stated that the proposed rule clarifies that the Services have the discretion to designate critical habitat for species listed before 1978, but does not specify when that discretion would be used. The commenter requested that the Services identify guidelines or standards for judging when to designate critical habitat for pre-1978 species.

*Our Response:* Whether to exercise discretion to designate critical habitat for species listed prior to 1978 is a case-specific determination dependent on the conservation needs of the species, scientific data available, and the resources available for additional rulemaking. Guidelines on this point could limit Secretarial discretion and may not allow for sufficient flexibility in furthering the conservation of a species.

(76) *Comment:* Several commenters were concerned that the Services must commit to using the best scientific data available when designating unoccupied areas as critical habitat.

*Our Response:* We are mandated by the Act to use (and are committed to using) the best scientific data available in determining any specific areas as critical habitat, regardless of occupancy.

(77) *Comment*: Several Tribes stated that while the Services readily acknowledge in the proposal their responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis, the proposed revision does nothing to clarify how the Services will carry out this responsibility.

*Our Response*: These revised regulations set forth our general practice for designating critical habitat, clarify definitions and phrases, and in general align the regulations with the statute. The revised regulations are not intended to be prescriptive in how the Services will implement the provisions or coordinate with federally recognized Tribes that are potentially affected. However, the Services are committed to communicate and coordinate meaningfully and effectively with federally recognized Tribes concerning actions under the ESA, including the development and implementation of critical habitat for species that may occur on their lands. We rely on the requirements of S.O. 3206 to provide the guidance on how the Services will carry out this responsibility. We have often found that the best and most meaningful coordination and collaboration, including fulfilling our responsibilities under S.O. 3206, occurs between our Regional and field offices and a specific Tribe on a particular species.

(78) *Comment*: Several commenters were opposed to the inclusion of the proposed § 424.12(g), saying the Act makes no distinction between foreign and domestic species and requires that all listed species receive critical habitat unless doing so is not prudent or determinable.

*Our Response*: We respectfully disagree. Subsection (g) is a continuation of existing subsection (h), which has long codified the Services' understanding that critical habitat should not be designated outside of areas under United States jurisdiction. This interpretation is well supported. The Act makes a distinction between coordination with and implementation of the provisions of the ESA between States and local jurisdictions within the United States versus with foreign countries. Section 4(b)(1)(A), which deals with listing species, provides that the Secretary shall consult, as appropriate, not only with affected States, but also, in cooperation with the Secretary of State, with the country or countries in which the species is normally found. In contrast, section 7 of the ESA does not include a requirement to consult with foreign governments. Further, section 8(b)(1) states that "the Secretary, through the Secretary of

State, shall encourage—(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4." It is clear that Congress understood the distinction between implementing the ESA within the jurisdiction of the United States and implementing the ESA within the jurisdiction of foreign countries. It then follows that since Congress did not explicitly state that critical habitat shall be designated in foreign countries or that the Secretary consult, as appropriate, with foreign countries on a designation of critical habitat, then the designation of critical habitat is limited to lands within the jurisdiction of the United States.

Justice Stevens approved of the Services' conclusion in his concurrence in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). There, he favorably noted the Service's longstanding interpretation of the limitation of critical habitat designations to areas within the jurisdiction of the United States:

The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 FR 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

That interpretation is sound. . . .

*Id.* at 587 (Stevens, J., concurring).

(79) *Comment*: One State requested that the Services include a new § 424.12(e) that requires that designation will be made after consultation with the affected States. It would read, "In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and finding of such consultation shall be addressed in the final rulemaking for the designation."

*Our Response*: The suggested new § 424.12(e) is not necessary because section 4(b)(5)(A)(ii) of the Act requires the Secretary to give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each

county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction. Further, section 4(i) of the Act requires the Secretary to provide a written justification for adopting regulations in conflict with the agency's comments or for failing to adopt a regulation as requested in a State petition. In addition to these requirements, the Services are committed to continuing to work with the States early in the process to ensure that we are using the best scientific data available.

(80) *Comment*: One State requested clarification on the application of this regulation to critical habitat designations that are currently under way, but not yet finalized.

*Our Response*: As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version applies.

(81) *Comment*: Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation.

*Our Response*: We respectfully disagree. We interpret the Regulatory Flexibility Act, as amended, to require that Federal agencies evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, not on indirectly regulated entities. Recent case law supports this interpretation ([https://www.sba.gov/sites/default/files/rfaguide\\_0512\\_0.pdf](https://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf), pages 22–23). NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule.

We understand that there is considerable confusion as to how these revisions to the regulation will change the process for designating critical

habitat, with many thinking it will greatly expand our designations and provide less clarity to the process. We went to great effort in our proposal and further in this final rule to explain that revised regulations will not result in any significant deviation from how the two agencies have been designating critical habitat. Our intent is to codify what we have been doing for many years and provide common-sense revisions based on lessons learned and relevant case law. It is our expectation that these revisions will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary. As a consequence, we find, as iterated above, that NMFS and FWS are the only entities directly regulated by these revisions and that an RFA analysis is not required.

(82) *Comment:* We received several comments that the proposed revised regulations constituted a major Federal action because they will result in significant socioeconomic consequences and these impacts must be analyzed under the National Environmental Policy Act of 1969 (NEPA).

*Our Response:* As detailed in the REQUIRED DETERMINATIONS section below, we have determined that this action qualifies for a categorical exclusion under both DOI and NOAA governing procedures.

#### **Final Amendments to Regulations Discussion of Changes to Part 424**

This final rule revises 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) to clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation.

In finalizing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version

applies. Nothing in these final revised regulations is intended to require that any previously completed critical habitat designation must be reevaluated on this basis.

#### *Section 424.01 Scope and Purpose*

We are making minor revisions to this section to update language and terminology. The first sentence in § 424.01(a) is being revised to remove reference to critical habitat being designated or revised only “where appropriate.” This wording implied a greater flexibility regarding whether to designate critical habitat than is correct. Circumstances in which we determine critical habitat designation is not prudent are rare. Therefore, the new language removes the phrase “where appropriate.” Other revisions to this section are minor word changes to use more plain language or track the statutory language.

#### *Section 424.02 Definitions*

This section of the regulations defines terms used in the context of section 4 of the Act. We are making revisions to § 424.02 to update it to current formatting guidelines, to revise several definitions related to critical habitat, to delete definitions that are redundant with statutory definitions, and to add two newly defined terms. Section 424.02 is currently organized with letters as paragraph designation for each term (e.g., § 424.02(b) *Candidate*). The Office of the Federal Register now recommends setting out definitions in the CFR without paragraph designations. We propose to revise the formatting of the entire section accordingly. Discussion of the revised definitions and newly defined terms follows. We note where these final revisions differ from those set out in the proposed rule.

We note that, although revising the formatting of the section requires that the entirety of the section be restated in the final-amended-regulation section, we are not at this time revisiting the text of those existing definitions that we are not specifically revising, including those that do not directly relate to designating critical habitat. In particular, we are not in this rulemaking amending the definitions of “plant,” “wildlife,” or “fish and wildlife” to reflect changes in taxonomy since the ESA was enacted in 1973. In 1973, only the Animal and Plant Kingdoms of life were universally recognized by science, and all living things were considered to be members of one of these kingdoms. Thus, at enactment, the ESA applied to all living things. Advances in taxonomy have subsequently split additional

kingdoms from these two. Any species that was considered to be a member of the Animal or Plant Kingdoms in 1973 will continue to be treated as such for purposes of the administration of the Act regardless of any subsequent changes in taxonomy. We may address this issue in a future rulemaking relating to making listing determinations (as opposed to designating critical habitat). In the meantime, the republication of these definitions here should not be viewed as an agency determination that these definitions reflect the scope of the Act in light of our current understanding of taxonomy.

The current regulations include a definition for “Conservation, conserve, and conserving.” We are revising the title of this entry to “Conserve, conserving, and conservation,” changing the order of the words to conform to the statute. Additionally, we are revising the first sentence of the definition to include the phrase “i.e., the species is recovered” to clarify the link between conservation and recovery of the species. The statutory definition of “conserve, conserving, and conservation” is “to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which measures provided pursuant to the Act are no longer necessary.” This is the same concept as the definition of “recovery” found in § 402.02: “improvement in the status of listed species to the point at which listing is no longer appropriate.” The Services, therefore, view “conserve, conserving, and conservation” as a process culminating at the point at which a species is recovered.

We are deleting definitions for “critical habitat,” “endangered species,” “plant,” “Secretary,” “State Agency,” and “threatened species” because these terms are defined in the Act and the existing regulatory definitions do not add meaning to the terms.

We also define the previously undefined term “geographical area occupied by the species” as: “the geographical area which may generally be delineated around the species’ occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).” This term appears in the definition of “critical habitat” found in section 3(5)(A)(i) and (ii) of the Act, but is not defined in the Act or in our current regulations. The inclusion of this new

regulatory definition reflects the Services' efforts to clarify the critical-habitat-designation process.

The definition of "critical habitat" in the Act has two parts, section 3(5)(A)(i) and (ii), which establish two distinct categories of critical habitat, based on species occupancy in an area at the time of listing. Therefore, to identify specific areas to designate as critical habitat, we must first determine what area constitutes the "geographical area occupied by the species at the time of listing," which is the language used in the Act. The scale of this area is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). This is because the first part of the critical habitat definition in the Act directs the Services to identify "specific areas within" the geographical area occupied by the species at time of listing. This intentional choice to use more narrow terminology alongside broader terminology suggests that the "geographical area" was expected most often to be a larger area that could encompass multiple "specific areas." Thus, we find the statutory language supports the interpretation of equating the geographical area occupied by the species to the wider area around the species' occurrences at the time of listing. A species' occurrence is a particular location in which members of the species are found throughout all or part of their life cycle. The geographic area occupied by the species is thus the broader, coarser-scale area that encompasses the occurrences, and is what is often referred to as the "range" of the species.

In the Act, the term "geographical area occupied by the species" is further modified by the clause "at the time it is listed." However, if critical habitat is being designated or revised several years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species' distribution, particularly on private lands, is limited as surveys are not routinely carried out on private lands unless performed as part of an environmental analysis for a particular development proposal. Even then, such surveys typically focus on listed rather than unlisted species, so our knowledge of a species' distribution at the time of listing in these areas is often limited and the information in our listing rule may

not detail all areas occupied by the species at that time.

Thus, while some of these changes in a species' known distribution reflect changes in the actual distribution of the species, some reflect only changes in the quality of our information concerning distribution. In these circumstances, the determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed. This interpretation was supported by a recent court decision, *Otay Mesa Property L.P. v. DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010), *rev'd on other grounds*, 646 F.3d 914 (D.C. Cir. 2011) (San Diego fairy shrimp). In that decision, the judge noted that the clause "occupied at the time of listing" allows FWS to make a post-listing determination of occupancy based on the currently known distribution of the species in some circumstances. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS' determination of occupancy in that case, the D.C. Circuit did not express disagreement with (or otherwise address) the district court's underlying conclusion that the Act allows FWS to make a post-listing determination of occupancy if based on adequate data. The FWS acknowledges that to make a post-listing determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information. For succinctness, herein and elsewhere we refer to areas as "occupied" when we mean "occupied at the time of listing."

The second sentence of the definition for "geographical area occupied by the species" clarifies that the meaning of the term "occupied" includes specific areas that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously. Areas of periodic use may include, for example, breeding areas, foraging areas, and migratory corridors. The Ninth Circuit recently supported this interpretation by FWS, holding that a determination that a species was likely to be temporarily present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present. *Arizona Cattle Growers' Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (Mexican spotted owl).

Nonetheless, periodic use of an area does not include use of habitat in that area by vagrant individuals of the species who wander far from the known

range of the species. Occupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history. However, because some species are difficult to survey or we may otherwise have incomplete survey information, the Services will rely on the best available scientific data, which may in some cases include indirect or circumstantial evidence, to determine occupancy. We further note that occupancy does not depend on identifiable presence of adult organisms. For example, periodical cicadas occupy their range even though adults are only present for 1 month every 13 or 17 years. Similarly, the presence (or reasonably determined presence) of eggs or cysts of fairy shrimp or seed banks of plants constitute occupancy even when mature individuals are not present.

We also finalize a definition for the term "physical or biological features." This phrase is used in the statutory definition of "critical habitat" to assist in identifying the specific areas within the entire geographical area occupied by the species that can be considered for designation as critical habitat. We define "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity."

The definition clarifies that physical and biological features can be the features that support the occurrence of ephemeral or dynamic habitat conditions. For example, a species may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. Thus, the Services could conclude that essential physical or biological features exist in a specific area even in the temporary absence of

suitable vegetation, and could designate such an area as critical habitat if all of the other applicable requirements were met and if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again.

In *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108, 123 n.4 (D.D.C. 2004), the court rejected FWS' designation for the piping plover as including lands that did not currently contain the features defined by FWS, but noted that it was not addressing "whether dynamic land capable of supporting plover habitat can itself be one of the 'physical or biological features' essential to conservation." The new definition for "physical or biological features" clarifies that features can be dynamic or ephemeral habitat characteristics. However, an area within the geographical area occupied by the species, containing habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the physical or biological features at the time of designation.

Having defined "physical or biological features," we are also removing the term "primary constituent element" and all references to it from the regulations in § 424.12. As with all other aspects of these revisions, this will apply only to future critical habitat designations and is further explained below in the discussion of the changes to § 424.12, where the term is currently used.

We are also revising the definition of "special management considerations or protection" which is found in § 424.02. Here we remove the phrase "of the environment" from the current regulation. This phrase is not used in this context elsewhere in the regulations or the Act and, therefore, may create ambiguity. We also insert the words "essential to" to conform to the language of the Act.

In determining whether an area has essential features that may require special management considerations or protection, the Services do not base their decision on whether management is currently in place or whether that management is adequate. FWS formerly took the position that special management considerations or protection was required only if whatever management was in place was inadequate and that *additional* special management was needed. This position was rejected by the court in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (Mexican spotted owl), the only court to address this issue. The Services agree with the

conclusion of the court on this point—it is incorrect to read the statute as asking whether *additional* special management considerations or protection may be required. The evaluation of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area.

We expect that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur, particularly for species that have significant habitat-based threats. However, if in some areas the essential features do not require special management consideration or protection because there are no applicable threats to the features that have to be managed or protected for the conservation of the species, then that area does not meet this part (section 3(5)(A)(i)) of the definition of "critical habitat." Nevertheless, we expect such circumstances to be rare.

Furthermore, it is not necessary that a feature currently *requires* special management considerations or protection, only that it *may require* special management to meet the definition of "critical habitat." 16 U.S.C. 1532(5)(A)(i) (emphasis added). Two district court decisions have emphasized this point. *CBD v. Norton* (Mexican spotted owl); *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004) (piping plover). The legislative history supports the view that Congress purposely set the standard as "may require." Earlier versions of the bills that led to the statutory definition of "critical habitat" used the word "requires," but "may require" was substituted prior to final passage. In any case, an interpretation of a statute should give meaning to each word Congress chose to use, and our interpretation gives the word "may" meaning.

Finally, we explain our interpretation of the meaning of the phrase 'interbreeds when mature,' which is found in the definition of 'species.' The "interbreeds when mature" language is ambiguous (*Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1032 (9th Cir. 2010)). Although we are not revising the regulatory definition of "species" at this time, we are using this notice to inform the public of our interpretation of this phrase." We have always understood the phrase "interbreeds when mature" to mean that a DPS consists of members of the same species or subspecies that

when in the wild would be biologically capable of interbreeding if given the opportunity, but all members need not actually interbreed with each other. A DPS is a subset of a species or subspecies, and cannot consist of members of different species or subspecies. The "biological species" concept, which defines species according to a group of organisms' actual or potential ability to interbreed, and their relative reproductive isolation from other organisms, is one widely accepted approach to defining species. We interpret the phrase "interbreeds when mature" to reflect this understanding and to signify only that a DPS must be composed solely of members of the same species or subspecies. As long as this requirement is met, a DPS may include multiple groups of vertebrate organisms that do not actually interbreed with each other. For example, a DPS may consist of multiple groups of a fish species separated into different drainages. While it is possible that the members of these groups do not actually interbreed with each other, their members are biologically capable of interbreeding.

Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of "species" to insert, "A distinct population segment 'interbreeds when mature' when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature." We have removed the proposed language from the definition of "species" in this final rule and left only the language in this preamble. We also noticed that we inadvertently left out the word "Includes" from the definition of "species" in our proposed regulation. We have restored the word "Includes" in this final regulation to match the definition of "species" found in our 1984 regulation. The Services are not substantively amending the definition at this time.

#### *Section 424.12 Criteria for Designating Critical Habitat*

We are revising the first sentence of paragraph (a) to clarify that critical habitat shall be proposed and finalized "to the maximum extent prudent and determinable . . . concurrent with issuing proposed and final listing rules, respectively." The language of the existing regulation is "shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing." We added the words "proposed and finalized" to be

consistent with the Act, which requires that critical habitat be finalized concurrent with listing to the maximum extent prudent and determinable. The existing language could be interpreted to mean *proposing* critical habitat concurrent with listing was the only requirement. Additionally, the existing phrase “shall be specified” is vague and not consistent with the requirement of the Act, which is to propose and finalize a designation of critical habitat. The last two sentences in paragraph (a) contain minor language changes to use the active voice.

Paragraphs (a)(1) and (a)(1)(i) are not changed.

The first sentence of paragraph (a)(1)(ii) remains the same. However, we add a second sentence to paragraph (a)(1)(ii) to provide examples of factors that we may consider in determining whether a designation would not be beneficial to the species. A designation may not be beneficial and, therefore, not prudent, under certain circumstances, including but not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether no areas meet the definition of “critical habitat.” For example, this provision may apply to a species that is threatened primarily by disease but the habitat that it relies upon continues to exist unaltered throughout an appropriate distribution that, absent the impact of the disease, would support conservation of the species. Another example is a species that occurs in portions of the United States and a foreign nation. In the foreign nation, there are multiple areas that have the features essential to the conservation of the species; however, in the United States there are no such areas. Consequently, there are no areas within the United States that meet the definition of “critical habitat” for the species. Therefore, there is no benefit to designation of critical habitat, and designation is not prudent.

While this provision is intended to reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

Section 424.12(a)(2) remains unchanged from the current regulation, and subparagraphs (i) and (ii) contain minor language changes to be consistent with the language in the Act.

The Services are completely revising § 424.12(b) of the current regulations. For the reason explained below, we also remove the terms “principal biological

or physical constituent elements” and “primary constituent elements” from this section. These concepts are replaced by the statutory term “physical or biological features,” which we define as described above.

The first part of the statutory definition of “critical habitat” (section 3(5)(A)(i)) contains terms necessary for (1) identifying specific areas within the geographical area occupied by the species that may be considered for designation as critical habitat and (2) describing which features on those areas are essential to the conservation of species. In addition, current § 424.12(b) introduced the phrase “primary constituent elements.” However, the regulations are not clear as to how primary constituent elements relate to or are distinct from physical or biological features, which is the term used in the statute. Adding a term not found in the statute that is at least in part redundant with the term “physical or biological features” has proven confusing. Trying to parse features into elements and give them meaning distinct from one another has added an unnecessary layer of complication and confusion during the designation process.

The definition of “physical or biological features,” described above, encompasses similar habitat characteristics as currently described in § 424.12(b), such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types. Our proposal is intended to simplify and clarify the process, and to remove redundancy, without substantially changing the manner in which critical habitat is designated. The Services still expect to provide a comparable level of detail and specificity in defining and describing physical or biological features essential to the conservation of a species.

Section 424.12(b) describes the process to be used to identify the specific areas to be considered for designation as critical habitat, based on the statutory definition of “critical habitat.” With respect to both parts of the definition, the revised regulations emphasize that the Secretary will identify areas that meet the definition “at a scale determined by the Secretary to be appropriate.” The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, square yard, acre, or even square mile

independently meets the definition of “critical habitat.” Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of “critical habitat.” Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds), and any draft conservation strategy that may have been developed for the species.

Under the first part of the statutory definition, in identifying specific areas for consideration, the Secretary must first identify the geographical area occupied by the species at the time of listing. Within the geographical area occupied by the species, the Secretary must identify the specific areas on which are found those physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection.

Under § 424.12(b)(1)(i), the Secretary will identify the geographical area occupied by the species using the new regulatory definition of this term. Under § 424.12(b)(1)(ii), the Secretary will then identify those physical and biological features essential to the conservation of the species. These physical or biological features are to be described at an appropriate level of specificity, based on the best scientific data available at the time of designation. For example, physical features might include gravel of a particular size required for spawning, alkali soil for germination, protective cover for migration, or susceptibility to flooding or fire that maintains early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a maximum level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. For example, a feature may be a specific type of forage grass that is in close proximity to a certain type of shrub for cover. Because the species would not consume the grass if there were not the nearby shrubs in which to hide from predators, one of these characteristics in isolation would not be an essential feature; the feature that supports the life-history needs of the

species would consist of the combination of these two characteristics in close proximity to each other.

In considering whether features are essential to the conservation of the species, the Services may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. For example, a small patch of meadow may have the native flowers, full sun, and a biologically insignificant level of invasive ants that have been determined to be important habitat characteristics that support the life-history needs of an endangered butterfly. However, that small patch may be too far away from other patches to allow for mixing of the populations, or the meadow may be too small for the population to persist over time. So the area could have important characteristics, but those characteristics may not contribute to the conservation of the species because they lack the appropriate size and proximity to other meadows with similar characteristics. Conversely, the exact same characteristics (native flowers, full sun, and a biologically insignificant level of invasive ants), when combined with the additional characteristics of larger size and short dispersal distance to other meadows, may in total constitute a physical or biological feature essential to the conservation of the species.

Under § 424.12(b)(1)(iii), the Secretary will then determine the specific areas within the geographical area occupied by the species on which are found those physical or biological features essential to the conservation of the species.

Section 424.12(b)(1)(iv) provides for the consideration of whether those physical or biological features may require special management considerations or protection. In this portion of the analysis, the Secretary must determine whether there are any "methods or procedures useful in protecting physical and biological features for the conservation of listed species." Only those physical or biological features that may be in need of special management considerations or protection are considered further. The Services may conduct this analysis for the need of special management considerations or protection at the scale of all specific areas, but they may also do so within each specific area.

The "steps" outlined in subparagraphs (i) through (iv) above are not necessarily intended to be applied strictly in a stepwise fashion. The instructions in each subparagraph must be considered, as each relates to the statutory definition of "critical habitat."

However, there may be multiple pathways in the consideration of the elements of the first part of the definition of "critical habitat." For instance, one may first identify specific areas occupied by the species, then identify all features needed by a species to carry out life-history functions in those areas through consideration of the conservation needs of the species, and then determine which of those specific areas contain the features essential to the conservation of the species. The determination of which features are essential to the conservation of the species may consider the spatial arrangement and quantity of such features in the context of the life history, status, and conservation needs of the species. In some circumstances, not every location that contains one or more of the habitat characteristics that a species needs will be designated as critical habitat. Some locations may have important habitat characteristics, but are too small to support a population of the species, or are located too far away from other locations to allow for genetic exchange. Considered in context of any generalized conservation strategy that might be developed for the species, § 424.12(b)(1)(i) through (iv) will allow for sufficient flexibility to determine what areas within the geographical area occupied by the species are needed to provide for the conservation of the species.

Occasionally, new taxonomic information may result in a determination that a previously listed species or subspecies is actually two or more separate entities. In such an instance, the Services must have flexibility, when warranted, to continue to apply the protections of the Act to preserve the conservation value of critical habitat that has been designated for a species listed as one listable entity (*i.e.*, species, subspecies, or distinct population segment (DPS)), and which is being repropose for listing as one or more different listable entities (*e.g.*, when the Services propose to list two or more species, subspecies, or DPSs that had previously been listed as a single entity). Where appropriate (such as where the range of an entity proposed for listing and a previously designated area of critical habitat align), the Services have the option to find, simultaneously with the proposed listing of the proposed entity or entities, that the relevant geographic area(s) of the existing designation continues to apply as critical habitat for the new entity or entities. Such a finding essentially carries forward the existing

critical habitat (in whole or in part). Alternatively, the Services have the option to pursue a succinct and streamlined notice of proposed rulemaking to carry forward the existing critical habitat (in whole or in part), which draws, as appropriate, from the existing designation.

More broadly, when applying § 424.12(b)(1) to the facts relating to a particular species, the Services will usually have more than one option available for determining what specific areas constitute the critical habitat for that species. In keeping with the conservation-based purpose of critical habitat, the relevant Service may find it best to first consider broadly what it knows about the biology and life history of the species, the threats it faces, the species' status and condition, and, therefore, the likely conservation needs of the species with respect to habitat. If there already is a recovery plan for that species (which is not always the case and not a prerequisite for designating critical habitat), then that plan would be useful for this analysis.

Using principles of conservation biology such as the need for appropriate patch size, connectivity of habitat, dispersal ability of the species, or representation of populations across the range of the species, the Services may evaluate areas needed for the conservation of the species. The Services must identify the physical and biological features essential to the conservation of the species and unoccupied areas that are essential for the conservation of the species. When using this methodology to identify areas within the geographical area occupied by the species at the time of listing, the Services will expressly translate the application of the relevant principles of conservation biology into the articulation of the features. Aligning the physical and biological features identified as essential with the conservation needs of the species and any conservation strategy that may have been developed for the species allows us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

We note that designation of critical habitat relies on the best available scientific data at the time of designation. The Services may not know of, or be able to identify, all of the areas on which are found the features essential to the conservation of a species. After designation of final critical habitat for a particular species, the Services may become aware of or identify other

features or areas essential to the conservation of the species, such as through 5-year reviews and recovery planning. Newly identified features that are useful for characterizing the conservation value of designated critical habitat can be considered in consultations conducted under section 7(a)(2) of the Act as part of the best available scientific and commercial data. We also note that if there is uncertainty as to whether an area was “within the geographical area occupied by the species, at the time it is listed,” the Services may in the alternative designate the area under the second part of the definition if the relevant Service determines that the area is essential for the conservation of the species.

The second part of the statutory definition of “critical habitat” (section 3(5)(A)(ii)) provides that areas outside the geographical area occupied by the species at the time of listing should be designated as critical habitat if they are determined to be “essential for the conservation of the species.” Section 424.12(b)(2) further describes the factors the Services will consider in identifying any areas outside the geographical area occupied by the species at the time of listing that may meet this aspect of the definition of “critical habitat.” Under § 424.12(b)(2), the Services will determine whether unoccupied areas are essential for the conservation of the species by considering “the life-history, status, and conservation needs of the species.” This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation.

Section 424.12(b)(2) subsumes and supersedes § 424.12(e) of the existing regulations. Existing section 424.12(e) provides that the Secretary shall designate areas outside the “geographical area presently occupied by a species” only when “a designation limited to its present range would be inadequate to ensure the conservation of the species.” Although the existing provision represents one reasonable approach to giving meaning to the term “essential” as it relates to unoccupied areas, the Services find, based on years of applying the existing regulations, that this provision is both unnecessary and unintentionally limiting. While Congress supplied two different standards to govern the Secretary’s designation of these two types of habitat, there is no suggestion in the

legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects Congressional intent that a designation generally should not include every area that the species *can* occupy, this does not necessarily translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Indeed, there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat.

For example, a species may occupy at low densities a large amount of habitat that is marginal habitat for the species. That marginal habitat may nonetheless meet the definition of “critical habitat” because the species has been extirpated from what historically was superior habitat, and it is possible to recover the species if all of the marginal habitat is thoroughly protected. However, a more certain and efficient path to recovery may involve the protection of a relatively small subset of the marginal habitat combined with protection of some of the superior habitat (allowing for natural expansion or artificial reintroduction). A variation of this scenario would involve habitat that may currently be of high quality, but is unlikely to remain that way due to the effects of climate change. Given these scenarios, it will be useful for the Services to retain the flexibility to consider various paths to recovery in considering what areas to designate as critical habitat.

We conclude that a rigid step-wise approach, *i.e.*, first designating all occupied areas that meet the definition of “critical habitat” (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and, in some circumstances, may result in a designation that is geographically larger but less effective as a conservation tool. Deleting current § 424.12(e) will allow us to consider including occupied and unoccupied areas in a critical habitat designation and to follow any general conservation strategy, criteria, or outline for the species that may be developed. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed

and minimizing regulatory burdens where not necessary.

In addition, the existing regulatory provision is unnecessary because the Secretary in any case must find that the unoccupied area is “essential.” In many cases the Secretary may conclude that an integral part of analyzing whether unoccupied areas are essential is to begin with the occupied areas, but the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. Therefore, we conclude that deleting existing § 424.12(e) restores the two parts of the statutory definition (for occupied and unoccupied areas) to the relationship envisioned by Congress.

As it is currently written, the provision in § 424.12(e) also confusingly references *present* range, while the two parts of the statutory definition refer to the area occupied *at the time of listing*. In practice, these concepts may be largely the same, given that critical habitat ideally should be designated at or near the time of listing. Nevertheless, the Services find that it will reduce confusion to change the regulations to track the statutory distinction. In addition, because critical habitat may be revised at any time, the statutory distinction may be important during a revision, which could occur several years after the listing of the species.

However, we note that unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species: This follows directly from the inclusion of the “features essential” language in section 3(5)(A)(i) but not in section 3(5)(A)(ii). Thus, even keeping in mind that “features” may include features that support the occurrence of ephemeral or dynamic habitat conditions, the Services may identify as areas essential to the conservation of the species areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain essential features in other areas. Areas may develop features over time, or, through special management considerations or protection. The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. Under § 424.12(b)(2), the Services will identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. This section is intended to provide a flexible, rather than prescriptive, standard to allow the Services to tailor the inquiry about what

is essential to the specific characteristics and circumstances of the particular species.

The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing following any generalized conservation strategy that might be developed for the species. As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important. For example, such areas may provide important connectivity between habitats, serve as movement corridors, or constitute emerging habitat for a species experiencing range shifts in latitude or altitude (such as to follow available prey or host plants). Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to determine from the record that they will eventually become, necessary to support the species' recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of "critical habitat."

An example may clarify this situation: A butterfly depends on a particular host plant. The host plant is currently found in a particular area. The data show the host plant's range has been moving up slope in response to warming temperatures (following the cooler temperatures) resulting from the effects of climate change. Other butterfly species have been documented to have shifted from their historical ranges in response to changes in the range of host plants. Therefore, we rationally conclude that the butterfly's range will likely move up slope, and we would designate specific areas outside the geographical area occupied by the butterfly at the time it was listed if we concluded this area was essential based on this information.

Adherence to the process described above will ensure compliance with the requirement in section 3(5)(C) of the Act, which states that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Existing § 424.12(c) resulted from a recent separate rulemaking (77 FR 25611; May 1, 2012); it is not addressed in this rulemaking.

Section 424.12(d) includes minor language changes and removes the

example as it is not necessary for the text of the regulation.

We are removing current § 424.12(e), as this concept—designating specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species—is captured in revised § 424.12(b)(2).

We are redesignating the current § 424.12(f) as § 424.12(e) and adding a second sentence to emphasize that designation of critical habitat for species that were listed prior to 1978 is at the discretion of the Secretaries. The first sentence of § 424.12(e) provides that the Secretary "may designate critical habitat for those species listed as threatened or endangered species but for which no critical habitat has been previously designated." This is substantially the same as current § 424.12(f) in the existing regulations, although the Services have changed the passive voice to the active voice.

The new second sentence codifies in the regulations the principle that the decision whether to designate critical habitat for species listed prior to the effective date of the 1978 Amendments to the Act (November 10, 1978) is at the discretion of the Secretary. This principle is clearly reflected in the text of the statute and firmly grounded in the legislative history. The definition of "critical habitat" added to the Act in 1978 provided that the Secretary "may," but was not required to, establish critical habitat for species already listed by the effective date of the 1978 amendments. See Public Law 95–632, 92 Stat. 3751 (Nov. 10, 1978) (codified at 16 U.S.C. 1532(5)(B)); see also *Conservancy of Southwest Florida v. United States Fish & Wildlife Service*, No. 2:10-cv-106-FtM-SPC, 2011 WL 1326805, \*9 (M.D. Fla. April 6, 2011) (Florida panther) (plain language of statute renders designation of habitat for species listed prior to the 1978 Amendments discretionary), *aff'd*, 677 F.3d 1073 (11th Cir. 2012); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 n.8 (D.D.C. 1995) (grizzly bear) (same). Similarly, the 1982 amendments expressly exempted species listed prior to the 1978 amendments from the requirement that critical habitat be designated concurrently with listing. See Public Law 97–304, 96 Stat. 1411, sec. 2(b)(4) (Oct. 13, 1982). To reduce potential confusion, the revised regulations reflect the discretionary nature of designations for such species.

As recent litigation has highlighted, the statutory history regarding the procedures for undertaking proposals to designate critical habitat for certain

species is nuanced and has proven confusing in other respects as well. For species listed before passage of the 1982 amendments to the Act (October 13, 1982), any proposed regulations issued by the Secretary to designate critical habitat are governed by the provisions in section 4 of the Act applicable to proposals to revise critical habitat designations. This is specified in an uncodified provision of the 1982 amendments. See Public Law 97–304, 96 Stat. 1411, 1416, 2(b)(2), 16 U.S.C. 1533 (note) ("Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 . . . for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat."); see also *Center for Biological Diversity v. FWS*, 450 F.3d 930, 934–35 (9th Cir. 2006) (unarmored three-spine stickleback). While the Services do not propose to add regulatory text to address this narrow issue, we explain below how these provisions must be understood within the general scheme for designating critical habitat.

As a result of the above-referenced provision of the 1982 amendments, final regulations to designate critical habitat for species that were listed prior to October 13, 1982, are governed by section 4(b)(6)(A)(i) of the Act. By contrast, for species listed after October 13, 1982, final regulations are governed by section 4(b)(6)(A)(ii). Proposed rules for species listed both pre- and post-1982 are governed by section 4(b)(5). Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision "should not be made" and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data. See 16 U.S.C. 1533(b)(6)(B)(i); see also *Center for Biological Diversity*, 450 F.3d at 936–37.

These provisions, however, do not affect the handling or consideration of *petitions* seeking designation of critical habitat for species listed prior to 1982. The term "petition" is not used in section 2(b)(2) of the 1982 amendments to the Act (compare to section 2(b)(1) of the same amendments, which mentions

“[a]ny petition” and “any regulation”). Thus, the special procedures for finalizing proposals to designate critical habitat for species listed prior to 1982 come into play only upon a decision by the Secretary to actually propose to designate critical habitat for such species. Petitions seeking such designations are managed just like any other petition seeking designation, which are governed by the provisions of the Administrative Procedure Act rather than section 4 of the Endangered Species Act. See 50 CFR 424.14(d); *Conservancy of Southwest Florida*, 2011 WL 1326805, at \*9 (“It is the Secretary’s proposal to designate critical habitat that triggers the statutory and regulatory obligations, not plaintiffs’ requests that the Secretary do so.”); *Fund for Animals v. Babbitt*, 903 F. Supp. at 115 (petitions to designate critical habitat are governed by the APA, not the ESA).

We are redesignating current § 424.12(g) as § 424.12(f) with minor language changes.

We are redesignating current § 424.12(h) as § 424.12(g) with minor language changes.

We are adding new § 424.12(h). This paragraph reflects the amendment to section 4(a)(3)(B)(i) of the Act in the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 424.12(h) codifies the amendments to the Act that prohibit the Services from designating as critical habitat lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, if those lands are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), and if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated. In other words, if the Services conclude that an INRMP “benefits” the species, the area covered is ineligible for designation. Unlike the Secretary’s decision on exclusions under section 4(b)(2) of the Act, this resulting exemption is not subject to the discretion of the Secretary (once a benefit has been found).

Neither the Act nor the National Defense Authorization Act for Fiscal Year 2004 defines the term “benefit.” However, the conference report on the 2004 National Defense Authorization Act (Report 108–354) instructed the Secretary to “assess an INRMP’s potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects . . . that address the particular conservation and protection needs of the species for

which critical habitat would otherwise be proposed.” We, therefore, conclude that Congress intended “benefit” to mean “conservation benefit.” In addition, because a finding of benefit results in an exemption from critical habitat designation, and given the specific mention of “habitat protection, maintenance, and improvement” in the conference report, we infer that Congress intended that an INRMP provide a conservation benefit to the habitat (e.g., essential features) of the species, in addition to the species. Examples of actions that provide habitat-based conservation benefit to the species include: Reducing fragmentation of habitat; maintaining or increasing populations in the wild; planning for catastrophic events; protecting, enhancing, or restoring habitats; buffering protected areas; and testing and implementing new habitat-based conservation strategies.

In the conference report, Congress further instructed the Secretary to “establish criteria that would be used to determine if an INRMP benefits the listed species.” The Services, therefore, describe in § 424.12(h) some factors that will help us determine whether an INRMP provides a conservation benefit: (1) The extent of area and features present; (2) the type and frequency of use of the area by the species; (3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and (4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis. FWS will defer to our Guidelines for Coordination on Integrated Natural Resource Management Plans in evaluating these plans.

Under the Sikes Act, the Department of Defense is also instructed to prepare INRMPs in cooperation with FWS and each appropriate State fish and wildlife agency. The compliant or operational INRMP must reflect the mutual agreement of the involved agencies on the conservation, protection, and management of fish and wildlife resources. In other words, FWS must agree with an INRMP (reflected by signature of the plan or letter of concurrence pursuant to the Sikes Act (not to be confused with a letter of concurrence issued in relation to consultation under section 7(a)(2) of the Act)) before an INRMP can be relied upon for making an area ineligible for designation under section 4(a)(3)(B)(i).

As part of this process, FWS will also conduct consultation under section 7(a)(2) of the Act, if listed species or designated critical habitat may be affected by the actions included in the INRMP. Section 7(a)(2) of the Act will continue to apply to any Federal actions affecting the species once an INRMP is compliant or operation. However, if the area is ineligible for critical habitat designation under section 4(a)(3)(B)(i), then those consultations would address only effects to the species and the likelihood of the Federal action to jeopardize the continued existence of the species.

New § 424.12(h) specifies that an INRMP must be compliant or operational to make an area ineligible for designation under section 4(a)(3)(B)(i). When the Department of Defense provides a draft INRMP for the Services’ consideration during development of a critical habitat designation, the Services may evaluate it following the guidelines set forth in our Policy on Exclusions from Critical Habitat under Section 4(b)(2) of the Act.

Existing § 424.19 results from a recent, separate rulemaking (78 FR 53058), and is not addressed in this rulemaking.

#### Required Determinations

##### *Regulatory Planning and Review—Executive Orders 12866 and 13563*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certified that the proposed rule to implement these changes to the 50 CFR part 424 regulations would not have a significant economic impact on a substantial number of small entities (79 FR 27066, at 27075). Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation. We explained that NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations (See our response to Comment 81). No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. No information received during the public comment period leads us to change our analysis.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the "Regulatory Flexibility Act" section above, these regulations will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that these regulations will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small

Government Agency Plan is not required. As explained above, small governments will not be affected because the regulations will not place additional requirements on any city, county, or other local municipalities.

(b) These regulations will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act. These regulations will impose no obligations on State, local, or tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, these regulations will not have significant takings implications. These regulations will not pertain to "taking" of private property interests, nor will they directly affect private property. A takings implication assessment is not required because these regulations (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. These regulations will substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether these regulations will have significant Federalism effects and have determined that a Federalism assessment is not required. These regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and 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.

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

These regulations do not unduly burden the judicial system and meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. These regulations will clarify how the Services will make designations of critical habitat under section 4 of the Act.

*Government-to-Government Relationship With Tribes*

In accordance with Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," the

Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy" (May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for designating critical habitat under the ESA, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate/coordinate with tribes on issues related to federally listed species and their habitats and work with them as appropriate as we develop particular critical habitat designations, including consideration of potential exclusion on the basis of tribal interests. See Joint Secretarial Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act", June 5, 1997).

*Paperwork Reduction Act*

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have analyzed these regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10-46.450), the Department of the Interior Manual (516 DM 1-6 and 8)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6. Our analysis includes evaluating whether this action is procedural, administrative, or legal in nature and, therefore, a categorical exclusion applies.

Following a review of the changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 and our requirements under NEPA, we find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions

would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement:

“Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

NOAA Administrative Order 216–6 contains a substantively identical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.”

§ 6.03c.3(i).

At the time DOI’s categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to this categorical exclusion gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government. In addition, examples of recent **Federal Register** notices invoking this categorical exclusion include a final rule that established the timing requirements for the submission of a Site Assessment Plan or General Activities Plan for a renewable energy project on the Outer Continental Shelf (78 FR 12676; February 26, 2013), a final rule that established limited liability for Noncoal Reclamation by Certified States and Indian Tribes (78 FR 8822; February 6, 2013), and a final rule changing the tenure of eagle permits (77 FR 22267; April 13, 2012). These regulations fell within the categorical exclusion because they did not result in any substantive change. In no way did they alter the standards for, or outcome of, any physical or regulatory Federal actions.

The changes to the critical habitat designation criteria are similar to these examples of actions that are fundamentally administrative, technical, and procedural in nature. The changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation. In addition, the regulation revisions to 50 CFR 424.01, 424.02, and 424.12 better track the statutory language of the Act and make transparent practices the Services follow as a result of case law. The Services also make minor wording and formatting revisions throughout the three sections

to reflect plain language standards. The regulation revision as a whole carries out the requirements of Executive Order 13563 because, in this rule, the Services have analyzed existing rules retrospectively “to make the agencies’ regulatory program more effective or less burdensome in achieving the regulatory objectives.” None of the changes to the text of the regulation will result in changes to the opportunity for public involvement in any critical habitat designations.

We also considered whether any “extraordinary circumstances” apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 (“Categorical Exclusions: Extraordinary Circumstances”). We determined that no extraordinary circumstances apply. Although the final regulations would revise the implementing regulations for section 4 of the Act, the effects of these proposed changes would not “have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,” as nothing in the revised regulations is intended to require that any previously listed species or completed critical habitat designation be reevaluated on this basis. Furthermore, the revised regulations do not “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects” (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the revised regulations in 50 CFR 424.01, 424.02, or 424.12.

Nor would the final regulations trigger any of the extraordinary circumstances of NAO 216–6. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. § 5.05c.

We completed an Environmental Action Statement for the Categorical Exclusion for the revised regulations in 50 CFR 424.01, 424.02, and 424.12.

*Energy Supply, Distribution or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. These regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### References Cited

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

#### Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

#### List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

#### Regulation Promulgation

Accordingly, we are amending part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

#### PART 424—[AMENDED]

- 1. The authority citation for part 424 continues to read as follows:

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

- 2. Revise § 424.01 to read as follows:

##### § 424.01 Scope and purpose.

(a) Part 424 provides regulations for revising the Lists of Endangered and Threatened Wildlife and Plants and designating or revising the critical habitats of listed species. Part 424 provides criteria for determining whether species are endangered or threatened species and for designating critical habitats. Part 424 also establishes procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species.

(b) The purpose of the regulations in part 424 is to interpret and implement those portions of the Act that pertain to the listing of species as threatened or endangered species and the designation of critical habitat.

- 3. Revise § 424.02 to read as follows:

##### § 424.02 Definitions.

The definitions contained in the Act and parts 17, 222, and 402 of this title

apply to this part, unless specifically modified by one of the following definitions. Definitions contained in part 17 of this title apply only to species under the jurisdiction of the U.S. Fish and Wildlife Service. Definitions contained in part 222 of this title apply only to species under the jurisdiction of the National Marine Fisheries Service.

*Candidate.* Any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

*Conserve, conserving, and conservation.* To use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, *i.e.*, the species is recovered in accordance with § 402.02 of this chapter. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

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

*List or lists.* The Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

*Physical or biological features.* The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

*Public hearing.* An informal hearing to provide the public with the opportunity to give comments and to

permit an exchange of information and opinion on a proposed rule.

*Special management considerations or protection.* Methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.

*Species.* Includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

*Wildlife or fish and wildlife.* Any member of the animal kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

■ 4. In § 424.12, revise paragraphs (a), (b), and (d) through (h) to read as follows:

**§ 424.12 Criteria for designating critical habitat.**

(a) To the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively. If designation of critical habitat is not prudent or if critical habitat is not determinable, the Secretary will state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species. The Secretary will make a final designation of critical habitat on the basis of the best scientific data available, after taking into consideration the probable economic, national security, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when any of the following situations exist:

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

(ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of "critical habitat."

(2) Designation of critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking; or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of "critical habitat."

(b) Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

(1) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas within the geographical area occupied by the species for consideration as critical habitat. The Secretary will:

(i) Identify the geographical area occupied by the species at the time of listing.

(ii) Identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

(iii) Determine the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species.

(iv) Determine which of these features may require special management considerations or protection.

(2) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data.

\* \* \* \* \*

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat.

(e) The Secretary may designate critical habitat for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For species listed prior to November 10, 1978, the designation of

critical habitat is at the discretion of the Secretary.

(f) The Secretary may revise existing designations of critical habitat according to procedures in this section as new data become available.

(g) The Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States.

(h) The Secretary will not designate as critical habitat land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to a compliant or operational integrated natural resources management plan (INRMP) prepared under section 101 of

the Sikes Act (16 U.S.C. 670a) if the Secretary determines in writing that such plan provides a conservation benefit to the species for which critical habitat is being designated. In determining whether such a benefit is provided, the Secretary will consider:

(1) The extent of the area and features present;

(2) The type and frequency of use of the area by the species;

(3) The relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and

(4) The degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

Dated: January 29, 2016.

**Michael J. Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

Dated: January 29, 2016.

**Samuel D. Rauch, III,**

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

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